

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 217

MC 07/2019

In the matter between:

Theodore Edmond
of Anse Aux Pins, Mahe

1st Petitioner

Lucy Edmond
of Anse Aux Pins, Mahe

2nd Petitioner

Michel Chetty
of Anse Aux Pins, Mahe

3rd Petitioner

The estate of late Dauphine Julienne
Represented by Michel Chetty
of Anse Aux Pins, Mahe

4th Petitioner

Rita Victorin
(rep by Mr J Camille)

5th Petitioner

And

Andre Joseph Chetty
of Anse Aux Pins, Mahe
(rep by Ms A Benoiton)

Respondent

Neutral Citation: Theodore Edmond & Ors v Andre Chetty (MC 07/2019) [2021] SCSC 217 (13 May 2021)

Before: Govinden CJ

Summary: Petition to divide co-owned property in kind; right to compensation by co-owner; lack of evidence relating to value of the property. Court orders the submission of Land Valuation prior to making further orders

Heard: 08 March 2019

Delivered: 13 May 2021

RULING

GOVINDEN CJ

Introduction

- [1] The Petitioners have petitioned this court for the partition of Parcel S71 in which each parties including the Respondent holds an equal and undivided share. Their Petition can be summed up as follows: the land parcel was previously a right of way in favour of all parties and that by virtue of a judgment of this court, *Edmond and ors vs Chetty and anor* (CS228/2011), the said right of way was extinguished. The Petitioners aver that they no longer wish to remain in indivision and are desirous to have their respective shares in title S71 be extracted and merged with that of their respective titles which runs parallel to and abut the said parcel. It is the averments of the Petitioners that this can be conveniently done leading to each parties having each one coherent single plot. In the event that any parties cannot conveniently be apportioned an adjoining plot, the Petitioners aver that they each are ready to compensate to the losing party his or her share in the said parcel. As such they pray to this court to make order in along these terms.
- [2] The Respondent contests the Petition. He raised certain objections regarding the form of affidavit used by the Respondent. Regarding the merits, he does not deny the fact that S71 was formally a right of way used by the parties upon which such rights have been extinguished by the court. He, however, avers that he holds a share in the shares of the 4th Respondent as he avers that the late Dauphine Julienne was his mother. He further avers that the parcel cannot be conveniently divided in kind without causing severe injuries to him and that the Petitioners have failed to identify their "*respective land titles*" which would have made it difficult for the court to make a determination. The Respondent also avers that, at any rate, he is unaware of the ability to compensate him if division in kind cannot be effected in his regards. In the alternative, he says that he is willing to purchase the shares of all the Petitioners if the property cannot be conveniently subdivided. As a result, he prays for the dismissal of the plaint and in the alternative that only the Petitioners share be ordered to be extracted.
- [3] In CS228/2011 the Petitioners had sued the Respondent and the government of Seychelles. The facts of the case was similar to this one except that previously the Petitioners were claiming that their right of way on S71 were in disuse as a result of the 2nd Defendant building a parallel right of way to the one on S71, rendering the latter redundant and. The Petitioners had claimed that the right of way on S71 which was literally on their doorstep was unsafe and caused disturbance to them daily and nightly and is often accessed by public vehicles. The Respondents house at the end of the *cul de sac* though being a dominant tenement, was not so inconvenienced. The Petitioners had approached the government for the grant of an alternative motorable access and the latter had proposed and made available an access reserved to the north of the existing right of way (on Parcel S4986) for substitution with the right of way on Parcel S71. This runs immediately parallel to S71 and

starts from the Anse Aux Pins main road and goes up to the property of the Respondent. The latter, despite repeated requests and the intervention of a mediator appointed by the court, had refused to entertain the alternative motorable right of way to the parties' properties.

[4] Based on these facts, the Learned Chief Justice ruled:

"Hence the creation of an alternative right of way which results in the property not being enclaved results in the original right of way being extinguished even if the limitation period has expired. There is Seychellois authority to that effect as well. Tall v Lefevre (1980) SLR 199 decided that where land is not enclaved and there is no necessity to a right of way as claimed, the owner is not entitled to it. Further, as the French authorities point out, where the owner of the servient tenement does not acquiesce to the extinction of the right of way, a court can make such a declaration. I am of the view that given the evidence in this case and the circumstances surrounding the grant of an alternative right of way by the second Defendant, the danger posed to the Plaintiffs and their properties, that the existing right of way on Parcel S71 should be extinguished and I so order. The Plaintiffs and the Second Defendant are ordered to make the public motorable access granted usable within three months of this order and to substitute the same for the existing right of way. A permanent bollard is then to be placed at the entrance of Parcel S71 making it impassable to motor vehicles. The Plaintiffs and the First Defendant remain in ownership of Parcel S71 and their property rights therein are not otherwise affected."

[5] Hence, by virtue of the said court order, the right of way was extinguished. The court however, kept the proprietary rights of the parties in Parcel S71 intact and as a consequence this case was brought by the Petitioners to apportion and distribute their respective shares according to law. Therefore, in my determination, I will endeavour not to revisit any issues of law and facts that have been determined previously by the court, even if they were raised by parties in evidence or counsel through submissions. I remind myself that this is a case of subdivision of a co-ownership and not regarding a right of way. The issues regarding the latter as far as I am concerned is res judicata.

Evidence

- [6] The 1st Petitioner is 63 years old and he and the other parties are neighbours. He has petitioned this court together with the other petitioners with a view to have a division of parcel S71 and the subsequent amalgamation of the new parcels to those of the parties to this case. A proposal for subdivision has been prepared by Land Surveyor, Mr Ah-Kon, and this was tendered in evidence as Exhibit P2. According to this witness each party will get the subdivision that abuts their respective parcels and the Respondent would be compensated for his share in the said parcel. According to him, the petitioners have discussed between themselves and all of the Petitioners have the means to pay the Respondent for his share. He wants to be apportioned parcel no 5 on the proposal as that is the plot that is adjacent immediately to his land. According to him, the Respondent cannot as such be awarded with this plot. It is his further evidence, however, that the Respondent would need to pull down a wall that hinders his access to the new government access road in order for him to come unto his property as per an order made by the court previously.
- [7] Mrs Lucy Edmond, is the spouse of the 1st Petitioner. She is a co-owner of S649; s1693 and S471, together with her husband and a co-owner with the rest of the parties of S71. According to her, following an order made in the previous court judgment, a right of way which formerly existed on this parcel is now in disuse and all of the parties are now using a new access road which runs parallel to S71. According to her, as per this judgment, the Respondent is also to use the new road and for this to happen he needs to break down a wall, however he has not done that and he is still using S71 as his access. She further testified that the Respondent lives at the far end of S71 therefore it could not have been subdivided in order to give him a portion parallel to his property, something that could only have been done as regards the Petitioners. As such, she is of the view that the Respondent should be compensated by all the Petitioners for his undivided share in the parcel as valued by a Quantity Surveyor. All the Petitioners have discussed the matter and they have agreed that they have the means to compensate the Respondent. The witness testified that in subdividing S71, it was agreed by the Petitioners to make the subdivisions to equate in size with the parcels of the respective properties of the Petitioners adjacent to them and the surveyor was asked to subdivide on that basis.

- [8] Mr Antoine Ah-Kon is a qualified land surveyor. He recalled drafting a sketch of proposal of parcel S71 at Anse Aux Pins Mahe on behalf of Mrs Lucy Edmond and he referred to Exhibit P2 being his sketch. The idea was to subdivide the parcel so that they can be amalgamated to adjacent owners, after which they will form one plot. As regards to plot S68, as it is found at the very end of parcel S71 and it not having a common boundary with the subdivided plots it was not to be awarded a subdivided parcel. According to this witness, this subdivision was proposed by Lucy Edmond and therefore he could not have made six proposed subdivisions in order to ensure that the Respondent gets a part.
- [9] The 5th Petitioner also gave evidence under oath as she is the proprietor of title S472, which exists parallel and adjacent to S71. She produced evidence as to her ownership of this parcel and she was not cross examined.
- [10] Mr Michel Chetty, the 3rd Petitioner, testified last for the Petitioners. His evidence is that parcel S2730 is registered on his name. He did not produced any certificate of official search to support this assertion, he produced only a last will and testament of his late mother.
- [11] Mr Andre Chetty, the Respondent, testified in support of his case. He is the owner of parcel S68 and a co-owner of S71, together with the 5 petitioners. Dauphine Julienne one of the co-owners was his grandmother. To him, when his grandmother passed away the land was not reverted to anyone except his mother. According to him, all the parcels of the parties in the case was originally one parcel and it was subdivided and allotted to parties who had subsequently transferred them to the existing parties, with S71 BEING KEPT AS THE COMMON ROAD RESERVE. According to him, there were only three co-owners initially and later the lands were further subdivided. He says that he is refusing to give up his use of the access road on S71. According to him, when the Petitioners built their houses, they should have known that they were close to S71 and taken into consideration the inconveniences that the traffic will cause. He refused to accept monetary compensation from the others for his share in the said parcel.

The law

- [12] In cases of co-ownership there are three options available under the Civil Code to the joint owner who does not wish to remain in indivision: sale by licitation, partition or action de in rem verso (based on unjust enrichment). Vide *Edmond v Bristol* (1982) SLR 353. The legal provisions under which such actions are brought is found in the Immoveable Property (Judicial Sales) Act and that of the Civil Code. A co-owner cannot be compelled to remain in a state of co-ownership and it is his choice to decide on his option to get out of the co-ownership. The following are the relevant provisions of the law:

In the Act

Application for stay of licitation and division in kind

107. (1) Any defendant in licitation, may, within the time prescribed in section 103, apply by petition to a Judge for an order staying the proceedings in licitation and substituting in lieu thereof proceedings for a division in kind (partage en nature) of the property sought to be licitated.

(2) 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.

In the Code

Article 1686

If a property owned in common by several persons cannot be divided conveniently or without loss;

Or if in a division of property by private agreement there are items which none of the co-owners is willing to take,

The sale shall be by auction and the price shall be divided amongst the co-owners.

Article 819

In the case of immovable property held in co-ownership, unless all the co-owners agree to postpone the sale, such property shall be sold. If the co-owners do not agree to a private sale, or if one of them is subject to an incapacity such as minority or interdiction or is absent from Seychelles and is not represented therein by a

duly appointed agent, the property shall be sold at a public auction. In this respect, articles 1686, 1687 and 1688 of this Code relating to licitation shall have application.

Nevertheless, even if one or more of the co-owners is subject to an incapacity as aforesaid, or is absent from Seychelles, the property may be sold otherwise than by a public auction with the permission of the Court.

Article 821

1. In the case of immovable property held in co-ownership, if the fiduciary or a co-owner decides to proceed to licitation, the court may, upon the application of any interested party, order the postponement of the sale for a fixed period, which may subsequently be renewed. In that case, the Court shall instruct the fiduciary or the executor, as the case may be, who shall be bound by such instructions.

The Court may make such order on two alternative grounds –

1st - That greater hardship would be caused by refusing to grant the order staying the proceedings in licitation than by granting it;
2nd - That the property may be conveniently and profitably divided in kind amongst those entitled. In that case the Court, in order to effect such partition, shall decide the manner of partition and the allocation of the divided property amongst the persons entitled.

2. In respect of this article, the procedure laid down in the Immovable Property (Judicial Sales) Act, Cap. 94, or any law amending or replacing it, shall be applicable.

- [13] Reading all the above provisions of law together has led me to believe that the law does not give precedent to any of the different separate causes of actions. A co-owner may of his or her own choosing decide whether he or she brings licitation proceedings or one for division in kind at first instance. However, once this is done, the court will have to decide whether hardship or greater injuries would be cause to the parties and may choose to stay the proceedings or make any appropriate orders including substitute one for the order. In this case the Petitioners have chosen to seek redress through a subdivision and the court must hear the parties before making the necessary orders.

Issues for determination

[14] Given the above state of affairs, I find that the following are the issues left for determination in this case:

- (1) Whether a division in kind of parcel S71 will cause severe injuries or greater hardship to the Respondent.
- (2) Whether the Petitioners has pleaded their respective land titles.
- (3) Whether the Petitioners have the means to compensate the Respondent.
- (4) Whether the Respondent can or should buy the shares of the Petitioners.

Whether a division in kind of parcel S71 will cause severe injuries or greater hardship to the Respondent.

[15] The latter's defence is that this subdivision will cause great hardship to him as he will not benefit from a divided portion of S 71; he will have to demolish part of a wall surrounding his property in order to have access to the new access road and that he would not benefit in kind as a co-owner of parcel s 2730, the latter also being partly own by his late mother. I have considered this plea in the light of the facts of the case and with due regards to the legal principles. Having done so I find that parcel S 71 runs parallel to the domicile of the Petitioners, this had caused severe inconvenience to them which consisted of nuisances and noise pollution. As a result the court had to condemn the right of way on this parcel in favour of a new one which exist further from the premises of the Petitioners. In that regards, the then Learned Chief justice had come to the following opinion, *"I am of the view that given the evidence in this case and the circumstances surrounding the grant of an alternative right of way by the second Defendant, the danger posed to the Plaintiffs and their properties, that the existing right of way on parcel S71 SHOULD BE EXTINGUIHED and so I order"*. The existence of that right therefore had caused hardship to the Petitioners

and not the Respondent. At any rate, the latter cannot claim for the existence of such a right S71 because this right that he has in that parcel had been extinguished by judgment of this court. The division in kind cannot be faltered on the basis of a right, which no longer exist.

[16] The Respondent, in the alternative, insists that his fair share must be given to him by the allocation of a subdivided part in S71 and if that cannot happen, undue hardship will be caused to him. I have scrutinised the proposed subdivision of S71 and I find that it would be impossible to allocate the Respondent with a plot given the configuration of the lands in issue. His plot is in a *cul de sac* and he has no parallel boundary with S71 and hence it would be totally impractical to award him one of the subdivided plots. His rights in the said parcel can properly be converted into a right to compensation for the value of his share, this would be equitable and would remove any injustice that a division in kind may cause.

[17] However for this to happen, the Respondent needs to demolish part of his wall which will allow him to have access to the new access road. This has been ordered in the previous court case, however a visit to the locus by the court and the parties shows that this still needs to be done. This is the only hardship that would be caused to the Respondent in order to allow this division to take place fairly and equitably. If this is to be considered an injury to the Respondent, I am of the view that it can be alleviated by the rest of the parties through a court order.

Whether the Petitioners have pleaded their respective land titles.

[18] I have scrutinised the Petition in the light of the position of the Respondent that the Petitioners have not pleaded their various titles properly. Having done so, I find that none of them have pleaded their respective titles. What they pleaded was that they have shares in title S71 which can be conveniently extracted and merged with their respective adjacent titles. To me this amounts to sufficient particularisations in their pleadings that would justify their legal claims. All the rest are issues of facts that needed to be supported by testimonies. Having heard their testimonies, I find that the evidence shows on a balance of probabilities that the following are the owners of the relevant parcels;

Rita Victorine; parcel S127 and S471.

Michel Chetty; parcel s 1970 and s 2729, which was bequeathed to him by his late mother by way of a will and testament EXP9.

The estate of the late Dauphine Julienne; parcel S270, which by virtue of the death of their late mother is also co-owned by Michel Chetty and the Respondent.

Michel Edmond and Lucy Edmond jointly; parcels S469 and S1693.

Whether the Petitioners have the means to compensate the Respondent.

- [19] With regards to whether the Petitioner has the ability to compensate the Respondent, the court is satisfied that the Petitioners as a whole has agreed to compensate the Respondent for his fair share in S71. I am satisfied that they have so agreed on the facts adduced before the court. The question as to their capacity to compensate is therefore irrelevant in this case as they would need to pay according to the quantum fixed by the court.

Whether the Respondent can or should buy the shares of the Petitioners.

- [20] As to the question of ordering the Respondent to buy the shares of the Petitioners in S71, this was raised as a defence by Mr Andre Chetty, however the evidence transpires otherwise. In his testimony, the Respondent declines any possibility of him buying the other co-owners of their interests in the said parcel.
- [21] As to a sale by licitation, I have considered the Respondent insistence of such a sale. Having done so, I find that the sale of this condemned access road to a third party will bring greater harm than good to all parties. A third party will find him or herself with a stretch of land, which lies sandwiched between the Petitioners properties and their right of way, a strip of land with no developmental value. This will give also rise to another problem, namely enclaving all of the petitioners' properties, as it will hinder their access to the new right of way. Coincidentally this option will leave only S68 disenclaved. Accordingly, this is not a viable option.
- [22] After a thorough consideration of all the circumstances, I find that the only option that will do justice to all parties in this case would be for the court to transfer a portions of S71 that

lies parallel and immediately adjacent to each of the respective properties of the petitioners to the latter and at the same time for S71 to be valued so that each of the parties contribute equal shares in the compensation of the Respondent of his undivided share in S71. As far as parcel S 2730 is concerned, if the Respondent is a co-owner of that parcel he would stand to benefit from the gain that this parcel will incur with the amalgamation of plot 1 on Exhibit P2.

- [23] However, the court is constraint in its capacity to make such orders given that the evidence of the value of S71 has not been laid before the court. Accordingly, the court orders that the Petitioners and the Respondent each produce evidence of the value of the said parcel by an affidavit or a report from a Quantity Surveyor. They may agree to produce joint evidence to this effect, which failure to do so will compel the court to rely on both or either of the expert evidence adduced. This evidence has to be produced to the court through the Registrar by Wednesday the 14th of July 2021 at 9.30 am. This case is to be mentioned on the same day in order to ascertain the filing of the Report(s).

Signed, dated and delivered at Ile du Port on the 13th day of May 2021

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by a horizontal line and a small flourish.

Govinden CJ