

**Alcindor & Or v Alcindor & Or
(1998) SLR 127**

France BONTE for the plaintiffs
Charles LUCAS for the defendants

Ruling on the issues (i) whether the application for division in kind (section 107(2) of Cap 94) should be granted on the concurrence of the parties alone, without a hearing of Court; and (ii) whether the 'transmission on death' (section 71(1) of Cap 107) should precede an application by a co-owner (section 107(2) of Cap 94) for division in kind.

Ruling delivered on 21 December 1998 by:

AMERASINGHE J: The Immovable Property (Judicial Sales) Act (Cap 94) provides in section 107(2) thus: "Any co-owner of an immovable property may also by petition to a judge ask that the property be divided in kind or, if such division is not possible, that it be sold by licitation."

The petitioners plead that they are, "the co-owners of a portion of land situated at Machabee, Mahe, registered as title no H1953 as heirs of the late Maurice Alcindor." It is conceded that in accordance with article 816 of the Civil Code that, "co-ownership arises mortis causa when property devolves, whether on intestacy or by will, upon more than one person jointly." When application is made under section 107(2) aforesaid, section 108 requires the judge to, "make an order fixing a day when the several other co-owners, and any other parties, whom he may in his discretion order to be joined, shall cause before him." The Civil Code has made no provisions to determine the particulars of the heirs of a deceased person or to register the rights of the heirs in respect of immovable property. Whereas section 72 of the Land Registration Act (Cap 107) provides for transmission on death with the result the heirs in the capacity of co-owners shall be substituted in place of a proprietor who has died. The effect of registration is to vest the ownership of land on the proprietor (see section 20(a) of Cap 107).

A Sauzier, legal consultant and former judge of the Supreme Court of Seychelles, in his opinion given at the request of the Land Registrar on 29 August 1994 declares thus:

It is the duty of the executor under article 1027 to file the affidavit of transmission under section 71 of the chapter 97."

(A copy of the above opinion was supplied by Mr J Hodoul, attorney-at-law, for my information. His gesture is greatly appreciated.)

No doubt the conclusion is in accordance with the law on account of the fact that the executor or the fiduciary does not have the capacity to make an application for division in kind, for section 107(2) of Cap 94 has specifically vested the right in any co-owner.

A Sauzier J in *Lesperance v Johnson & others* (1982) SLR 348 held that:

- (iv) the fiduciary did not have the powers of disposition or alienation of the co-owned property;
- (vi) although a partition was not an act of disposition or acquisition it was akin to the acquisition of a right or ownership of land.

For an application for division in kind to be determined before the court as well as to invoke the jurisdiction of the court in accordance with section 107(2) of Cap 94, the Applicant is legally bound to satisfy the court that he is a co-owner as the statute requires so. A mere concurrence of the applicants and the respondents cannot satisfy the statutory requirement. When a statute specifically provides for the registration of heirs who inherit the immovable property of a deceased proprietor (as provided in section 72(1) of Cap 107) a co-owner is bound to satisfy the court that "transmission on death" confers on him or her such status. "Transmission on death" enables a court to further determine the co-owners who are entitled to have notice of the application as among whom the division should take place. When the Civil Code makes no provisions for such determination by registration, the provisions of section 72(1) of Cap 107 will supersede the general provisions found in the Civil Code on the matter of co-ownership.

A copy of the Notice of First Registration dated 14 May 1990 of parcel H1953, the subject matter of the application submitted to the Court, reveals that section 72(1) of Cap 107 has not been satisfied for the reason that the registration therein is in the name of "Heirs Mr Maurice Alcindore." The said document also bears a legal charge of R500 in favour of the Government of Seychelles, which obliges such party to be noticed on account of the fact that a division in kind if granted creates new allotments of land in place of the parcel of land H1953 which is subject to the charge and the subject matter of the application. In the case of *Lesperance v Johnson and three others* (supra) Sauzier J has highlighted the above position as follows:

- (vii) a partition is the conversion of a claim to a share in the proceeds of sale of a whole property to the full ownership in a definite parcel of that property (emphasis added).

When a parcel of land owned by several persons is converted into definite and divided portions of land to take the place of the whole, the division replaces the whole, hence a party in whose favour a charge is registered is entitled to notice the application for division in kind.

I therefore rule,

- (a) Parties who claim undivided shares of a land owned in common and the subject matter of the application for division in kind is required to satisfy the court that they are entitled to such legal right. The agreement of parties before the court alone cannot confer legal rights

to the undivided shares of the land to be divided.

- (b) Properties registered under the Land Registration Act (Cap 107) are deemed to be entitled to such share or shares in the absence of claims to the contrary. On the death of a proprietor under the Act, compliance with the provisions of transmission on death under the Act should precede an application in kind under section 107(2) of Cap 94.
- (c) In respect of the charge in favour of the Government, notice is due. Issue notice on the Attorney-General, representing the Government, with a copy of this order for service.

Record: Civil Side No 61 of 1995