

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

[2022] SCCA 69  
(16 December 2022)  
SCA 45/2020  
(Arising in MC114/2016)

**CYRIL HITIÉ**

*(rep. by Serge Rouillon)*

**Appellant**

and

**MAGGIE AH WENG**

*(rep. by Wilby Lucas)*

**Respondent**

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**Neutral Citation:** *Hitié v Ah Weng* (SCA 45/2020) [2022] SCCA 69 (16 December 2022)  
(Arising in MC 114/2016) [2020] SCSC 687

**Before:** Twomey-Woods, Tibatemwa-Ekirikunbinza, André, JJA

**Summary:** partition/division in kind

**Heard:** 5 December 2022

**Delivered:** 16 December 2022

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**ORDER**

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*The appeal is allowed.*

1. *Mr. Antoine Ah-Kong, land surveyor and court appraiser, is to divide Parcel H11684 into two parcels, with the rear parcel comprising 456 square meters (Lot1) and the front parcel adjoining the public road comprising 380 square metres (Lot 2).*
  
  2. *Once partitioned and the plan submitted and approved by the Planning Authority, Lot 1 is allocated to Mr. Cyril Hitié and Lot 2 to Mrs. Maggie Ah Weng.*
  
  3. *Each party is to bear his own costs.*
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**JUDGMENT**

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**DR. M. TWOMEY-WOODS JA**

**(Tibatemwa-Ekirikunbinza and André JA concurring)**

## **Background**

- [1] The parties are siblings and together co-owned Parcel H11684 at Ma Constance, Mahé. In November 2016, Mrs. Ah Weng petitioned the court for an order of division of the co-owned land averring that she no longer wished to remain in indivision with her brother, Mr. Hitié.
- [2] Mr. Hitié in his Answer, prayed for an appraiser to be appointed at the costs of Mrs. Ah Weng, and that should the property be conveniently subdivided, that Mrs. Ah Weng be ordered to demolish developments she had made on the co-owned land or pay him compensation. It must be noted that he did not Cross Petition to make the prayers he made in the Answer.
- [3] In a decision delivered on 18 September 2020, the learned trial judge ruled that each party owned a half share of the undivided land and that there was good cause to partition the co-owned land. He then granted the parties the lots allocated by the land surveyor Ah-Kong. Hence, Mrs. Ah Weng was allocated the land adjoining the main road and Mr. Hitié the rear plot.

## **The Appeal**

- [4] It is from this decision that Mr. Hitié appealed on three grounds, which were condensed by the appellant in his skeleton heads as follows:

*The learned trial judge has not correctly assessed the whole situation before making his final ruling which completely favours the Respondent rather than being a fair partition of the property in question- Title H11684.*

- [5] At the hearing, Mr. Rouillon, learned Counsel for the appellant, attempted to introduce evidence of a different matter between the parties currently before the Supreme Court. We disallowed the evidence from the bar, reminding Counsel that the only case before this Court was the appeal of a decision regarding the partition of Parcel H11684.

## **The submissions**

- [6] Mr. Rouillon has submitted that the Court should now relook into the findings of fact. He contends that Mr. Hitié will not be able to build on the land allocated to him. In contrast,

Mrs. Ah-Weng has been given the lion's share, especially after encroaching on the undivided land. He has submitted that this court is empowered to relook at findings of fact when there is no sufficient reason to explain or justify the trial judge's conclusion, where the trial judge has misdirected himself, failed to take important matters into account or made a decision that was wrong or unreasonable. He has relied for these propositions on the cases of *Attorney-General v Ernestine* (1980) SAR 175, *Moscow Narodny Bank v Captain et al. of various fishing vessels* (1998-1999) |SCAR 75 and *Hall v Morel & Ors* (SCA22/2017) (2019 SCCA 24.

[7] Mr. Rouillon has also submitted that lots should have been drawn.

[8] Mr. Lucas, learned Counsel for the respondent, has contended that the learned trial judge relied on the report of the court-appointed appraiser in this matter, Mr. Ah Kong. In his report, Mr. Ah-Kong considered the proximity of parcels of land currently owned by the parties and that, in any case, Mr. Hitié was allocated a more considerable lot than his sister.

### **Our deliberations**

[9] We note that the learned trial judge visited the *locus in quo*. The parcels of land already owned by the parties were pointed out to him. It was also indicated that the subdivisions proposed for Parcel H11684 would each, on their own, not be granted planning permission as their size would not meet planning regulations for buildings to be constructed thereon. However, amalgamation with adjoining land belonging to each party would be sufficient to permit the construction of houses.

[10] The topography of the parcel proposed to be allocated to Mr. Hitié was commented upon when Mr. Ah-Kong gave evidence in court. He accepted that the rear lot was steeper but indicated that he had compensated for this fact by allocating a more significant parcel of land to Mr. Hitié.

[11] Mr. Jolene Sinon, another appraiser, had also submitted a plan for the partition of Parcel H11684. His plan was similar to that of Mr. Ah-Kong save that when he testified, he proposed that an even more significant portion of land be allocated to Mr. Hitié to make

up for the disparity in the value of the two plots. While Mr. Ah-Kong proposed that Mr. Hitié be allocated the rear plot of land comprising 436 square metres and his sister the land comprising 400 square meters adjoining the road, Mr. Sinon proposed instead to have the rear plot comprise 456 square meters, and the one adjacent to the road comprise 380 square metres (See Page 88 of the transcript of proceedings.) Mr. Sinon testified that that would be more equitable.

[12] We note that the trial judge remarked that to do justice to the case, Mr. Hitié would have to be granted extra land.

### **The Law**

[13] The petition relates to a division in kind, governed by the provisions of the Immovable Property (Judicial Sales) Act (Cap 94).

[14] Sections 112 and 113 of the same Act provide as follows:

#### *“112 Appraisalment*

*The Judge may also, before deciding upon the demand, order an appraisalment (expertise) by an appraiser to be named by him.*

*In such case the appraiser shall, within a delay to be fixed by the Judge, make and file in the registry his report which shall in a summary manner give a description of the property, the estimated value thereof, and the basis upon which such valuation is made. The report shall further state whether or not the property can conveniently be divided in kind, and if so divisible shall set forth the proposed lots in conformity with this Act and the provisions of the Civil Code of Seychelles.*

*In no case of appraisalment under the provisions of this Chapter shall it be necessary to administer an oath to the appraiser.*

*The parties to the division in kind shall be summoned, by a notice served upon them in person or at the domicile elected by them in accordance with section 110, four days at least before the day fixed for the appraisalment, to attend at the time and place where the said appraisalment is to be made.*

#### *13. Formation of lots in case of unequal rights*

*If the rights of the parties to the division (co-partageants) although liquidated are unequal, the Judge, if of opinion that the drawing of lots would be attended with inconvenience or disadvantage, may either refuse to order the division in kind, or he*

*may, in ordering an appraisal, direct the appraiser to form the respective lots in proportion to the rights of the respective parties, and further to allot accordingly without any drawing of lots.”*

[15] It is clear, therefore, that the Judge is guided by the appraiser and can order the allotment without drawing any lots. In the present case, the lots were unequal in terms of the topographical challenges and their value. We observe that the trial judge was aware that the lots were unequal but seemed to have overlooked Mr. Sinon’s proposals to make the allocated lots equitable. In fact, the 456/380 partition was accepted by Mrs. Ah Weng to settle the matter. This should have been the order of the court.

**Our decision**

[16] It would be equitable in the circumstances to divide Parcel H11684 and allocate the two resulting parcels as follows: the parcel at the rear to comprise 456 square meters to be allocated to Mr. Hitié and the parcel at the front adjoining the road to be allocated to Mrs. Ah Weng and to comprise 380 square metres.

**Our orders**

[17] We, therefore, make the following orders:

- (1) Mr. Antoine Ah-Kong, land surveyor and court appraiser, is to divide Parcel H11684 into two parcels, with the rear parcel comprising 456 square meters (Lot1) and the front parcel adjoining the public road comprising 380 square metres (Lot 2).*
  
- (2) Once partitioned and the plan submitted and approved by the Planning Authority, Lot 1 is allocated to Mr. Cyril Hitié and Lot 2 to Mrs. Maggie Ah Weng.*
  
- (3) Each party is to bear his own costs.*

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Dr. M. Twomey-Woods, JA.

I concur

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Dr. L. Tibatemwa-Ekirikubinza JA

I concur

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S. André, JA

Signed, dated and delivered at Ile du Port on 16 December 2022.