

SUPREME COURT OF SEYCHELLES

Reportable
[2025]
MC 43/2024

JOSEPH BANANE
(rep. by Oliver Chang-Leng)

Petitioner

VERSUS

1. NOELLA BANANE
2. HEIRS OF MICHEL BANANE
3. GUY BANANE
4. JOVANIE ANTOINE MADELEINE
(unrepresented)

Respondents

Neutral Citation: *Banane v Banane and Ors* (MC 43/24) [2025] (11th April 2025).
Before: Pillay J
Summary: Division in kind
Heard: 25th November 2024
Delivered: 11th April 2025

ORDER

- [1] The Petition is granted.
- [2] Antoine Ah-Kong shall proceed to make a proper detailed survey in line with the proposal he made in July 2023, produced as PE1, ensuring that there are no encroachments on any of the plots from structures on adjoining plots.
- [3] Noting that the nature of the action each side shall bear their own costs.

JUDGMENT

PILLAY J:

- [1] The Petitioner prays for an order appointing Antoine Ah-Kong to survey the land and to order the division in kind of parcel V5152 in order that the Petitioner's share can be extracted therefrom.
- [2] The Petitioner avers that he is the Executor of the Estate of the late David Banane, and the Respondents are co-owners of undivided share in land parcel V5152.
- [3] He further avers that the said parcel V5152 is 3, 035 square metres in size and situated at Belvedere, Mahe. He avers that the Petitioner and the Respondents have already built their houses on different parts of the said parcel.
- [4] He avers that he is the co-owner of one undivided share in the said parcel, being 54.289%, having been rectified subsequent to a judgment order given in CS 74 of 2013. He further avers that 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 said parcel.
- [5] He avers that the said parcel is divisible and the said undivided share of the Petitioner can be extracted therefrom. He further avers that the parties commissioned a land surveyor, Antoine Ah-Kong, to prepare a sub-division proposal in compliance with the Court order. A draft proposal was made in July 2023, however it did not take into consideration the actual physical positioning of the house on proposed Plot 3 which would result in the house encroaching on Proposed Plot 2, as well as the proximity of the smallest house on Proposed Plot 2 with Proposed Plot 1.
- [6] The Petitioner further avers that in spite of repeated attempts by himself and the surveyor Antoine Ah-Kong to have a new subdivision proposal drafted and finalised, the Respondents have refused to allow Mr. Ah-Kong access to the premises and are insisting that the first draft is accepted which would result in the identified issues.
- [7] The Respondents filed a Reply and attached a letter to the surveyor Mr. Ah-Kong requesting his services to prepare a sub-division proposal to extract their share collectively.

- [8] In fact, the Respondents admitted the ownership of the land as averred by the Petitioner. They admitted the size and location of the property as averred as well as the fact that the parties have built houses on the property.
- [9] They indicated their desire to have the property sub-divided however took issue with the Petitioner's averment that he worked with the surveyor Mr. Ah-Kong to come to a final proposal. They pleaded that the Petitioner never negotiated with the Respondents but that instead he attempted to pressure the surveyor to amend the proposal to accommodate his structure which the surveyor considered an encroachment.
- [10] The Respondents pleaded that they filed a petition for division in kind on 14th May 2021 in MC26/2024 but that it was dismissed for non-appearance of the Respondents. Their prayer is for the matter to be referred to mediation.
- [11] Effectively, the Respondents do not oppose a sub-division but take issue with the allegations made about their willingness to undertake the process.
- [12] On 23rd October 2024 the Respondents failed to appear resulting in the matter being listed for ex parte hearing on 25th November 2024. Learned counsel relied on the affidavit of the Petitioner and called one witness, the surveyor, Antoine Ah-Kong.
- [13] Mr. Ah-Kong deponed that he is a land surveyor and knows the parties. He was approached by one of the land owners who wanted him to do a sub-division of their property. He made a proposal and gave it to them but there was some disagreement. It was his evidence that he has been on site. It was further his evidence that the proposal he made is just a rough idea. In the future he would need to do a proper detailed survey because there are lots of walls, septic tanks that are involved and he would need to make sure that they each fall within the allocated respective owner.
- [14] It was his evidence that he never finalised the proposal because the co-owners were not happy. He did not produce any other survey in relation to the property in question.
- [15] The assertion of the Respondents at paragraph 8 of their Reply is that it was the Petitioner who took issue with the proposal made by Mr. Ah-Kong. By implication, therefore, it is

the opinion of this Court that the Respondents did not object to the proposal made by Mr. Ah-Kong, the proposed subdivision produced as PE1. In view of Mr. Ah-Kong's statement that he did not produce any other survey in relation to the property in question it is safe to conclude that the proposal produced as PE1 is the only proposal he made, which all parties had access to and is the one referred to in the Reply at paragraph 8.

[16] In the case of *Laporte v Sullivan & Ors (1978-82) SCAR 191* the Court found that "no one can be compelled to own anything undividedly, and a division can always be demanded notwithstanding a prohibition or any agreements to the contrary."

[17] Applications for division in kind is governed by the Immovable Property Judicial Sales Act by virtue of which section 107 (2) provides that:

(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.

[18] 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.

[19] In the case of *Alcindor & Anor v Alcindor & Anor (CS 61/1995) [1998] SCSC 23 (21 December 1998)* the Court held;

"For an application for division in kind to be determined before the court as well as to invoke the jurisdiction of the court in accordance with section 107(2) of Cap 94, the Applicant is legally bound to satisfy the court that he is a co-owner as the statute requires so.

- [20] At this juncture, the Court takes judicial notice of the Court of Appeal case of *Banane v Banane (SCA 29 of 2018) [2020] SCCA 40 (18 December 2020)* wherein the Court of Appeal considered an appeal against the decision of the learned Chief Justice who had “after considering all the evidence before her, ordered the Land Registrar to rectify the Land register to enter the share of the deceased, David Banane in Parcel V 5152 as 54.289% and to adjust the shares of the other owners accordingly.”
- [21] The Court of Appeal confirmed that “the Supreme Court was correct in its findings to conclude that in 1987, David Banane had 49.99%, Josephine Ismael 2.777% and Isabelle Banane 47, 21% shares in Parcel V5152.” Further that “this share [for David Banane] was in addition to inheriting the 1/11 undivided share from the estate of the late Isabelle Banane.”
- [22] The Court of Appeal concluded that “the apportionment made by the learned Chief Justice was consistent with the evidence before her and should not be disturbed.”
- [23] In the circumstances, there is irrefutable evidence that the Petitioner’s share is 54.289%. Furthermore, it is admitted that the property spans 3, 035 square metres and there is no dispute as to the convenience of a subdivision. With that in mind, and in consideration of all the above, there is no reason to refuse the Petition for division in kind as prayed for.
- [24] The Petition is, therefore, granted.
- [25] Antoine Ah-Kong shall proceed to make a proper detailed survey in line with the proposal he made in July 2023, produced as PE1, ensuring that there are no encroachments on any of the plots from structures on adjoining plots.
- [26] Noting that the nature of the action each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on 11th April 2025

