

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT LUWERO

MISC. CAUSE NO. HCT-17- LD-MC-0052-2023

ERICK RWEBUZAGURE.....APPLICANT

V

1. NYIGIGIZIKI FRED KABATSI
2. RUGUMAHO FRANK
3. MUZUNGU EMMANUEL
4. KAZOORA IVAN
5. COMMISSIONER LAND REGISTRATION.....RESPONDENTS

BEFORE LADY JUSTICE HENRIETTA WOLAYO

RULING

Introduction

1. By a notice of motion filed on 24.1.2024, the applicants moved the court under Articles 26 and 50 of the 1995 Uganda Constitution as amended; Section 33 of the Judicature Act Cap. 13; Rules 3 and 8 of the **Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure Rules); Section 98 of the Civil Procedure Act Cap. 71 and order 52 rules 1 and 3 of the Civil Procedure Rules**, for the following orders:
 - a) An order dissolving the tenancy in common between the applicant and the respondents in respect of land comprised in

Bulemezi Block 1001 Plot 10 situate at Nakasagazi, Kinyogoga, Nakaseke District.

- b) An order directing the Commissioner Land Registration to subdivide the suit land to enable the applicant have a separate and independent title.
 - c) A declaration that the applicant is entitled to approx. 110.886 hectares of the suit land.
 - d) An injunction restraining the respondents from interfering with the applicant's proprietary rights in his portion.
2. The application is supported by the affidavit in support of the applicant. The first respondent Nyigiziki Fred filed an affidavit in reply on behalf of three other respondents in opposition to the application. These are Rugumaho Frank second respondent; Muzungu Emmanuel fourth respondent; Kazoora Ivan fifth respondent and their written authority dated 16.11.2023 is on record. Only the third respondent Birazi Ronald did not sign the authorization. This means only four respondents are party to the case and Birazi is hereby struck out.
3. While counsel for the applicant filed written submissions, counsel for the respondent did not although counsel Mudola Dennis for the respondents was in court on 16.11.2023 when directions were given. I have carefully considered submissions of counsel for the applicant.

Background facts

4. It is not disputed that the applicant and the four respondents are brothers and sons of the late Kabatsi Paul who was the registered owner of FRVHQ763 FOLIO 12 BLOCK (ROAD) 1001 PLOT 10 Kyangula-Katabanda, herein referred to as the four respondents. The land area according to a search statement, measures 776 hectares and is held in unequal shares by the five respondents and the applicant as tenants in common. The applicant holds 7/50 shares of the land.

The applicant's case

5. It was the applicant's case that while the four respondents have developed and fenced off their portions on the suit land, constructed structures thereon and are carrying out agricultural activities, they have denied him access to his portion. He attached photographs of the respondent's structures as proof of his assertions. The applicant deposed that because of the conduct of the four respondents, the tenancy in common should be severed.
6. In his affidavit in reply, Nyigiziki Fred Kabatsi deposed that upon his father's death, as the eldest son, he and his brothers processed a titles and registered it in the names of all the boys from the different wives of his late father with specific and distinct acreage.
7. Furthermore, that although all the tenants in common including the applicant have a duty to hold the land on behalf of their mothers and

siblings, the applicant has developed an urge to sell off his portion. He supported this averment with an incident where the applicant sold part of his portion but his wife and mother protested which led to the respondent refunding the purchase price. He attached illegible copies of what he referred to as the sale agreement to the affidavit.

8. In this regard, the respondent deposed that together with the co-respondents and the applicant's mother, they believe the applicant wishes to sell his portion, a position they are totally opposed to.
9. Regarding the legal basis for the application, the applicant moved the court under Articles 26 and 50 of the Uganda Constitution 1995 as amended and the Judicature **(Fundamental Rights and Freedoms) (Enforcement Procedure Rules)** . Article 26 confers the right to everyone to own property while Article 50 empowers any person who claims a fundamental right or freedom has been infringed may apply to a competent court for redress.
10. At the same time, **Section 56 of the Registration of Titles Act Cap. 230** provides that land may be owned jointly or in common. It is an agreed fact that the applicant owns the suit property in common with the four respondents wherein he owns 7 out of 50 shares which he construed as 108.64 hectares, a fact not disputed by the respondents.

Issues for determination

- a) Whether the tenancy in common can be severed at the instance of the applicant.
- b) If so, whether the applicant's portion is encumbered with other interests.
- c) Remedies

Burden of proof

11. This being a civil case, the plaintiff has a legal the burden to prove its case. **Section 101 of the Evidence Act Cap. 6** stipulates that

'whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove that those facts exist'.

12. As for the standard of proof, in **Miller v Minister of Pensions[1947]2ALL ER 372** at 373-374, Denning J when speaking on the degree of cogency of evidence required to discharge the burden of proof in civil cases had this to say:

That degree is well settled. It must carry a reasonable degree of probability, but not as high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not, the burden is discharged but if the probabilities are equal, it is not'

Issue No. 1: Whether the tenancy in common can be terminated at the instance of the applicant.

13. Counsel for the applicant cited **Zachary John Olum v Bongomin Jon Odora and four others, Civil Application No. 120 of 2015(unreported)** in support of his contention that the continuation of a tenancy in common is dependent on all parties wanting that

continuation and where one of them wishes out, the whole tenancy ends, a position which is not supported by the Registration of Titles Act Cap.230 (RTA) and Halsbury's Laws of England which is of persuasive authority only.

14. Section 56 of the RTA of provides for joint tenants and tenants in common in the following terms:

'Two or more persons who are registered as joint proprietors of land shall be deemed to be entitled as joint tenants...'

'Where two or more persons are entitled as tenants in common to undivided shares in any land, those persons in the absence of any evidence to the contrary, be presumed to hold that land in equal shares.'

15. Under Section 57, where the certificate of title for joint tenants is accompanied by the words '*no survivorship*', it shall be unlawful ,save for the proprietors themselves(together), for any one person deal with the land without an order of court.

16. **Halsbury's Laws of England Vol 87(2022) para. 222**(accessed from *LexisNexis online library*, suggests that a tenancy in common can be partitioned and the land belonging to the co-owners allotted to them so as to put an end to the community of ownership between some or all of them. This legal position suggests that the tenancy in common can remain with respect to those willing to continue with it and the persons desiring to leave the community are free to go.

17. Regarding joint tenancies, **Halsbury's Laws of England Vol.87 (2022)** para. 210 suggests that a joint tenancy can be severed by mutual agreement to hold as tenants in common but the severance takes place only in equity because the land is held in trust to give effect to the beneficial interest only.
18. The following principles emerge from the foregoing analysis. While a joint tenancy with a '*no survivorship clause*' cannot be severed except with leave of court, a tenancy in common can be severed or it can be left intact with the remaining tenants where only a few want to opt out. In other words, where one tenant wants to leave the arrangement, the others can continue with theirs as the one tenant gets his portion properly demarcated.
19. The sum effect of this principle is that as the applicant is desirous of opting out of the tenancy in common with his brothers, and in order to give effect to his right to own property as an individual, and furthermore, as the tenancy is not a joint tenancy but a tenancy in common, the application is allowed.
20. However, as four co-owners(Nyigiziki Fred Kabatsi; Rugumaho Frank; Muzungu Emmanuel; and Kazoora Ivan do not wish to end their tenancy in common, the said land shall be partitioned so as to give effect to this order so that the applicant's portion is given a separate title while the rest of the land remains under one title until any of the co-owners wishes to opt out.

Issue No. 2: Whether the applicant's portion is encumbered with other interests.

21. The respondents object to the application majorly on the grounds that there are other family members with interests on the land, namely the applicant's mother and his wife. They also cited other occupants to whom the applicant had rented a portion of the land.
22. Counsel for the applicant submitted that no trust had been registered in accordance with the **Trustees Incorporation Act Cap. 165** and therefore, the respondents' could not plead a trust in opposition to a partition.
23. Counsel's submission, notwithstanding, I cannot ignore the interests of the current wife (name not given) of the applicant and his mother (name not given) whose interests are protected by law.
24. **Section 16 of the Succession Amendment Act 2022** protects the principal residential holding or any other residential holding occupied by a surviving spouse, from distribution. In the premises, since it is not disputed that the father of the parties was survived by different wives, it follows that since the applicant inherited his portion from his father, he will hold the land subject to his mother's interest.
25. As regards the applicant's wife, she too is protected by **Section 39 of the Land (Amendment Act) 2004** that forbids dealing in family land where the couple derives sustenance without the consent of the

spouse. In this regard, the applicant is reminded that he cannot deal in the land without the consent of his wife.

26. Regarding the licensees on the land who are there with the express permission of the applicant, their interests are limited to the duration of the agreed period for using the land.

27. Regarding the 20 acres the first respondent Nyigiziki redeemed after the applicant had sold the same, this belongs to Nyigiziki and the certificate of title to be issued shall exclude this 20 acres.

28. In the premises, the application is allowed with the following orders:

- a) As the other co-owners do not wish to end their tenancy in common, the said land shall be partitioned so that the applicant's portion is given a separate title while the rest of the land remains under one title until such a time as all or any of them wish to opt out.
- b) The applicant's share to be partitioned is $\frac{7}{50}$ shares as reflected in the land title less twenty acres Nyigiziki redeemed.
- c) The exercise to partition the land shall be carried out without interference from any one including the respondents.
- d) The Registrar of Titles is directed to rectify the register to reflect the orders of this court and to create a separate title for the applicant.

- e) The applicant will file a report in this court once the exercise to secure his portion of land is complete not later than six months from the date of this Ruling.
- f) Since the applicant inherited his portion from his father, he will hold the land subject to his mother's interest.
- g) The applicant will hold the land subject to the legal protections accorded to his recognized wife not to alienate it without her consent.
- h) The interests of the licensees is limited to the duration of the period agreed for using the applicant's portion of land.
- i) The 20 acres the first respondent Nyigiziki redeemed after the applicant had sold the same, belongs to Nyigiziki and the certificate of title to be issued shall exclude this 20 acres.
- j) Each party shall bear their own costs.

DATED AT LUWERO THIS 28TH DAY OF MARCH 2024.

LADY JUSTICE HENRIETTA WOLAYO

Legal representation

Nyanzi, Kiboneka, & Mbabazi Advocates for the applicant

Famm Advocates for the respondents