SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 408
(MC No. 13 of 2018)

In the matter of:
Channel Vincent Azemia **Petitioner**
(rep by Ms. L. Pool)

Versus

1. **Alda Therese Jeanne (nee Azemia**) **Respondents**

2. **Marcel Azemia**

3. **Dolorota Margaret Azemia**

4. **Arsen Louis Azemia**
(rep by Ms. K. Domingue))

Neutral Citation:	*Channel V. Azemia v Alda T. J Jeanne (nee Azemia) & Ors* (MC No. 13 of 2018) [2023] SCSC 408 (2nd June 2023)
Before:	Andre JA (sitting as a Judge of the Supreme Court)
Summary:	Sub-division of inherited property
Heard:	15 January2023 (Filing of written submissions of the Respondents)
Delivered:	2 June 2023

ORDER

The Court makes the following orders:

(i) The application succeeds.

(ii) The report of the Surveyor Mr Leong of the 2 February 2021 is hereby confirmed and partition of Title H2314 is to proceed as proposed in the said report.

(iii) All parties shall bear their own costs.

RULING

ANDRE JA
(Sitting as a Judge of the Supreme Court)

Introduction

[1] This Ruling arises out of a petition filed by Channel Vincent Azemia (petitioner), on the 23 February 2018, for a division in kind of Title No. H2314 (hereinafter referred to as property). The petition is objected to by Alda Therese Jeanne nee Azemia (deceased) represented by Emmanuel Jeanne and Sabrina Jeanne; Marcel Azemia; Dolorota Marguerite Azemia; and Arsen Louis Azemia (cumulatively referred to as respondents), on the basis that the partition cannot be made.

[2] Both parties filed written submissions of which due consideration have been taken thereof for the purpose of this Ruling.

Background

[3] The Petitioner, Channel Vincent Azemia, and the Respondents, Alda Therese Jeanne nee Azemia (deceased) represented by Emmanuel Jeanne and Sabrina Jeanne; Marcel Azemia; Dolorota Marguerite Azemia; and Arsen Louis Azemia are co-owners in indivision of land under the Title H2314 having inherited it from their late parents. The Petitioner no longer wishes to remain in a state of indivision with the Respondents and applied for the land to be partitioned. The Petitioner seeks two things from this Court: (a) appoint an Appraiser to submit a report on the method of partition; and (b) order that the land be divided in kind in order that the Petitioner will obtain his share.

[4] The Petitioner avers at paragraph 2 of the Application that Petitioner owns 6/10 shares of the land and Respondents own 1/10 share each.

[5] The Respondents objected to the Application, claiming that the parcel cannot be conveniently divided in kind as it is too small to be divided. The Respondents further offered to buy out the Petitioner's share in the house on Parcel H 2314.

[6] On the 15th of September 2020 the Court ordered that Mr Michel Leong, Surveyor of Cooperative House at G&M Surveys, Victoria undertakes the survey of parcel H 2314 and submit a proposed plan of a sub-division indicating the partitioning of the petitioners and the respondent's indicated share as per petition of the 20th February 2018. The Surveyor's Report was provided, dated 2nd February 2021. The Report states that partition is possible in accordance with the suggested allocation. The Report provides at paragraph 4 that the partition proposal excludes the existing residential buildings.

Submissions

[7] The Petitioner submits that the Application is made under section 107 of the Immovable Property (Judicial Sales) Act CAP 94.

[8] The Petitioner submits the Survey Report proposes a subdivision into 2 plots, Plot 1 with an area of 1068 square meters with house thereon to be allocated to the Petitioner and Plot 2 allocated to the Respondents. It is further submitted that the 1st Respondent passed away during the proceedings and her heirs offered their share to the Petitioner. The remaining Respondents also offered their 1/10 share to the Petitioner who could not afford to buy them at the price offered.

[9] It is therefore submitted that the Report shows that the land can be conveniently sub-divided in kind. The Petitioner submits that a co-owner cannot be forced to remain in a perpetual state of indivision with the other co-owners.

[10] The Respondents submit in relation to the Surveyor's Report that the Report is not clear as at paragraph 4.3 it refers to Titles H 2313 and H 2314 with the former going to the Petitioner and the latter going to the Respondents. It is further submitted that *"it is understood that there's certain encroachment and that might be the cause of the ambiguity but it is submitted that that still does not give the Court enough guidance and explanation"*. The Respondents confirm that heirs of Alda Azemia, who passed away,

stated in Court that they had no issue in transferring the shares belonging to Alda Azemia to the Petitioner.

[11] The Respondents submit that the Court needs to address certain issues before it makes determination. The Respondents submit that the application is defective as both original and amended Petition are not supported by the affidavit (reference made to *Khany v Cannie* (1983) SLR65); that the affidavit of transmission should have been sworn by Alda's heirs transmitting her share (reference made to *Alcindor v Alcindor* Civ 61/1995, 21st December 1998); that in determination whether a petition should be allowed the court must be satisfied that (i) the rights of the parties are liquidated; (ii) the property can be conveniently divided; and (iii) the division of the property is the most advantageous course for the heirs and that convenience must not be understood to mean merely physical convenience (reference made to *Joseph v Peat* (1983) SLR 42).

[12] The Respondents submit that they do not wish for the partition to take place especially with the view that the family home is on the property and is solely enjoyed by the Petitioner. The Respondents state that should the Court allow the partition it should not make an order that the family home is awarded to the Petitioner. The Respondents thereafter refer to *Laurence v Lenclume* (1976) SLR 216 which stated that:

> *"The common property descending from a succession may be divided into as many lots as there are equal souches, and it is immaterial if the subdivision of property awarded to a souche cannot in its turn be subdivided into as many lots as there were co-heirs in a souche.*
>
> *An attribution without the drawing of lots cannot be effected unless the parties agree to such attribution.*
>
> *Constructions on common land by individual co-owners form part of the immovable to be divided as they are the common property of all co-owners, an individual co-owner having merely a claim against the other co-owners for the plus-value given to the common property by any construction that individual erected."*

[13] The Respondents agree that a co-owner cannot be forced to remain in indivision but state that such division must be equitable and convenient. They submit that division would be neither convenient nor equitable as the Petitioner may end up with the family home to which all the parties contributed to its demolition and re-construction. They further state that the rest of the property is unbuildable due to the presence of boulders. Further, it is

submitted that although the attribution of land may be made in favour of the Petitioner, he should have a duty to pay the Respondents their share of the family home, or else such attribution must clearly state that the house or houses on the property are excluded from the division in kind.

[14] The Respondents submit that the case should be dismissed on the defective pleadings; alternatively if the Court decides not to dismiss the case, *"it is submitted that the proposal as laid down in paragraph 8 above, will meet the justice of the case and the Respondents pray accordingly"*.

Legal Analysis based on submissions and evidence adduced

[15] Prior to the analysis of the sub-division issue, I shall briefly address the points raised by the Respondents in their submissions which I deem appropriate to consider at this stage of the proceedings.

Surveyor's Report

[16] In my view, the Respondents' understanding of paragraph 4.3 of the Surveyor's Report (supra), in incorrect as it does not state that parcel H 2313 is going to the Petitioner and parcel H 2314 is going to the Respondents. It proposes to divide parcel H 2314 as per the report and stating that H 2313 is the adjoining parcel.

[17] The Report provides that total area of the land is 1658 square meters, which was divided into two zones with different rate per square meter. The total value of the land as per Report is SCR 353,760.00. Paragraph 4 also states that proposal excludes the existing residential buildings due to the reasons stated in the Report.

[18] The Report suggests that Plot 1, which is comprised of areas from Zone 1 and 2, total area of 1068 sqm and total value of SCR 212,160.00 be allocated to the Petitioner; and Plot 2, which is comprised of area from Zone 2 only (with higher rate per sqm), total area of 590 sqm and total value of SCR 141,600.00 be allocated to the Respondents. It is noted at this juncture that it appears that the area which is allocated to the Petitioner is more than 6/10 of total area of the land in square meters. However, the value of the land

allocated to the Petitioner and the Respondents represent their shares with slight difference of SCR 96.00.

Petition and affidavit

[19] The Petition is accompanied by the Affidavit on Transmission by death sworn by the Petitioner, Channel Azemia and stamped by the Land Registry. Affidavit is dated 27th October 2017. It is not accompanied by any other affidavit of facts in support of the Petition.

[20] Section 107 expressly refers to petition, *"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"*. Section 107 does not expressly refer to an affidavit. In *Khany v Cannie* (1983) SLR65, the authority referred to by the Respondents, the court also made no express reference to an affidavit, but held that co-owner may petition to a judge and it *"is to be done by way of petition"* and dismissed the plaint.

[21] In *Barrado v Labonté* (MC 53 of 2017) [2019] SCSC 657 (30 July 2019) where the matter was not commenced by petition the Court stated that this alone should have resulted in dismissal. However, the court observed that this was overlooked by the presiding judge at the commencement of the proceedings and decided to disregard this point and proceeded with the matter:

> *"[4] It must be noted that this matter was not commenced by petition as it should have been. That alone should have resulted in the dismissal of the application but I now disregard this point as it was overlooked by my brother Nunkoo J who presided over the matter at the commencement of proceedings and upon whom I do not sit in judgment."*

Affidavit of transmission should have been sworn by Alda's heirs

[22] The relevance of this point is not clear as even if the heirs of Alda Azemia are prepared to renounce their share in favour of the Petitioner, his amended Application mentions them as the Respondents owning 1/10 share and he is not praying the Court in the Application to transfer their share to him.

[23] In that same light, in the case of *Alcindor v Alcindor* (1998) SLR 127 it was held:

> *"(i) Parties, who claim undivided shares of land which is owned in common and the subject matter of the application for division in kind, must satisfy the court that they are entitled to such a legal right. The agreement of parties before a court alone cannot confer legal rights to the undivided shares of the land to be divided.*
>
> *(ii) The owners of property registered under the Land Registration Act are deemed to be entitled to such share or shares in the absence of claims to the contrary.*
>
> *(iii) On the death of a proprietor, compliance with the provisions of transmission on death under s 72 of the Land Registration Act should precede an* application in kind under s *107 of the Immovable Property (Judicial Sales) Act."*

Sub-division

[24] Section 107 of the Immovable Property (Judicial Sales) Act CAP 94 provides:

> *"107. Application for stay of licitation and division in kind*
>
> *(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."*

[25] In *Monthy v Esparon* (2012) SLR 104 it was held:

> *" (i) In cases of co–ownership there are three options available under the Civil Code to a joint owner who does not wish to remain in indivision: sale by licitation, partition, or action de in rem verso (based on unjust enrichment). If the plaint is not an action based on any of these causes of action, but on equity alone, the judge will be acting ultra vires if an order of property division is made. Equity cannot be resorted to because there are other legal remedies available.*
>
> *(ii) A co–owner will be entitled to compensation if he or she is unlawfully ejected and cannot enjoy his or her property.*
>
> *(iii) The Land Registrar is entitled to transfer land in accordance with an order of a judgment. Section 230 of the Code of Civil Procedure provides that unless there is an order or an application before the court "an appeal shall not operate as a stay of execution". An appellant should be alive to the risk of transfer and apply for a stay of execution pending appeal."*

[26] The present case falls into partition option as prayed for in the Application. In *Joseph v Peat* (1983) SLR 42, as was submitted by the Respondent, it was held that in the determination of whether a petition should be allowed the court must be satisfied that, *"(a) the rights of the parties are liquidated; (b) he property can be conveniently divided; and (c) the division of the property is the most advantageous course for the heirs"* and that, *"Convenience must not be understood to mean merely physical convenience"*.

[27] In *Joseph v Peat* (supra) the Court further held that, *"on the facts of this case, …, the division of the property in the manner indicated in the appraiser's report could be conveniently done and was the most advantageous course for the general body of co-owners"*. The report in that case allotted two plots with different geographical features of the land: northern portion allotted to the petitioners was steep but watered and southern portion allotted to the respondents was flat but not watered. Two of the petitioners have built houses on the northern portion and none of the respondents had any houses on the land. Petitioners agreed to the suggested partition but 3rd respondent objected on the ground that portion allocated to respondents was the most difficult part of the land and proposed they should get a bigger portion or petitioners should purchase their rights if they wished to build on the land.

[28] In *Joseph v Peat* the court referred to the Court of Appeal decision in *Laporte v Sullivan* (C.A. 11/80 decided on 20th March 1981), where it was held that after the appraisal report is done, "*the parties must be given an opportunity to show cause against the confirmation of the report; Thereafter the judge may confirm the report …"* The following was held regarding the meaning of 'convenient':

> *"As equivalent expression appears in Article 827 of the French Civil Code which reads as follows:*
>
> *«Siles immeubles ne peuvent pas se partager commodement, il doitetre procede a la vente par licitation."*
>
> *It has been held in Mauritius in Papana or Sinatambou v. Albert & Wife & Ors. (1882) M.L.R. 129 following French Jurisprudence that "commodement" in Article 827 C.C. must not be understood to mean merely & "physical" convenience.*
>
> *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, d 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 that the interest which they all have in the succession of the deceased shall not be depreciated in value by the division."

[29] The Petitioner in the present case presented Affidavit of Transmission by death registered with the Land Registry attached to the Petition and Exhibit P2. The Affidavit of Transmission states that 5 heirs have renounced and abandoned their undivided 1/10th share to the Petitioner's name. At paragraph 5 the shares are registered as 6/10th in the name of Petitioner and remaining 1/10th each in the names of Respondents (as per initial petition, Alda Therese Jeanne, nee Azemia still listed). Although the Respondents attempted to claim that the Petitioner 'tricked' the 5 heirs into renouncing their shares, none of them came to testify to that effect and none of them are respondents. Moreover and most importantly, in the Answer to Application and Submissions, the Respondents admit that the Petitioner owns 6/10th shares.

[30] The Petitioner also provided a letter from his father where he states that the three-bedroom house standing on parcel H 2314 *"belongs to Channel Azemia who has built the said dwelling-house with his own personal finances"* (Exhibit P3). The letter is signed before the Notary G. Maurel, dated 27th January 2003 and bears registration stamp dated 12.10.2018. During the proceedings on 15th September 2020 the 2nd Respondent attempted to produce the letter of same effect and date but stating that it was the 2nd Respondent to whom the house belongs. The Petitioner's Counsel objected to the production of the document on the basis that the letter was not registered. Counsel for the Respondents stated that this letter does not need to be produced but, *"what it will do is merely shed light on the case for the Court as regards to what would be eventually the shares in the dwelling house if the Court orders that a partition is done with regards to eventually possibly a claim with regards to the dwelling house"*. The Court stated that the letter be admitted as item number 3 *"to be produced as exhibit upon the calling of Mr Gerard Morel accordingly"*. As it appears Mr Morel was never called and letter was marked as Item 2 and was not marked as an exhibit.

[31] The Petitioner is residing in the house that is located at the Plot of land, which the Surveyor suggested to be allocated to the Petitioner. The Respondents further submitted, through their written submissions that all heirs have contributed to house's demolition

and reconstruction. However, this was never an issue before the Court because the issue before this Court is subdivision. The house is neither mentioned in the Application nor in the Answer to Application – in essence, it was never pleaded by either of the parties. The letter, which may or may not indicate that the 2nd Respondent has interest in the house was not even formally produced as an exhibit. As stated by the Respondents' Counsel during the proceedings, the letter may or may not indicate the possibility of future potential claim regarding the ownership of the house.

Conclusion

[32] It was admitted by the Respondents that the Petitioner owns 6/10 of parcel H2314. The main objection was that the land cannot be conveniently sub-divided as the property is too small. The Surveyor provided a Report which suggests that the land can be sub-divided. The Report states that partition proposal excludes the existing residential buildings. According to the suggested partition, the house in which the Petitioner resides is on a portion of land, which the Report has suggested it be allocated to the Petitioner.

[33] The Respondents in the Submissions state that the parcel allocated to them is unbuildable. The Respondents further object to the sub-division as the Petitioner would get the family home and aver that the Petitioner should pay the Respondents their share of the family home or else such attribution must clearly state that the house/houses on the property is/are excluded. It is reiterated that the ownership of the house was not the issue pleaded in the Application and Answer to the application.

[34] Against the above analysis, this Court is satisfied that the Petitioner filed the Petition in accordance with the procedure as set out under Section 107 of the Immovable Property (Judicial Sales) Act and is further satisfied that (a) the rights of the parties are liquidated; (b) the property can be conveniently divided; and (c) the division of the property is the most advantageous course for the heirs. Therefore, I proceed to confirm the report of the Surveyor Mr Leong and order the partition as proposed accordingly.

[35] The Court orders as follows:

(iv) The application succeeds.

(v) The report of the Surveyor Mr Leong of the 2 February 2021 is hereby confirmed and partition of Title H2314 is to proceed as proposed in the said report.

(vi) All parties shall bear their own costs.

Signed, dated, and delivered at Ile du Port on the 2 June 2023.

…….

ANDRE JA
(Sitting as a Judge of the Supreme Court)