



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Application No. 120 of 2015

In the matter between

ZACHARY JOHN OLUM

APPLICANT

And

1. BONGOMIN JOHN ODORA	}	
2. NYEKO JOHN BOSCO	}	
3. GEOFFREY OPOK alias JEFFEREY OPOK	}	RESPONDENTS
4. CHARLES ODORA alias SALEH	}	
5. MARINO OKOT	}	

Heard: 1 March 2019

Delivered: 1 April 2019

Summary: Application by a co-owner of land for its sub-division.

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application under article 50 (1), (2) and 26 of *The Constitution of the Republic of Uganda, 1995*, Rules 1 and 8 of *The Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules*, and Order 52 of *The Civil Procedure Rules*. He seeks a declaration that part of the land in issue belongs to the applicant, an order directing subdivision of the land to enable the applicant appropriate and register his portion in his own names, an injunction restraining the respondents from interfering with the applicant's proprietary rights in the land,

general damages for violation of the applicant's right to property and the costs of the application.

- [2] His grounds are that there is need to sub-divide the land held by the applicant and another as tenants in common, to enable the applicant deal with his part of the land. As a tenant in common, the applicant has the right to unilaterally seek severance of the title without consent of the other non-severing tenant in common, yet the respondents have, in violation of his constitution right to property, refused to co-operate in the proposed sub-division. This court has the capacity to order the severance as a court of competent jurisdiction.
- [3] In an affidavit in reply by the fifth defendant, Marino Okot, it is contended that application is misconceived, made in bad faith and only intended to frustrate justice. The late Odora permitted the applicant to cultivate the land in issue just like the rest of the respondents. The respondents have been in possession of their respective portions of the land since 1975, save for the period of insurgency. Furthermore, that the question of ownership should be decided before a subdivision is ordered.

Background to the application;

- [4] The background to the application is that the applicant together with his late cousin, Sylvester Martin Odora, were co-owners of a 1,113.8 hectare (2,751.086 acres) tract of land comprised in L.R.V. HQT 322 Folio 14, Nwoya Block 2 Plot 28 at Loka Aswa Alero, Nwoya District as tenants in common in equal shares (each owning approximately 1,375.543 acres), of a 44 year lease that commenced on 1st March, 1988. Upon the death of his co-owner in 1990, by mutual agreement dated 2nd April, 2014 the applicant and the first respondent acting on behalf of the estate of the late Martin Odora, disposed off parts of their respective shares. The applicant disposed off 500 acres of his part (leaving a residue of 875.543 acres) while the first respondent disposed of 1000 acres

(leaving a residue of 375.543 acres) of the deceased's share. The two portions disposed off were amalgamated into LRV HQT 381 Folio 25 which was transferred to M/s Amatheon Agri Uganda Limited. The combined residue of 607.132 hectares (1,499.616 acres) was then re-constituted into L.R.V. HQT 322 Folio 14, Nwoya Block 2 Plot 33 at Loka Aswa Alero, Nwoya District. The applicant now seeks a sub-division of that land so that he secures a title deed in his sole name to his 354.471 hectares (875.543 acres) separate from the respondents' 152.042 hectares (375.543 acres). It is that proposed sub-division that the respondents oppose.

The parties' arguments;

- [5] In his written submissions, counsel for the applicants argued that the respondents are in violation of the applicant's constitutional right to property. The respondents claim that the entire land belonged to their late father. They have attempted to force the applicant off the land yet he is a co-owner and a title deed is conclusive proof of ownership, save for fraud, error or illegality, none of which the respondents have proved. In any event, the respondent's having acknowledged the applicant's interest in the land at the time of sale of part of the land to M/s Amatheon Agri Uganda Limited on 2nd April, 2014, they are estopped from denying it subsequently. The applicant seeks redress for the violation of his fundamental rights and severance of the title.
- [6] In their written submissions in response, counsel for the respondents M/s Kunihira and Company Advocates argued that the land in dispute forms part of the estate of the late Sylvester Martin Odora. The respondents as beneficiaries of the estate of the deceased, occupy and live on the land with their respective families. Their late father entrusted documents relating to that land to the applicant who refused to hand them back. Following the death of their father and wishing to sell part of the land to M/s Amatheon Agri Uganda Limited, the respondents were forced by circumstances and the applicant's misrepresentation

to acknowledge that the applicant was a co-owner of the land. The respondents have since established that the applicant fraudulently procured registration as co-owner with their deceased father. The applicant through forgery and fraud, procured registration of his name on the title deed as co-owner. The respondent's have filed a suit to challenge the applicants claimed ownership of part if the land. The application therefore should be dismissed with costs.

General principles;

- [7] The enforcement of fundamental human rights as enshrined in article 50 of *The Constitution of the Republic of Uganda, 1995* is a recourse available to any person whose fundamental right is breached, being breached or about to be breached, who may therefore apply to the High Court for redress. A right is a liberty protected and enforced by law, which compels a specific person or persons to do or abstain from doing something (see *Chief Adeogun v. Honourable Fushogbon (2003). 17 N.W.L.R (Pt. 719)*). In other words, an ordinary right is any advantage or benefit conferred on a person by a rule of law. A right in that regard or sense is limited to the specific interest recognised and protected by law. Rights in this sense are considered as the reasonable claim of the individual which are accepted by society and approved by statute.
- [8] On the other hand, human rights, as a form of rights, unlike ordinary rights, transcend the general notion of rights as liberties protected and enforced by law. Human rights are broader in perspective because; they embrace all conceivable rights to which a human being can lay a just or valid claim, not necessary on the basis of law, but on the fact that the claimant is a human beings. Human rights are therefore inherent, universal and they transcend sex, race, region and religion. Generally these are rights that a human being needs to survive with respect, dignity and freedom, i.e. basic to a real life as contradistinguished from those that are basic to a normal life. Fundamental human rights are those core rights directly derived from "human dignity." As superior rights, they are above

ordinary civil rights. They are of three categories; absolute rights; rights that can be restricted; and rights which are principally left to the legislature to confirm. Though, inherent and universal, and are also constitutional rights in Uganda because they are incorporated in the constitution, not all human rights in their entirety are incorporated as guaranteed human rights in *The Constitution of the Republic of Uganda, 1995*.

[8] For the jurisdiction of the court to be invoked under article 50 of *The Constitution of the Republic of Uganda, 1995*, the pleadings must show that what is claimed is a right which is fundamental to the applicant as a human being, basic to a real living of a nature that applies to all people equally, that is enjoyed, no matter where one lives, what they do, and how they behave, or any other status, and facts have developed sufficiently such that an infringement of that right has occurred or is likely to occur, rather than being contingent or remote. The jurisdiction may not be exercised when the determination of whether the applicant has suffered a concrete infringement depends on contingent or hypothetical facts, or upon events that have not yet come to pass, uncertain or contingent future events that may not occur as anticipated or may not occur at all. For a threat of infringement to justify action under this provision, it must be direct and immediate rather than conjectural, hypothetical, or remote.

[9] It is common ground that article 26 of *The Constitution of the Republic of Uganda, 1995* protects the right to property. It is only existing property and not the right to acquire property in the future that is protected. It follows that an expectation to inherit property in the future, for example, will not be protected under this article. This article entails three distinct principles; (i) the principle of peaceful possession and enjoyment of property; (ii) deprivation of property only subject to specified conditions; and that (iii) the state is entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as it deems necessary for the purpose. In order to be justified, any interference with the right to property must serve a legitimate

objective in the public, or general, interest, but it is not sufficient that the interference serves a legitimate objective. It must also be proportionate.

Scope of property rights;

- [10] Property, once acquired, should be used and enjoyed. The rights of acquisition, enjoyment, and disposal are thus legally protected. This right includes the authority to exclude others, the right against trespass, the right of quiet enjoyment and the right of active use to the point where such use does not violate the rights of others to quiet enjoyment. Common law limits the right of free use only when a use encroaches on the property rights of others. The burden is on those who object to a given use to show how it violates a right of theirs. If they fail in that, the use could continue. On the other hand, actions that impair the right to peaceful enjoyment and possession of property may be the subject of an action for enforcement.
- [11] As with all fundamental human rights, human beings are the rights holder of the right to property. Although many of the entrenched rights are, by their very nature, exclusively "vertical" in their operation, the right to property imposes duties on the state, as well as on all those whose actions and / or omissions have an impact on this right and on the environment in which the right is to be fulfilled. Therefore, article 26 of *The Constitution of the Republic of Uganda, 1995* is not restricted to interferences with property which involve the transfer of some benefit to the State. It is capable of applying to measures introduced by the State (or other public authority) which affect an individual's property rights by transferring them to, or otherwise benefiting, another individual or individuals, or which otherwise regulate the property of an individual, as well as the conduct of private persons and bodies since private power as much as public power has the capacity to oppress.

[12] This is mainly because rights and duties are inextricably linked, the idea of a human right only makes sense if the duty of all people to respect it is acknowledged. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it (see *Educational Company of Ireland Ltd v. Fitzpatrick (No.2)* [1961] I.R. 345 and *Attorney General (Society for the Protection of the Unborn Child (Ireland) Ltd) v. Open-Door Counseling Ltd*, [1988J I.R. 593). Whereas fundamental rights are primarily to protect the citizen against the state, they also incorporate an objective scale of values which applies, as a matter of constitutional law, throughout the entire legal system (see The Federal Constitutional Court of Germany's (Bundesverfassungsgericht) (BVerfG) *Lüth Case*, 7 BVerfGE 198 (1958) decision of 15th January, 1958). The rigid position that fundamental rights and freedoms only applies vertically has been overtaken by the emerging trend in the development of human rights law and litigation. It is now widely accepted that an individual needs protection from both the state and the private actors. Many, if not all, of the entrenched fundamental rights are therefore enforceable not only against the state or its organs, but also against individuals, natural or juristic, who may be disposed to threaten them or interfere with their enjoyment.

Examination of alleged violation of property rights;

[13] It follows from the above that the relevant questions to be asked when considering whether there has been a violation of the right to property guaranteed by article 26 of *The Constitution of the Republic of Uganda, 1995* are:

- i. Whether the application relates to an existing property right or possession.
- ii. Whether there has been unlawful interference with that right or possession.

- iii. If so, under which of the three rules of article 26 does the interference fall to be considered?
- iv. Whether the interference serves a legitimate objective in the public or general interest.
- v. Whether the interference is proportionate, i.e. whether it strikes a fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights.

[14] An action for enforcement of the right to property ought to be premised on an interference within one of the three principles, such as; unlawful compulsory acquisition, expropriation, or deprivation of property; unlawful restriction or control of use of the property; or interference that with its possession or enjoyment that cannot be justified. The essence of the application now before court is that although legally the applicant's ownership of title to the land remains intact, in practice the possibility of the applicant exercising his right to that property has been significantly reduced by the actions of the respondents. The application is thus premised on the principle of peaceful possession and enjoyment of property. This principle applies where a measure or conduct has the effect of interfering with the use or enjoyment of property, but falls short of being a taking, and is not intended to control the use of property.

First issue; Whether the application relates to an existing property right or possession.

[15] When considering whether there has been a violation of article 26 of *The Constitution of the Republic of Uganda, 1995*, the first step is to consider whether the applicant has any existing property right, or possession.

[16] The applicant has made out a *prima facie* case of being a co-owner of 607.132 hectares (1,499.616 acres) of land comprised in L.R.V. HQT 322 Folio 14, Nwoya Block 2 Plot 33 at Loka Aswa Alero, Nwoya District. He has presented a

copy of the title deed that shows that . According to section 59 of *The Registration of Titles Act*, a certificate of title issued under the Act should be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and is conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.

[16] Whereas section 56 of *The Registration of Titles Act* provides that where two or more persons are registered as joint proprietors of land, they shall be deemed to be entitled to the land as joint tenants, this is true where the four so-called unities of possession, interest, title, and time exist. In such cases, through the right of survivorship, the interest of a co-owner in a joint tenancy will pass equally to all of the other co-owners upon his or her death. If multiple co-owners remain, the joint tenancy remains in existence, while if only one owner survives, the entire interest in the property passes to the survivor. At common law there is a presumption in favour of joint tenancy rather than a tenancy in common. It is presumed that a joint tenancy is created every time there is more than one owner of land (See *Morley v. Bird (1798) 3 Ves 628*). This presumption is rebutted in two circumstances: by lack of one or more of the four unities or by the use of words of severance in the conveyance such as “between” or “equally.” This would sever the unities and convert the joint tenancy into a tenancy in common.

[17] In contrast, upon the death of a co-owner in a tenancy in common, the deceased’s interest in the property passes to his or her estate. Therefore Survivorship restricts the freedom of alienation of the property as all of the interest of a deceased co-owner passes to the other co-owner(s) on his death. The intestacy rules have no effect on this neither does a will. Joint tenants hold single unified interests in the entire property. The result of this is that joint tenants own 100% of the property jointly and through survivorship one of the joint tenants will own 100% .

- [18] The assumption under section 56 of *The Registration of Titles Act* can be displaced by indications from the words and conduct of the parties that they intend to take the estate as tenants in common. The presumption may be rebutted by evidence that it was not, or ceased to be, the common intention of the parties to hold the property jointly. In the following cases, equity will declare a tenancy in common over the equitable estate rather than a joint tenancy, and the list is not exhaustive; express or implied words of severance, absence of the "four unities," contributions towards the purchase price in unequal proportions, and commercial partners (see *Malayan Credit Ltd. v. Jack Chia-MPH Ltd* [1986] AC 549 and *City of London Building Society v. Flegg* [1988] A.C. 54.).
- [19] In the instant case, the respondents have adduced evidence to show that the lease over the land in dispute, under minute No. MIN 29/76 (5) of 6th April, 1976 of the West Acholi Land Committee, was initially offered to the late A.M. Odora (annexure "F" to the affidavit in reply) leading to the issuance, during the year 1983, of a five year leasehold title for purposes of mixed farming, in respect of 1,113.8 hectares of land comprised in Nwoya Block 9 Plot 2 (annexure "E" to the affidavit in reply). It is in respect of that lease which upon its extension in the year 2014, to the full term with effect from 1st March, 1988 by addition of the remaining 44 years that the applicant became co-owner by a lease agreement date 26th June, 2014, leading to the issuance of a 44 year leasehold title for purposes of mixed farming, in respect of 1,113.8 hectares (2,751.086 acres) comprised in L.R.V. HQT 322 Folio 14, Nwoya Block 2 Plot 28 at Loka Aswa Alero, Nwoya District as tenants in common in equal shares.
- [20] Whereas it was expressly stated on that title deed that both the applicant and the late Sylvester Martin Odora were "tenants in common in equal shares," by virtue of the transaction of 2nd April, 2014 by which the applicant and the first respondent, the latter acting on behalf of the estate of the late Sylvester Martin Odora, disposed of parts of their respective shares, the status of ownership of

equal shares changed following that transaction. The applicant disposed of 500 acres of his part (leaving a residue of 875.543 acres of his share) while the first respondent disposed of 1000 acres (leaving a residue of 375.543 acres) of the deceased's share. The two portions disposed of having been amalgamated into LRV HQT 381 Folio 25 which was transferred to M/s Amatheon Agri Uganda Limited. In any event, alienation by one joint tenant of his or her interest in the property to a third party destroys the unities of time and title between the tenants.

[21] The implication is that out of the combined residue of 607.132 hectares (1,499.62 acres) that was re-constituted into L.R.V. HQT 322 Folio 14, Nwoya Block 2 Plot 33 at Loka Aswa Alero, Nwoya District, the applicant lays claim to 354.471 hectares (875.543 acres) while the respondents lay claim to 152.042 hectares (375.543 acres), hence in unequal proportions. Given that the late Sylvester Martin Odora became owner in 1983 and the applicant co-owner in 2014, of the four unities they only have the unified right of possession. This therefore is a tenancy in common and not a joint tenancy. The issues before court therefore relate to an existing property right or possession as a tenant in common.

Second issue; Whether there has been unlawful interference with that right or possession.

Third issue; If so, under which of the three rules of article 26 does the interference fall to be considered?

[22] The second step is to consider whether there has been unlawful interference with that right or possession and then, thirdly, the nature of the interference.

[23] It is trite that each of the tenants in common enjoys the right to continue the tenancy in common, exercising his or her rights, which include an unrestricted right of access to the property, the right to enjoy the property on an equal basis along with the other co-owners, and the right to share any income generated by

the common property, on a *pro-rata* basis. No tenant in common is permitted to physically demarcate or erect boundaries on any part of the co-owned land for their own use at the exclusion of all other co-owners. Each tenant in common has the right to exercise other acts attributable to owners of land, so long as he or she does not interfere with the equivalent rights of the other co-owners (see *Bull v. Bull* [1955] 1 QB 234).

[24] A joint tenancy may be severed by mutual conduct, where the conduct is such that the pattern of dealing between all of the parties is, though not quite unambiguous and explicit enough to constitute a mutual agreement to sever, nevertheless evince a clear common intention to sever the tenancy in common. There must be a consensus between all the joint tenants, as disclosed by a pattern of dealings with the co-owned property, which would in effect exclude the future operation of the right of survivorship (see *Williams v. Hensman* (1861) 70 E.R. 862; *Barton v. Morris* [1985] 1 WLR 1257; [1985] 2 All ER 1032 and *Quigley v. Masterson* [2011] EWHC 2529).

[25] A joint-tenancy may be severed in three ways; (i) an act of any one of the persons interested operating upon his or her own share may create a severance as to that share; (ii) by mutual agreement; or (iii) any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common (see *Williams v. Hensman* (1861), 70 E.R. 862 and *Burgess v. Rawnsley* [1975] 3 All E.R. 142). The three rules may be summarized as follows: Rule 1: unilaterally acting on one's own share, such as selling or encumbering it; Rule 2: a mutual agreement between the co-owners to sever the joint tenancy; and, Rule 3: any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. Similarly, it is to be inferred that if a tenant in common wishes to act on their "share," they must be presumed that they no longer wish to be regarded as a tenant in common. Any act by a tenant in common operating upon his or her own share, severs their

interest. The person so acting must have intended the act to be final and irrevocable (see *Mortgage Corporation Ltd v. Shaire* [2001] Ch 743).

- [26] The continuation of a tenancy in common requires all of the tenants in common to desire its continuation, the desire for determination by one tenant in common suffices for the ending of the whole tenancy (see *Hammersmith and Fulham LBC v. Monk* [1992] 1 A.C. 478). With tenancies in common, whether created so at the outset or have come about following severance, the co-owner is thereby immune from the risks associated with survivorship, and the tenant in common is now able to exercise full control over their share of the property in terms of dispositions and wills.
- [27] If the tenants in common enter into a mutual contract for sale of the co-owned property to someone else, then there will be severance in equity, provided there is no evidence of intention that the joint tenancy continue over the money the proceeds of sale. A court may find that joint tenants by their conduct have shown a mutual intention that the property should in future not be held in undivided shares. If the acts and dealings of the parties of the joint tenancy indicate an intention to treat it as property held in common and not jointly, the court will, from those acts and dealings, infer an agreement to sever the joint tenancy.
- [28] Severance is the mechanism for the transformation or termination of co-ownership. Whereas severance of a joint tenancy turns it into a tenancy in common and can occur at law or in equity depending on the circumstances, severance of a tenancy in common terminates the co-ownership. Whereas with a joint tenancy severance does not put an end to co-ownership but means survivorship ceases to exist, severance of a tenancy in common terminates the co-ownership. Destruction of one or more of the four unities will cause a severance of a joint tenancy at law or in equity as the unity of possession is essential to a joint tenancy and a tenancy in common destruction of this unity will put an end to co-ownership.

- [29] A tenant in common has no right to survivorship and they may pass their interest in the property by will or under the intestacy rules as each tenant in common has a distinct and independent interest in the entire property. All co-owners are entitled to alienate their property rights. Each individual co-owner has the right to alienate his or her interest ownership rights. Each co-owner can grant interests in the property to another person (by sale or transfer). Tenants in common can alienate their ownership rights without consent. A purchaser from a tenant in common slips into the tenancy in common, as there substituted for the original tenant in common.
- [30] However, interests can only be granted on the basis that they do not interfere with the rights of the other co-owner. If the grant of interest interferes with the rights of the other co-owner, both co-owners must agree on the grant of interests. Where the parties alienate by mutual agreement they will remain co-owners over the proceeds of sale on the same basis that they were co-owners of the now sold property. This can occur unless intention to sever the co-ownership is evident from the parties' behaviour in the transaction. In absence of statutory limitations, the common law permits a co-tenant to unilaterally without permission of the other joint tenant(s) to change the nature of the tenancy.
- [31] As a general principle, tenants in common and joint tenants can petition a court to partition the property. The court is asked to divide the property into different lots or sections. There are two general types of partitions. The first is a partition in kind. This is the physical division of land. The court determines how to divide the property based on the ownership interest of each tenant in common. The second type of partition is a partition by sale. Through this process, the court orders the sale of the property, even if the co-tenants did not want to sell their share. The court distributes the share of the profits to each co-tenant in relation to their ownership interests.

- [32] In the instant case, it is the applicant's case that the respondents have prevented him from exercising his rights, which include an unrestricted right of access to the property, the right to enjoy the property on an equal basis along with the respondents as co-owners, and the right to share any income generated by the common property, on a *pro-rata* basis. He has been denied access to the co-owned land for his own use yet the respondents are using it to his exclusion as a co-owners.
- [33] A co-owner is justified in preventing another co-owner from performing acts attributable to owners of land, only if such acts interfere with the equivalent rights of the other co-owners. The burden is on those who object to a given use to show how it violates a right of theirs. If they fail in that, the use could continue. The justification advanced by the respondents is that the applicant fraudulently procured registration as co-owner with their deceased father. That it is through forgery and fraud, that applicant procured registration of his name on the title deed as co-owner. They content further that they have filed a suit to challenge the applicant's claimed ownership of part if the land.
- [34] The respondents did not attach a copy of the pleadings filed in the suit they claim to have filed challenging the applicant's status. The court therefore is not in position to assess the plausibility of that claim. Be that as it may, filing of a suit by itself does not curtail or suspend property rights, save by temporary injunction or such other interim measures. For a suit stated to have been filed on or about 9th February, 2018 the respondents should have sought and secured such relief by now. In absence of such measures, this court is enjoined by the provisions of section 59 of *The Registration of Titles Act*, to find that until the alleged fraud is proved, for the purposes of this application the certificate of title presented by the applicant, sets forth the entries in the Register Book, and is conclusive evidence that he is named co-owner in the certificate possessed of that estate to the extent of his interest therein. Since the respondents have not proved any act on the part of the applicant that interferes with their equivalent rights as co-owners,

preventing the applicant as co-owner from performing acts attributable to owners of land, constitutes a violation of the principle of his peaceful possession and enjoyment of the property.

Fourth issue; Whether the interference serves a legitimate objective in the public or general interest.

Fifth issue; Whether the interference is proportionate.

[35] Any interference with property, whichever rule it falls under, must satisfy the requirement of serving a legitimate public (or general) interest objective and must strike a fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights. There must there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

[36] The remedy of partition is the legal division of property so that each co-owner occupies and owns a separate part of the property. It can be done voluntarily by deed, or where no agreement can be made by court order. Partition can be sought by any interested party such as a co-owner, or mortgagee. Partition ends the unity of possession and puts an end to co-ownership. Partition involves the courts determining the respective shares of the parties and providing for the actual physical division of the property.

[37] It is thought in some jurisdictions, such as the state of California where the right to partition is an absolute right, that if an application is made for partition the court is obliged to either grant partition or a sale but cannot refuse both unless there are extraordinary reasons to refuse either remedy such as where the property is the family home. There, the demand for partition by persons with concurrent interests who have not "waived" the right to partition must be granted by the Court to those persons. Even if the result could be economically disastrous, the court must grant partition, either by physical division of the

property or sale and division of proceeds, if even one concurrent interest plaintiff insists (see *Priddell v. Shankie (1945) 69 C.A. 2d 319*).

- [38] The position is different in other jurisdictions such as in Ireland as illustrated in the case of *First National Building Society v. Ring [1992] I.R. 375 35* where the court stated it had discretion to refuse either remedy, particularly where third party interests such as the right of a mortgagee would be affected.
- [39] There are no statutory provisions in our jurisdiction to guide applications for partition. It is my considered view nevertheless that since a tenant in common can sell his or her interest, or even give it to someone by gift or will, without the consent of his or her fellow co-tenant(s), it follows that an application for partition may be maintained by one of the co-tenant(s). Any tenant in common, however small his or her percentage may be, is entitled at any time and without having to offer any particular reason, to seek the termination of the tenancy in common.
- [40] The general principles that should apply in the determination of whether or not the court should grant an application for partition are that: a co-owner has a prima facie right to partition and sale, a co-tenant has a concomitant obligation to permit partition or sale, and that the court should compel partition or sale unless there is a sufficient reason such an order should not be made. It is the view of this court that in light of article 26 of *The Constitution of the Republic of Uganda, 1995* the Court will not force two or more people to continue co-owning real property where one of the owners wants out. The court can only refuse either remedy where there are some unusual circumstances in the case justifying a refusal e.g. partition or sale of a family home, or where the applicant has behaved maliciously, oppressively, or with vexatious intent toward the respondent, or if the hardship that will result, including financial hardship, to the co-owner resisting the application is of such a nature as to amount to oppression. The discretion to refuse is broader in family law matters but is applied sparingly in commercial matters.

[41] When determining whether the application is oppressive the Court will consider: (i) whether the applicant's conduct undermines the reasonable expectations of the other parties, and (ii) whether the applicant's conduct is coercive, abusive or unfairly disregards the interests of the other co-owner(s). There is no evidence in the instant case to show that the applicant's conduct or intentions are oppressive. The legitimate objective in the public or general interest advanced by the respondents for opposing the application is the prevention of acquisition of property by fraud, since they allege the applicant fraudulently procured registration as co-owner with their deceased father. They allege that it is through forgery and fraud, that the applicant procured registration of his name on the title deed as co-owner. They contend further that they have filed a suit to challenge the applicant's claimed ownership of part of the land.

[42] However considering that the respondents have remedies in that suit including a temporary injunction or such other interim measures, none of which they have sought despite having filed the suit on or about 9th February, 2018; considering further that filing of a suit by itself does not curtail or suspend property rights; and furthermore, that the respondents also have the remedy of lodgement of a caveat, rejecting this application to facilitate any of these processes would be disproportionate in the circumstances of this application. A partition should be allowed as article 26 of *The Constitution of the Republic of Uganda, 1995* recognises that undue restrictions on alienation are unwarranted. The court's discretion as to choice of methods of partition does not extend to the denial of the right of partition among concurrent interest, unless the co-owners waived it. Where it is clear the parties intend that the property be held separately but have not taken any steps to formalise their intention, equity will give effect to the severance. An applicant is entitled to partition or a sale in lieu of partition, unless good reasons to the contrary exist.

[43] A partition in kind of the common property will be possible subject to the planning restrictions applicable to the area where the land is situate. If the resultant plots will meet the minimum size of a plot according to the zoning rules, a partition in kind should be ordered. If, on the other hand, the zoning rules do not allow for a partition in kind, or if the common property cannot be divided according to the shares each co-owner has, or if it is an apartment, or a small plot, the only solution is the partition by sale, so that the proceeds are analogically distributed to the owners.

[44] It appears to me that there are no zoning restrictions in respect of the land in issue in this application that would prevent a physical partition. I am therefore inclined to give effect to article 26 of *The Constitution of the Republic of Uganda, 1995* alongside the provisions of section 59 of *The Registration of Titles Act*.

Order:

[10] I find that until the alleged fraud is proved, or unless there is issued a temporary injunction or such other interim measures by a court of competent jurisdiction pending that determination, the applicant is entitled to the enforcement of his right to property by way of portioning off his 354.471 hectares (875.543 acres) from the land comprised in L.R.V. HQT 322 Folio 14, Nwoya Block 2 Plot 33 at Loka Aswa Alero, Nwoya District, and it is so ordered. I have not found any basis for awarding general damages.

[11] For all the foregoing reasons, the application is allowed with costs to the applicant.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the applicant : Mr. Moses Oyet.

For the respondents: Ms. Kunihira Josylene.