

EMMA THOMAS

v.

THE ESTATE OF ELIZA MILLER
& TESS GOULDING

[HIGH COURT, 1996 (Pathik J) 12 December]

Civil Jurisdiction

Land- tenants in common- action for sale of land- whether "for the benefit of the parties interested". Property Law Act (Cap. 130) Section 119 (2).

The occupier of an apartment within a property in which she had a two-thirds interest sought the sale of the apartment to her. The High Court distinguished the Plaintiffs claim from an action for partition, concluded that sale would be for the benefit of all parties having an interest in the property and ordered valuation and sale.

Cases cited:

Cook v. Johnston (1970) 2 O.R. 1 (H.C.J.)

Gilbert v. Smith (1879) 11 Ch.D. 78

Lalor v. Lalor (1883) 9 P.R. (Ont.) 455

Morris v. Morris (1917) 12 O.W.N. 80

Nausori Meat Co. Ltd v Fiji Electric Ltd FCA 71/82 - FCA Repts 83/157

Ontario Power Co. v. Whattler (1904) 7 O.L.R. 198

Re Dibattista et al. and Menecola et al. 74 D.L.R. (4th) 569

Sokimi Atu v. Emily Atu (1983) 29 FLR 100

Turner v Morgan (1803) 8 Ves 143

M. Gago for the Plaintiff

R. Chand for the Defendants

Pathik J:

By originating summons dated 17 March 1994 the Plaintiff ("Emma") is applying for an Order or Orders that the rear flat (the "flat") at 302 Waimanu Road, Suva on C.T. 8450 being the interest of the 1st Defendant Eliza Miller deceased ("Eliza") be sold under the direction of the Court in accordance with section 119(2) of the Property Law Act Cap. 130 (the "Act").

The application is supported by Emma's affidavit sworn 16 March 1994. Subsequently various affidavits have been filed as follows in the matter in support and by the defendants in opposition:

- (a) Affidavits of Agnes Charlotte Goulding sworn 18 April 1994.

15 July 1994, and 26 September 1994.

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- (b) Affidavits of Emma Thomas sworn 12 August 1994, 24th August 1994 and 26 August 1994.
 - (c) Affidavit of Edward Henry Thomas sworn 19th August 1994.

B The Court has before it just the affidavit evidence. Both counsel made oral and written legal submissions.

The said section 119 (2) under which the Plaintiff's application is made provides as follows and for ease of reference and to follow easily the arguments put forward it is necessary to set out the whole section:

C "119. (1) Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly.

D (2) The court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the court that, by reason of the nature of the land, or of the number of parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstances, a sale of the land would be for the benefit of the parties interested.

E (3) The court may also, if it thinks fit, on the request of any party interested, direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale, and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.

F (4) On directing any such sale or valuation to be made, the court may give also all necessary or proper consequential directions.

G (5) Any person may maintain such action as aforesaid against any one or more of the parties interested without serving the other or others, and it shall not be competent to any defendant in the action to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further considerations:

Provided that all persons who, if this Act had not been enacted,

would have been necessary parties to the action shall be served with notice of the decree or order on the hearing, and, after that notice, shall be bound by the proceedings as if they had originally been parties to the action, and shall be deemed parties to the action, and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by rules of court, apply to the court to add to the decree or order.

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(6) On any sale under the provisions of this section, the court may allow any of the parties interested in the land to bid at the sale, on such terms as the court deems reasonable as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters." (underlining mine for emphasis)

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The facts

The salient facts are these.

The said C.T.8450 ("property") has been occupied by Emma for 22 years, and this is not in dispute; she has 2/3 interest in the property. The first defendant Eliza has one-third interest in it. There are seven beneficiaries to the Estate of Mrs. Eliza Miller and each of them has 1/7 of the Estate's 1/3 interest in the property and it is obvious from the facts that they cannot all practically reside in the property as they are not living in Fiji and they are not likely to come to Fiji to live.

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The Plaintiff and defendants have not been on good terms for sometime. As stated in the submissions of Plaintiff there are various allegations of one dispute or the other regarding the property. The Plaintiff has alleged that her peaceable and quite enjoyment of her 2/3 interest in the property is "encumbered" by the Defendants and she has had to resort to an application for injunction in the past. The second defendant has also alleged that the Plaintiff had refused to recognise her rights to occupation of same. However, for some time now the understanding of the Plaintiff and the Defendants has been that the flat (also known as flat 3) is the first Defendant's one-third share (now sought to be sold) in the property as borne out by the various affidavits filed herein.

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Plaintiff's submission

Mr. Gago for the Plaintiff submits that this is tacitly a private and voluntary partition between the parties. He feels that both parties have understood that the only way to resolve the various conflicts or squabbles is for the first defendant's share (1/3 interest in the property) to be sold (particularly to be bought by the Plaintiff), which sale is also in the interest of the beneficiaries of the Estate of

Eliza Miller.

- A The Plaintiff has offered to pay the market price of the flat after a valuation is duly made. This is the requirement of section 119(3) of the Act. The Plaintiff still abides by her offer.

- B He submits that the defendants' main concern about the sale is that the Plaintiff allegedly owes the first defendant some rent had and received over the years in respect of the flat. This is part of the subject-matter of an action etc in Civil Action No. 133 of 1993 in the Magistrates Court. Mr. Gago submits that these proceedings will not in any way prejudice the Magistrates Court action for rent claim on either side. However, the Plaintiff denies that she owes any rent to the first defendant.

- C For the above reasons the Plaintiff seeks an order for the sale of the flat to her after valuation. She says that because of the nature of the property, the number of persons interested in the 1/3 share of the first defendant a Court order for the sale would be for the benefit of all concerned.

Defendants' Submission

- D Mr. Chand submits, inter alia, that ordering the sale of property under s.119(1) can be achieved and thus he says "cannot throw any obstacles in the path of the Plaintiff". He says that the sole aim of the Plaintiff is to become the sole owner of the property. He submits that the defendants also have the right to purchase the Plaintiff's share and that the position of co-owners "is an artificial one where each is entitled in law to possession in common with the other". Quoting from
- E Land Law by Hinde McMorland & Sim Vol 2 at p.809 he says the co-owner has a right to possession and enjoyment of the whole of the property. He says that the two cases of Sokimi Atu v. Emily Atu (1983) 29 FLR 100 and Nausori Meat Co. Ltd v Fiji Electric Ltd FCA 71/82 do not help the Plaintiff.

- F Mr. Chand submits that the Plaintiff's claim be dismissed as it is misconceived and is not presented in accordance with the Rules of Partition Law as contained in s.119 of the Act. It is his contention that in this case there has to be an action for partition under s.119(1) to enable the Court to make an order for sale of a land under s.119(2). He says that this is not an action for partition.

The issue

- G The issue for the Court's determination is whether on the facts and circumstances of this case the application ought to be granted to the Plaintiff or not under s.119(2) of the Act under which the application is made.

Consideration of issue

I agree with Mr. Gago's submission that in s.119(1), (2) and (3) provision is

made for three separate kinds of action which can be maintained in relation to any property. I reject the defendants' contention that land can only be sold on a

court order if there is "an action for partition and not otherwise", and therefore that an application under s.119(2) must be based on an "action for partition".

In England under the old law the Court had no power to decree sale instead of partition until the Partition Act, 1868 when the court was given power to order a sale. The views of the holders of the greater share prevailed, unless the minority could prove to the Court that their view was the most beneficial. Rules were laid down for the guidance of the Court which are similar to the provisions under our section 119(1), (2) & (3). In all these cases the Court had a discretion.

Where a large estate had to be divided among a few people, the expense was not heavy; but many cases have occurred where a small estate has been given (generally by Will), as in the case before me, to a very large number of persons, some of whom cannot be found, and in these cases the expenses were out of all proportion to the value of the estate. This produced numerous inconveniences and absurdities such as for example a house which was partitioned by actually building a wall up the middle (Turner v Morgan (1803) 8 Ves 143, Lord Eldon LC). This led to the passing of the Partition Act 1868 (31 & 32 Vict. C.40) and the Partition Act 1876 under which the Court was given jurisdiction to order a sale of the property and distribution of the proceeds in lieu of making an order for partition. But since the Law of Property Act, 1925 the necessity for sale by the Court no longer exists in England, since, whenever several persons share land beneficially, it is now vested in trustees on trust for sale. Hence the Partition Acts no longer enable the Court to order a sale in a partition action but an action for partition can apparently still be brought, if occasion arises.

This is not a partition action. The subject matter of this application is not based on 119(1) which requires the court to direct a sale of the land and a distribution of the proceeds but there the applicant's interest has to be "one moiety" before that can be done. A "moiety" is defined in Atu (supra) to mean "a half". Therefore no action for partition of land and subsequent sale can be brought by an applicant where interest in the property is below one-half of the total interests in land. Such is the case here.

Here the Plaintiff is neither applying for a partition nor a distribution of the proceeds. The word "partition" is described in Halsbury 1st Ed. Vol 21 at p.810 as:

"The legal term 'partition' is applied to the division of land tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them."

It is further stated in Halsbury that "the co-owners may be joint tenants, tenants

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in common or co-partners”.

A The application here is under s119(2) under which sale of land under the direction of the court may be ordered if such sale is considered by the court to be “for the benefit of the parties interested” for the said section 119(2) clearly specifies the circumstances under which the Court could make an Order for sale notwithstanding the dissent or disability of any other party provided that “the sale would be for the benefit of the parties concerned”. In the definition of
B “land” is included “all estate and interests in land” (section 2 of the Act).

In any consideration of the issue in this case the court acts on evidence and decisions will have to be reached on the basis of the evidence. On the affidavit evidence the Plaintiff has proved and satisfied the Court that s.119(2) is available to her.

C In coming to this conclusion I have been persuaded by the observations made by Brooke J.A in his judgment in Re Dibattista et al. and Menecola et al. (Ontario Court of Appeal 74 D.L.R. (4th) p.569). There he refers to Cook v. Johnston (1970) 2 O.R. 1 (H.C.J.) where Grant J considered the question of when and in what circumstances the court may order a sale. I quote below what Grant J said
D in his judgment at pp. 1-2:

In Morris v. Morris (1917), 12 O.W.N. 80 Middleton, J., in dealing with a similar matter stated at p.81: “Sale as an alternative for partition is quite appropriate when a partition cannot be made.”

E In Gilbert v. Smith (1879), 11 Ch.D. 78, Jessel, M.R., at p.81 stated:

“The meaning of the Legislature was that when you see that the property is of such a character that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money amongst the parties.”

F In Lalor v. Lalor (1883), 9 P.R. (Ont.) 455, Proudfoot, J., who was deciding whether partition or sale should be ordered, stated:

“I do not think any party has a right to insist on a sale; and it will not necessarily be ordered, unless the Court thinks it more advantageous for the parties interested.”

G In Ontario Power Co. v. Whattler (1904), 7 O.L.R. 198, Meredith C.J. reviewed the legislation in the Province giving jurisdiction to the Court to order a sale instead of partition. In reference to the form of such remedies then adopted by the Consolidated Rules, he stated at p. 203:

“That form must be read in the light of the legislation by

which jurisdiction has been conferred on the Court to order a

sale instead of a partition; and the provision as to proceedings being taken for partition or sale is, I think, a compendious mode of saying that proceedings are to be taken to partition unless it appears "that partition cannot be made without prejudice to the owners of, or parties interested in, the estate," but that if that is made to appear proceedings are then to be taken for the sale of the lands."

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On the evidence I find that the defendants have not advanced any good reason why an order for sale of the flat should not be made.

The most practical solution to the problem which has plagued the parties for some time is to sell the property to the Plaintiff after valuation on terms and conditions hereafter appearing.

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The Plaintiff I consider is entitled to the order she is seeking.

As for the defendants' claim for rent in the action pending in the Magistrates Court, they are at liberty to pursue it and its pendency does not in any way affect the determination of the issue before me in this summons.

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In the outcome, for the above reasons, under s.119(2) I direct and order that the flat be sold to the Plaintiff and further direct as follows:

1. That within 28 days from the date of this judgment the Plaintiff appoint a valuer to carry out a valuation of the flat. The valuer to be acceptable to the defendants' solicitors.
2. Upon receipt of the Valuation Report the parties to agree to a selling price which is not to be below the valuation amount.
3. In the event the parties not being able to agree to the selling price then an arbitrator agreeable to parties be appointed within 14 days of the disagreement. The arbitrator's decision shall be final.
4. Once the selling price is agreed all necessary documents including document of transfer shall forthwith be prepared by the Plaintiff's solicitors who shall forward same to defendants' solicitors who shall obtain their clients' execution thereto and hold same until the purchaser of property is in a position to settle. All costs of transfer shall be borne by the Plaintiff.

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A 5. Forthwith upon settlement the defendants' solicitors shall pay into Court the settlement moneys and furnish an account of disbursements and costs incurred by the Plaintiff in the sale of the property.

B 6. Within one month after payment into Court of the said moneys, each party is to furnish to the other and file in Court his or her claim in respect of the sale moneys supported by documentary evidence of payments alleged to have been made or expenses incurred in the purchase of the property.

7. Liberty to parties to apply generally.

C *(Judgment for the Plaintiff.)*

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