SUPREME COURT OF SEYCHELLES

Reportable
[2023].....
MC 40/2021

In the matter between:

ANTONY VALER PAYET — **Plaintiff**
(rep. by Bernard Georges)

and

MARISE GREEN — **First Respondent**
(rep. by Kieran Shah)

ALLEN HOAREAU — **Second Respondent**
(rep. by Kieran Shah)

Neutral Citation: *Payet v Green and Anor* (MC 40/21) [2023] ..... (..... November 2023).
Before: Pillay J
Summary: Application for division-in-kind
Heard: [date]
Delivered: 22nd November 2023

ORDER

[1] The Plaint is dismissed.

[2] Each side shall bear their own costs in view of the nature of the application.

JUDGMENT

PILLAY J:

[1] By way of his Petition, the Petitioner seeks an order appointing an appraiser to survey the land and for the Court to order the division of parcel T573 in order that the Petitioner's share can be extracted therefrom.

[2] The Petitioner claims as follows:

(1) [he] is an heir of the late Francois Mondon and the Respondents are joint executors of Francois Mondon's estate.

(2) The sole asset of the estate is parcel T573 situated at Capucins, Takamaka.

(3) The Petitioner is a co-owner of an undivided 17/288 share in the said parcel.

(4) Attempts by the Executors to sell the said parcel of land (with the consent of all the co-owners) so that the proceeds of sale could be shared amongst the co-owners have proved unsuccessful.

(5) The Petitioner is no longer willing to remain in a state of indivision with the Respondents and is desirous of excising his share from the parcel.

(6) The said parcel is divisible and the said undivided share of the Petitioner can be extracted therefrom.

[3] The Respondents admit that the Petitioner is an heir of the late Francois Mondon and the Respondents are joint executors of Francois Mondon's estate. They admit that the sole asset of the estate is parcel T573 situated at Capucins, Takamaka and that the Petitioner is a co-owner of an undivided 17/288 share in the said parcel.

[4] They deny that attempts to sell the property had been unsuccessful and state that there are other buyers interested in the whole property although one sale did not materialize. They further state that the property should be sold as a whole as approved by order of the Supreme Court of Seychelles dated 29th March 2019 in SCSC 282/2019.

[5] They aver that it would be to the manifest disadvantage of the rest of the co-owners if any portion is excised in that:

a) *there is no access road and services for the entire property*

b) *a large portion of the property is in a nature reserve*

c) *a division in kind amongst all the co-owners would be excessive in costs to provide for access roads, electricity and water services and sub-division fees.*

d) *it will be impractical to divide amongst all the co-owners as many co-owners have a minute share like 1/3360, 1/2400, 1/1680, 1/960, 1/384, and so on, and sub-division of their respective shares, would be excessive and out of all proportion for the costs having regard to the value of their respective shares.*

[6] Alain Savy, a licensed surveyor testified that he knows parcel T573 having visited the site upon receiving a request from the Court. He visited the site, assessed the access, the lay of the land and the issues at stake. Thereafter he looked at all the cadastral information as well as the request from the Court before producing a report.

[7] It was his testimony that the property in question T573 measures 101 hectares. Title is registered to the heirs Francois Mondon. The Petitioner has 17/288 shares in the said parcel equating to 5.9% of the whole property. On his first report he looked at a way to extract the portion of 5.9% in a way that it would not impact the rest of the property. His other reason for coming to that extraction proposal is so that he gets a fair share of the property being a bit of coastline, a bit of flat land and a bit of hill as well. His evidence was that the strip of land goes from the shore "very flatish and then in the middle it goes fairly steep and then very steep towards the end".

[8] In his second report he reduced the proposed strip of land in order for the Petitioner to get the ruins where his mother grew up as part of his share. The second proposal is half of what his share actually is.

[9] It was his evidence that the most advantageous extraction for the remaining heirs would be the first one as it would have less impact than the second proposal. It was his evidence that the Petitioner's share can be extracted conveniently, provided that the right of way is well

defined as it is crucial that there is access to the remaining property which is crucial. He was unaware though if the property is in a nature reserve.

[10] In cross examination he stated that the property is "huge, a large property and the terrain varies vastly." He agreed that if the property was to be divided into eight plots the plots would have to be of equal value taking into account that the beach in the middle of the property is where the most value is located. Everybody can get a piece of beach and be compensated with an increased area. He agreed that normally the appraiser would prepare the partition and then the Courts would draw lots to determine who gets what.

[11] The witness agreed that the property is right for a tourism project. He agreed that the second report was modified to include the ruins after discussions with the Petitioner. But he did not discuss with the Respondents.

[12] The Petitioner testified that he is one of the co-owners of T573 located at Anse Marie-Louise, Capucin, Takamaka measuring 101.5 hectares. He inherited some of the shares from his mother Gemma Payet nee Mondon and then was approached by some of the other heirs to purchase their shares. He owns 17/288 shares in T573. The property is not developed. There was an offer for sale of the property approved by the Court in 2019 for sale of the property for 18 million Euros. However the sale did not go through. The Petitioner stated that he had no objection to the property being sold as long as his portion is extracted.

[13] In cross examination he accepted that there are different zoning on the property "which is defined by the planning authority".

[14] The first Respondent testified that she is one of the executors along with another and they have done work for a number of years relating to the succession of Mondon. The executors have been approached and there have been attempts to sell the property. There has been correspondence with the Seychelles Investment Bureau dated 20th April 2022 about an intended purchaser for the property. She testified that it was to the advantage of all the heirs to sell the property hence her objection to the Plaintiff extracting his share as it would change the discussions that is being had for a sale. She accepted that all the heirs have a

right to enjoy the property and that she represents every single heir and not just the main ones.

[15] Learned counsel for the Petitioner submits that the applicable law is the Immovable Property Judicial Sales Act specifically sections 107 (2), section 111 and section 112.

[16] She identifies the issues before the Court as follows:

a) *whether the application for division-in-kind to extract the Petitioner 's share by dividing Parcel T573 into two Plots should be allowed?*

b) *whether the Court order (Marise Green & ORs SCSC 282/2019 – XP 19/2019) allowing the sale of parcel T573 was specific to the offer at the time or was to apply for future offers?*

[17] Learned counsel submits that the Petitioner no longer wishes to remain in a state of indivision. She submits that in line with ***Laporte v Sullivan & Ors 1978*** the Court stated that division can always be demanded since in accordance with Article 815 of the French Code no one can be compelled to own anything undividedly.

[18] She submits that the Petitioner's share in discernible in that he owns 17/288 (5.9%) which he obtained through succession and by buying other co-owners shares. She further submits that the parcel T573 is 1, 011, 500 square metres and the Petitioner owning 5.9% share, he owns a large portion which means it can be extracted as per the surveyor's report, since his share amounts to 14.7 acres from a total of 250 acres.

[19] Learned counsel submits that the Petitioner will be the one bearing the cost of the extraction of his share. She further submits that the extraction of the Petitioner's share will make it easier for the sale of the remainder of the land.

[20] In terms of the Order in SCSC 282/2019, Learned counsel for the Petitioner submits that "the application was meant to be in relation to the offer by the purchaser at the time, the use of the words "an offer", by referring to the said offer as genuine and realizable and by the fact that it referred to a specific amount". She further submits that the use of the words "the purchaser" by the Learned former Chief Justice Twomey indicate that the sale was

meant to be to that specific purchaser. She moved the Court to "enter judgment on behalf of the Petitioner by confirming the court appointed Land Surveyor's proposal for divison of Parcel T573 in order to extract his shares therefrom".

[21] Learned counsel for the Respondent for his part submits that the petition should be refused. He submits that the Petitioner consented to the sale in XP 19/2019 and unless the Court Order is vacated or amended the Petitioner remains bound to the commitment for the sale of the entire property.

[22] It is his submission that miniscule shares only have monetary value in a sale as they are too small to partition into respective plots of buildable land. Learned counsel submits that in view of the evidence of the surveyor it would be more suitable and equally advantageous to all the heirs if the property was sold in its entirety.

[23] Learned counsel submits that if the partition is to be permitted, T573 must be divided into 8 plots for the first line heirs which the surveyor admitted is possible to ensure equality bearing in mind all factors. He submits that the Petitioner cannot pick and choose one plot of land because he lived there at some stage in his childhood.

[24] Without a doubt, as stated in the case of ***Laporte v Sullivan & Ors (1978-82) SCAR 191*** no one can be compelled to own anything undividedly, a co-owner could petition for a division in kind.

[25] The law by which one can seek a division in kind is found in section 107 (2) of the Immovable Property Judicial Sales Act which provides as follows:

> *(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.*

[26] In determining whether a division in kind should be allowed the Court must be satisfied that in accordance with section 111 (2) of the Immovable Property Judicial Sales Act:

> *a) the rights of the parties are liquidated*

b) the property can be conveniently divided in kind

c) the costs of the proceedings for a division in kind, including any ulterior proceedings of raise en regle, consequent thereon, would not be excessive, regard being had to the value of the property.

[27] In the event that the rights are unequal as in the present case, section 113 of the aforementioned act is applicable and reads as follows:

> *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 appraisement, 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.*

[28] In terms of whether the rights of the parties are liquidated, there is clear evidence what share each heir is entitled to (PE2). In fact, the Respondents admit that "the Petitioner is a co-owner of an undivided 17/288 share in" T573.

[29] The main point of contention is whether the property can be conveniently divided. To my mind, in coming to a conclusion as to whether the Petitioner's application for dividing T573 into two plots should be granted, the main issue to consider is this: does convenient division mean convenient for one co-owner or convenient to all co-owners or simply convenient division physically in terms of shares and topography?

[30] Indeed, it is not in dispute that the property at issue is over 1 million square meters (101.15 hectares/250 acres). In his report (PE1(b)), the surveyor indicated that "most of T573 is categorised as R0 permitting low density residential/tourism development with minimum plot size of 4, 000m2". Parcel T573 having an area of 250 acres and the Petitioner's share amounting to 14.7 acres, clearly extraction of 14.7 acres is possible from the 250 acres.

[31] However, does the fact that 14.7 acres can be extracted from 250 acres mean that it meets the criteria under section 111 (2) (b) that the property can be conveniently divided?

[32] In the case of ***Joseph and Ors v Peal and Ors (1983) SLR 42*** reference was made to the case of ***Laporte v Sullivan (CA 11/80 decided on 20th March 1981)*** where the Court stated as follows:

> *"When a division is authorised under section 114 i.e. where the rights of the parties are equal, the drawing of lots takes place under section 118 before the Judge. Where on the other hand the rights of the parties are unequal, as in the present case but a division in kind seems appropriate in terms of section 115, and the judge has ordered an appraisement and has directed the appraiser to form the lots in proportion to the rights of the respective parties, and further to allot accordingly without any drawing of lots, the parties must be given an opportunity to show cause against the confirmation of the report. Thereafter the judge may confirm the report, his order of confirmation operating as a definite allotment of shares, in terms of section 118."*

[33] Seaton CJ then went on to look at the three conditions specified in section 113 if they had had been satisfied. In determining whether the property can be conveniently divided in kind, he went on to consider the meaning of the word "conveniently" as follows:

> *As equivalent expression appears in Article 827 of the French Civil Code which reads as follows:*
>
> > *"Si les immeubles ne peuvent pas se partager commodement, il doit etre 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.*

[34] In the case of ***Joseph and Ors v Peal and Ors*** above there was:

> *"a marked difference in the geographical features of the northern and southern parts of the properties, the former being steep whereas the latter was flat. The northern part also is watered, whereas the southern part is not.*

Though Seaton CJ accepted that the share proposed to the third respondent was in terrain that is more "difficult" than that of the other respondents he went on to order the division

in kind on the basis that the property can be conveniently divided and that the most advantageous course for the general body of the co-owners is the allocation as demarcated.

[35] On a reading of ***Peal*** therefore, "convenience" encompasses amongst others a consideration of; the size of the property in issue, the size of the plots to be extracted, the topography of the land, the availability of services such as utility, the access way, the buildability in relation to the planning restrictions in place as well as costs associated with creating access for the other co-owners and construction.

[36] With the above in mind the size of the property is noted. Indeed, it is an area of 101 hectares with the Petitioner having a 5.9% share. On the face of it the Petitioner's share which comes to 5.97 hectares can easily be extracted from the 101 hectares property.

[37] However, it is noted that the property is made up of different zoning areas; the majority of which is very low density residential and tourism with a good portion of the buffer zone on the west side of the property and a sliver falling within the low density residential zone. Judicial notice is taken that the different zoning areas are put in place by the national land use plan and dictates the development that can be undertaken within those zones. The majority of the land falling within the low density residential zone falls within the proposed plot to be allocated to the Petitioner whereas the remainder of the property falls within the very low density residential zone. It therefore follows that the ability of the Petitioner to develop his share of the land if he is allocated the portion as per the first proposal of the surveyor will be far greater than that of the other co-owners.

[38] Furthermore, the proposed extraction is right at the edge of the property closest to the access way. With that being so the other co-owners would have to go to greater expense to carve out an access road to the furthest point on the property at Pointe Cocos.

[39] In terms of the issue of the right of way, which the surveyor said was crucial in determining the division of the property, the Petitioner had this to say:

> *Definitely access has to be granted because they need to access their property, but it has to be done in a way where it suits both parties and that has to be decided basically by a further survey of the right location.*

[40] The valuer's position is that the location of the right of way has to be agreed between the two parties and the Petitioner has to be compensated for the area of the right of way through Plot 1 (see PE 1 (a). If indeed "the distraction of Plot 1 from Parcel T573 will not adversely affect the remainder of the land" and "such parcels of land bordering the sea are attractive to investors wishing to undertake an eco-tourism development" does the Peitioner's ability to control the access to a certain extent, in the event he is allocated Plot 1, not give him an unfair advantage in negotiations for sale of the remainder of T573 to the detriment of the other co-owners? In my opinion it does.

[41] It is further noted that the property has no utilities services whatsoever. Whereas the proposed Plot 1 is close to the access way resulting in lower costs in getting utilities, without a doubt the other co-owners will incur greater expense in getting utilities to the furthest point and the highest point of the remainder of the property.

[42] In his report, PE1(b) at 4.4, the valuer noted that "surface area of Plot 1 that lies between 0m to 50m has been increased to compensate for area between 100m and 250m which will have a lower value due to elevation and difficulty to develop". By the same report 49% of the surface area of T573 lies between 100m and 250m. If the Petitioner is being given a greater area at 0m to 50m to compensate for the lower value and difficulty to develop the higher elevation does that not mean that the other co-owners will be affected in that they will be left with a lesser portion of property that is of a higher value and can be easily developed? To my mind should the Petitioner be given more of the property at a lower elevation as proposed it follows that the value of the property as a whole would be impacted as will the ability of the other co-owners to get a higher sale price.

[43] In my humble opinion convenience connotes as sense of fairness. It is fair that the Petitioner should be able to extract his share if he so wishes, however the extraction has to be fair to the other co-owners as well. The benefit should not be only for one party. All the heirs own the property in undivided shares. No one heir has a claim to any specific part of the property. Why was it that the partition was discussed with the Petitioner but not the Respondents who represent the other heirs? Is there another heir who would or could lay claim to the said ruins the Petitioner wishes to have?

[44] In explaining how a refusal to allow him to extract his share would affect him he went on to add:

> *It would affect me in the sense that I have spent quite a bit for the process, and since becoming one of the main shareholders in 2008 and 2009, I have not had any benefits from my investment.*

But the Petitioner accepted that if the property was divided into eight shares of fair value he could get a better plot than the one proposed by the valuer.

[45] Sauzier Ag CJ in the case of ***Laurence and Ors v Lenclume (1976) 216 at 224*** held that – "*the constructions on the land must be divided together with the land as the constructions are the common property of all the co-owners. A co-owner may have a claim against the other co-owners for the plus value given to the land by a construction erected by him but he had no specific right to the construction itself.*"

[46] The Petitioner's prayer in examination in chief was as follows:

> *I would have like to have the portion where my mother was born and grew up and stayed until, like I said earlier, she moved when she got married. To me, this has importance why I chose this portion specifically.*

In line with the decision in ***Laurence*** above the Plaintiff has no specific right to that portion of land where his mother grew up. To my mind if one is to consider the Plaintiff's personal preference in terms of the plot that he is allocated in terms of his attachment to a specific area, then the opinions of all other co-owners will need to be considered in the allocation which is nigh impossible.

[47] With the above in mind I find that the property cannot be divided conveniently to extract the Petitioner's share. Division of the property into two plots will not only be impractical but the result would be inequities not only in area, development costs and all the other attributes discussed, but in value as well.

[48] As regard the second issue; whether the Court order (Marise Green & ORs SCSC 282/2019 – XP 19/2019) allowing the sale of parcel T573 was specific to the offer at the time or was to apply for future offers, the Court order dated 29th March 2019 reads as follows:

> 1. *I hereby authorise the executors to proceed by private sale of Parcel T573 to the purchaser for the sum of Euro 18 million.*
>
> 2. *the payment of Euro 180. 000 to the executors is approved to cover their fees and expenses since their appointment as executors.*
>
> 3. *the distribution of the proceeds of sale is to be carried out in the proportion set out in the Schedule attached.*
>
> 4. *I hereby attach a copy of the Schedule to this Order.*

[49] The above referenced order makes reference to an order dated 19th August 2009 whereby the Court determined the method of sharing the estate amongst the first-line heirs in CS308 of 2005. Furthermore, CJ Twomey declared that it is not in the interest of the heirs to remain in indivision.

[50] The Application in Ex Parte Marise Green and Allen Hoareau (marked as PE4) at paragraph 5 reads thus:

> *The estate has received an offer for the said parcel T573 in the net sum of 18 million Euro.*

[51] The prayer at paragraph (a) reads thus:

> *Authorise the sale of parcel T573 by private sale for the sum of Euro Eighteen Million (Euro 18, 000, 000.00) net.*

[52] CJ Twomey proceeded to formulate the view that "*the duties of the executors will be met by the proposed sale of the property...*". The Learned Chief Justice then proceeded to make an order "authoris[ing] the executors to proceed by private sale of Parcel T573 to the purchaser for the sum of Euro 18 million."

[53] The Learned Chief Justice's use of the word "the" in itself solves the second issue. It is trite that the word "the" is a definite article, defining the meaning of a noun as a particular thing or person. It is used before a noun when the identity of the noun is known to the reader or writer. In contrast "a" is an indefinite article referring to a group of things and is used before a noun that is general or when the identity of the noun is not known.

[54] On that basis, in my view the Order of the Learned Chief Justice dated 29th March 2019 refers to the specific proposed sale to a known purchaser in the sum of Euros 18 million and no other.

[55] Accordingly, the Plaint is dismissed.

[56] Each side shall bear their own costs in view of the nature of the application.

Signed, dated and delivered at Ile du Port on 22nd November 2023

Pillay J