IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2024] (19 August 2024)

Civil Appeal SCA 01/2024

(Arising in MC 40/2021) SCSC 777

In the matter Between

Anthony Valer Payet **Appellant**

(rep. by Ms. Karine Dick)

And

Marise Green **1st Respondent**

Allen Hoareau **2nd Respondent**

(rep. by Mr. Kieran Shah)

Neutral Citation: *Payet v Green & Anor* (Civil Appeal SCA 01/2024) [2024] (19 August 2024) (Arising in MC 40/2021) SCSC 777)

Before: F. Robinson, Dr. L. Tibatemwa-Ekirikubinza, S. Andre JJA

Summary: Appeal against a decision of the Supreme Court – application for division in kind – Sections 107 (2) & 111(2), 112 & 113 of the Immoveable Property (Judicial Sales) Act (Cap 94) – Article 26 (2) of the Constitution.

Heard: 6 August 2024

Delivered: 19 August 2024

ORDERS

The Court makes the following Orders:

(i) The appeal partially succeeds in so far as the decision of the learned trial Judge is set aside as it relied on an incomplete appraisal report.

(ii) It is hereby ordered in terms of Rule 31 (5) of the Court of Appeal Rules that the matter be remitted back to the Supreme Court before another learned Judge to order an appraisal of parcel T573 that is in accordance with section 112 of the IPJS Act, and propose a subdivision of the same taking into account all the heirs, and subsequently determine whether the property can be conveniently sub-divided.

(iii) Both parties shall bear their own costs.

JUDGMENT

ANDRE, JA

INTRODUCTION

[1] This is an appeal arising from a decision of the Supreme Court in MC 40 of 2021 by virtue of the notice of appeal filed on the 4 January 2024 by Antony Valer Payet (Appellant) against Marise Green and Allen Hoareau in their capacity as Executors (Respondent), being dissatisfied with the decision of Judge L.Pillay given at the Supreme Court on the 22 November 2023 wherein the Learned Judge refused an application for the division-in-kind of parcel T 573.

[2] The Appellant had petitioned the Supreme Court for a division in kind for the property T573 situated at Capucins, Takamaka. The court a quo dismissed the petition because in the opinion of the learned trial judge, the property could not be conveniently divided to extract the Appellant's share. The learned trial judge explained this position by stating that the division as proposed by the land surveyor will be impractical, would result in inequities in area, development costs and value, among other things.[1]

[3] Dissatisfied with this, the Appellant is before this Court setting out four grounds of appeal which read as follows:

[1] At paragraph [47] of the impugned judgment.

1. *Having correctly set out the law governing division in kind under section 107 (2) & 111 (2) of the Immovable Property (Judicial Sales) Act, the learned trial judge misapplied the law to the facts of the Appellant's case.*

2. *The learned trial Judge erred in her definition of 'conveniently' as having greater reach that physical convenience and requiring mutual convenience between the Appellant and other co-owners.*

3. *The learned trial Judge erred in failing to adopt the report pf the land surveyor which clearly stated that the share of the Appellant can be conveniently extracted from the parcel.*

4. *The learned trial Judge erred in dismissing the petition of the Appellant without calling for and considering other options for extracting his share from the parcel.*

[4] The appellant as per cited notice of appeal (supra) further seeks the relief set out in paragraph 5 thereof namely, setting aside the judgment of the Supreme Court and remitting the case to the Supreme Court for the process of the extraction of the Appellant's share from parcel T573 to continue.

SUBMISSIONS OF THE PARTIES ON GROUND 1

[5] In support of ground 1, the Appellant submits that he satisfies the legal requirements of being granted a division in kind in terms of section 111 of the Immovable Property (Judicial Sales) Act (IPJS) Act and refers this Court to his submissions in the Court a quo from pages 38 to 44. Firstly, it was submitted in the court a quo that the Appellant's share in parcel T573 are ascertainable to be 5.9% of the property and that he owns the most shares individually and these are not contested. Secondly, it was submitted that the property can be conveniently divided as the report of the surveyor so provides. Thirdly, it was submitted that since the petitioner is seeking only the extraction of his shares, he will be bearing the costs for this.

[6] The Respondents for their part submit that without the consent all the heirs, the parcel cannot be conveniently divided. It was submitted that the essence of division in kind proceedings is to partition the entire property among all co-owners and not just for the Appellant which will necessitate the allocating of all lots to all co-owners in terms of section 116 of the IPJS Act.

SUBMISSION OF THE PARTIES ON GROUND 2

[7] In respect of ground 2, the Appellant has referred this Court to the case of *Benjamin Joseph & Ors v Jules Peat & Ors* 1983 SLR 43 which was quoted by the learned trial Judge in the impugned judgment. It is submitted that Seaton CJ (as he was then) noted that *commodement* in Article 827 of the Civil Code must not be understood to mean merely physical convenience. It is submitted before this Court that the trial Judge omitted the subsequent part of the judgment which stated that '*It is apparent that on the one hand the judge who has this matter to consider ought to endeavour to fulfil that requirement of the law, which says that the heir shall have his share in kind and on the other he must also see that it is the most advantageous course for the general body of the heirs and the interest which they all have in the succession of the deceased shall not be depreciated in value by the division.*'

[8] It is further submitted by the Appellant that in the same case, Seaton CJ noted the marked difference in the geographical features of the northern and southern parts of the properties. The Appellant places emphasis on how this is similar to the present case where the parcel of land consists of the coastline, flat land and hill. Another aspect which the Appellant places emphasis on is that the court in *Benjamin Joseph & Ors v Jules Peat & Ors* (supra) held that the property could be conveniently divided in kind and it was the most advantageous course for the general body of co-owners to do so in accordance with the plan attached to the appraiser's report. The Appellant submits that as similar approach ought to have been adopted by the learned trial Judge as the surveyor has done a diligent job to show how parcel T573 can be conveniently divided.

[9] Still substantiating ground 2, it is submitted that the trial judge's construction of the word 'convenient' was too restrictive in the context of division in kind of co-owned property and that a synonym of the word in the context could be 'possibly'. The Appellant submits

that the trial Judge sought general convenience whereas the law seeks that it is possible to subdivide the land such that the parcel extracted is useful and the remainder is not affected by the extraction more adversely than the extraction itself would render it.

[10] The Respondent on the other hand submit that the learned Judge was correct in her determination that the parcel could not be conveniently divided. In support of this, the Respondents rely on three main points the impugned judgment made. Firstly, the appraiser only interacted with the Appellant and sought to accommodate the Appellant's wishes and did not discuss any proposal with the Respondents. Secondly, the appraiser did not propose a division in kind comprising of 8 lots for the 8 first line heirs or for all the heirs as required by sections 112 and 113 of the IPJS Act. Thirdly, no solution was presented for those heirs with miniscule shares unable to get a portion of land that would be of use to them, and therefore a private sale or licitation would be beneficial to them.

[11] The Respondent also submits that the learned Judge's reasons were pertinent in paragraphs [37], [40]; [41]; [46]; [47] and [48] of the impugned judgment. The Respondents maintain that if the Appellant is allocated the low residential zone, his ability to develop is better than the rest. It is submitted that the proposed extraction for the Appellant is closest to the access road and other co-owners would have to carve out an access road to the furthest point of the property. It is further submitted that the appraiser did not show how and where the access road serving the rest of the property would pass and if left for future decision, the Appellant would have an unfair advantage over other co-owners. It is submitted that getting utilities such as water and electricity would be easier for the Appellant and more expensive for the rest of the co-owners all being proportionate to the distance and nature of the terrain. It is further submitted that the Appellant has no right to a specific area or ruins in law. Moreover, it is submitted that the division into two plots will be impractical resulting in inequities in area and development costs.

SUBMISSIONS OF THE PARTIES ON GROUND 3

[12] In respect of ground 3, the Appellant submits that the authority in *Laporte v Sullivan & Ors* (1978-82) SCAR 191 provides that no one can be compelled to own anything undividedly and a co-owner can petition for a division in kind. It is submitted that the

learned trial Judge failed to take into consideration the explanation given as to whether the division in kind should be allowed by dividing parcel T573 into two plots. The Appellant has referred this court to his submissions in the court a quo on pages 41 to 43 of the Court of Appeal brief. Some of these submissions I have already recounted earlier for ground 1. Perhaps most striking to take note of is submissions of the Appellant in the court a quo[2] that the division in kind is most the most advantageous course for the heirs. It was submitted in particular that for years, the co-owners have not benefitted in any way from the property and the division in kind as proposed into two plots would make it easier to sell the remaining plot so the heirs can financially benefit.

[13] The Respondents submit that although physically and theoretically the parcel of land can be divided into 8 lots, the absence of a proposed division and provision made for access road, electricity supply to the entire property, the appraiser's plan cannot be viewed in isolation as it only took into account the Appellant's share. Therefore the learned Judge was correct in not accepting the appraiser's proposal.

SUBMISSIONS OF THE PARTIES ON GROUND 4

[14] In respect of ground 4, the Appellant refers this Court to Article 26 (1) of the Constitution of Seychelles which provides for the right to acquire property, own, peacefully enjoy and dispose of the same either individually or in association with others. It is submitted that the Appellant's personal circumstances do not fall under those derogations provided for by Article 26 (2) of the Constitution. It is submitted that his right to enjoy his property has been denied for 18 years ever since the executors were appointed. It is submitted that on the basis that is it unclear when the property can be sold given government policy position on foreigners buying property in Seychelles, the two options by the surveyor in Exhibits P1 (A) and (B) ought to have been considered by the trial court and to have failed to consider fully these options was an error on part of the trial judge.

[15] The Respondents argue that the learned Judge was correct to have decided on the evidence before her – and it was for the Appellant to raise an alternative. It is also submitted that the extraction of the Appellant's share is not necessarily a division in kind

[2] On page 43 of the Court of Appeal brief.

in law, and that instead a division of the entire property is required in order to have a fair and equitable partition.

ANALYSIS BY THE COURT

[16] On the consideration of the grounds of appeal and the legal arguments advanced by the submissions of the parties, I consider the present appeal to be hinged upon whether the learned trial judge was correct in her finding that the property could not be conveniently divided as proposed by the appraiser.

[17] The law on sub-division has been correctly cited by counsel for the parties to these proceedings – section 107 (2) of the IPJS Act provides that any co-owner can apply to the court for subdivision and where the same is not possible, then the property can be sold by licitation. Such an application may be refused by virtue of those three things listed in section 111 of the IPJS Act, which are rights of the parties are not liquidated, the property cannot be conveniently divided in kind or the costs of the proceedings for a division in kind would be excessive, regard being had to the value of the property. Any of these reasons can cause a suit for division in kind to fail. The learned Judge's reasoning was that it appeared to her that the property cannot be conveniently divided.

[18] On a perusal of the evidence, I note a 26 October 2021 order made by the learned Judge appointing Mr Allen Savy as the appraiser in terms of section 112 of the IPJS Act. On a closer reading of this order, I find that it was restrictively couched because it ordered that the appraiser submit a report proposing a partition of the property allowing for the undivided share of the Appellant (petitioner in the court a quo) to be extracted. Certainly, this approach could not have shown how convenient it was to divide the property to all the co-owners. The appraiser is also guided by what the Court orders – so he was correct in extracting the share of the Appellant as this is what the Court ordered, but this created an inadequate or limited appraisal report.

[19] In my view, the learned trial Judge could not have made a finding on convenience of the subdivision relying on a limited appraisal report which was geared towards the extraction of the share of one co-owner. I would agree with the Respondents when they submit that the extraction of the Appellant's share is not necessarily a division in kind in law. An

adequate appraisal for a court would have, as submitted by the Respondent, taken cognisance of all of the shares of co-owners and drawing of such portions on the property to show fully or propose how the property can be subdivided among the heirs.

[20] This brings me to the question of heirs, which during the hearing held on 6 August 2024, there seems to be no dispute that there are 8 first line heirs. This too was a live issue in the court a quo. Therefore, the appraisal showing or proposing a subdivision ought to have had the objective of creating 8 plots for the 8 heirs, and not extract a plot for one heir.

[21] The Appellant raises interesting points in respect of the right to property in Article 26 of the Constitution and further argues that his right to enjoy the property has been denied for 18 years since the executors have been appointed. Certainly, 18 years in co-ownership may have the effect of denying one's right to enjoy their property. Which is why the salient point to be made in the present case is that a holistic appraisal is a necessity to determine the extent of the possibility to subdivide the property among the heirs. In so doing, it takes into account the share of all the 8 first line heirs, who too enjoy the right to property under Article 26 of the Constitution. After all, the Respondents in their submissions have conceded that partition of the property into 8 lots for the 8 first line heirs is in line with the law as it takes into account the shares of all heirs.

[22] Although the Respondents through their submission have stated that the property must be sold by licitation or private sale, I would disagree with this as this would be akin to putting the cart before the horse. Naturally, this Court is placing emphasis on subdivision because as the law provides in section 107 (2) of the IPJS Act, a subdivision is the first attempt and if this fails, then a sale by licitation may be considered next.

CONCLUSION AND ORDERS OF THE COURT

[23] Both parties have prayed that the matter be remitted to the Supreme Court although for varying objectives. The Appellant for his part prays that the matter be remitted for the process of extraction of the Appellant's share from T573. The Respondents on the other hand pray - in the alternative to dismissing the appeal - that the matter be remitted for a proper appraisal for a division in kind of the entire property.

[24] Therefore the appeal partially succeeds in so far as the decision of the learned trial Judge is set aside as it relied on an incomplete appraisal report.

[25] It is hereby ordered in terms of Rule 31 (5) of the Court of Appeal Rules that the matter be remitted back to the Supreme Court before another learned Judge to order an appraisal of parcel T573 that is in accordance with section 112 of the IPJS Act, and propose a subdivision of the same taking into account all the heirs, and subsequently determine whether the property can be conveniently sub-divided.

[26] Both parties shall bear their own costs

Signed, dated, and delivered at Ile du Port on 19 August 2024.

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S. Andre, JA

I concur …….

Dr. L Tibatemwa-Ekirikubinza, JA