

UGANDA / JUDGMENT

# Tumwine and Others v Asiimwe (Miscellaneous Cause 9 of 2023) [2023] UGHC 103 (10 November 2023) [2023] UGHC 103

## COURT

High Court of Uganda

## BEFORE

Allan Nshimye, J

## CASE / FILE NUMBER

Miscellaneous Cause 9 of 2023

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA  
HCT-05-CV-MC-0009-2023**

- 1. TUMWINE WILLS
- 2. KENGONZI TUMUSIIME BABRA
- BIRUNGI DOREEN -----

**VERSUS**

ASHIMWE WILSON -----

**Before:** Hon. Justice Nshimye Allan Paul M. 10**RULING****REPRESENTATION**

The Applicants were represented by M/s Mujurizi & Tumwesigye Advocates, while 15 the Respondent was represented by Mubiru Aruho Associated Advocates.

## BACKGROUND

This Application was brought by way of a notice of motion basing on the law in Article 50(1),(2) and 26 of the Constitution of the Republic of Uganda, Section 98 of 20 the Civil Procedure Act, Sections 14 & 33 of the Judicature Act, Rules 1 and 8 of the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, and Order 52 Rules 1,2&3, seeking orders that;

1. An order be issued authorising the Applicants to subdivide the land comprised in Freehold Register Volume 1162, Folio 5, Plots 6 and 12 Bulemba Crescent \$25\$ and Plot 231 Bulemba Road measuring 0.327 hectares, Sheet 86/1/14/NE/2, I/S No. MM 4635 Mbarara Municipality, Mbarara South City, to the surviving 4 coowners in joint tenancy of the land in 4 equal shares.

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- 2. A restraining order be issued against the Respondent or anyone claiming any rights through him from interfering with the Applicants' process in subdividing the above-mentioned land.
- 3. Costs of the Application be provided for.
- The Application is supported by affidavits deposed by Tumwine Wills, Kengonzi \$ \mathsf{S} \$ Tumusiime Babra and Birungi Doreen, and opposed in an affidavit deposed by the Respondent.

## GROUND

- The grounds of the Application as stated in the notice of motion are; 10
- 1. The Applicants and the Respondent are biological children of the late Turvahikayo William Siira and Amooti Betty Turyahikayo (deceased).
- 2. The Applicants, the Respondent and their biological mother the late Amooti Betty Turyahikayo are joint tenants for the land comprised in Freehold Register
- Volume 1162, Folio 5, Plots 6 and 12 Bulemba Crescent and Plot 231 Bulemba 15 Road measuring 0.327 hectares, Sheet 86/1/14/NE/2, I/S No. MM 4635 Mbarara Municipality, Mbarara South City.
- 3. That on 14<sup>th</sup> July, 2022 Amooti Betty Turyahikayo died leaving the Applicants and Respondent as the only surviving registered proprietors on the title.
- 4. That upon the death of Amooti Betty Turyahikayo, the Applicants and the 20 Respondent took a decision to subdivide the title into four (4) equal shares of the surviving co-owners legally registered on the certificate of title.

- 5. That efforts to subdivide the land into 4 equal shares so that each co-owner ultimately attains their share, independent title and ownership have been frustrated by the Respondent without any reason.
- 6. That the Applicants are unreasonably derailed by the Respondent in attaining their share, independent titles and ownership due to the Respondent's insatiable appetite, betrayal and selfish interest at the immeasurable costs, pain and expenses of the Applicants.
- 7. That the Applicants are entitled to equal share since the said land is held in joint 30 tenancy.
- 8. That it's in the interest of justice that this honourable Court grants order for sub division of the said land to the Applicants.

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## SUBMISSIONS

### Applicants' submissions

Counsel submitted that the remedy of partition is the legal division of property so that each co-owner occupies a separate part of the property, and it can be done

- voluntarily or by Court order. That partition ends the unity of possession and co-  $\mathsf{S}$  ownership he then made reference to ZACHARY JOHN OLUM VS BONGOMIN JOHN ODORA CIVIL APPLICATION NO.120 OF 2015. Counsel argued that the principles Court should apply in the determination of whether or not to grant partition are; a co-owner has a prima facie right to partition and sale; a co-tenant has an obligation
- to permit partition or sale, and that Court should compel partition or sale unless 10 there is sufficient reason that such order should not be made. Counsel contended that under the spirit of Article 26 of the Constitution. Court should not force two or more people to continue co-owning real property against their will. Counsel prayed for the Application to be granted.

### Respondent's submissions

The Respondent raised a preliminary objection to the effect that this matter is still under determination of the office of the Administrator General and is therefore improperly before this Court. The Respondent contended that this Application is malafide since none of the parties has obtained letters of administration. He prayed for the Application to be dismissed.

Regarding merits of the Application, the Respondent admitted that he is a co-owner of the suit property with the Applicants. He submitted that prior to the deceased's death, she had bequeathed to him part of the suit land which is included in the 25 certificate of title. He added that in case there is subdivision, Court should order that the Respondent's part be excluded as he already has equitable interest therein. He prayed for the Application to be dismissed with costs.

### Applicants' rejoinder 30

In response to the objection, counsel submitted that the office of the Administrator General does not have jurisdiction over joint tenancy. Counsel reiterated his earlier submissions.

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### DETERMINATION

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In principle where the four unities of time, title, interest, and possession exist a joint tenancy is created. In Uganda the law in section 56 of the Registration of Titles Act provides that;

"56. Joint tenants and tenants in common

Two or more persons who are registered as joint proprietors of land shall be deemed to be entitled to the land as joint tenants; and in all cases where two or more persons are entitled as tenants in common to undivided shares of or in any land, those persons shall in the absence of any evidence to the contrary \*be presumed to hold that land in equal shares."

The evidence on court record in annexure B to the affidavit in reply shows a certificate of title that is comprised in Freehold Register Volume 1162 folio 5, plot 6 and 12 Bulemba Crescent and plot 231 Bulemba road all measuring 0.327 15 Hectares at Mbarara municipality, registered in the names of Amooti Turyahikayo Betty, Asimwe Wilson, Kengonzi Tumusiime Barbra, Tumwine Wills and Birungi Doreen that were all registered as proprietors on 13.4.2012 at 4.08 pm under instrument 465976. In my analysis of this evidence, it is clear that as of the 13.4.2012 at 4.08pm the five persons registered on the certificate of tile, namely; 20 Amooti Turyahikayo Betty, Asimwe Wilson, Kengonzi Tumusiime Barbra, Tumwine Wills and Birungi Doreen, were all joint tenants as is provided in section 56 of the Registration of titles Act.

In principle when a co-proprietor of land held under joint tenancy passes on, the 25 interest in the deceased's share in the land is shared equally among the surviving proprietors as was stated in OLUM ZACHARY V BONGOMIN JOHN & 4 ORS HIGH COURT CIVIL APPLICATION NO. 120 OF 2015 where His Lordship Justice Stephen Mubiru held that;

"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"

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The evidence in paragraph 4 of the affidavit in support shows that Amooti Turyahikayo Betty, died on 14<sup>th</sup> July 2022, a copy of her death certificate is attached as annexure A to the affidavit in support. This evidence pertaining to death of Amooti Turyahikayo Betty is also corroborated by the respondent's evidence in paragraph 5 of the affidavit in reply. In my analysis, by virtue of the law in section 56 of the registration of titles Act, the property interest that the late Amooti Turyahikayo Betty owned in the suit land ceased to exist and as of her date of death on 14<sup>th</sup> July 2022 her interest in the land was owned equally by the surviving four co proprietors namely, Asimwe Wilson, Kengonzi Tumusiime Barbra, Tumwine Wills and Birungi Doreen.

The respondent has in his affidavit evidence and submissions laid claim to the interest of the Amooti Turyahikayo Betty, who he claims gave her land as stated he stated in paragraph 14 of the affidavit in reply. He also avers in paragraph 2 that 15 after the death of their mother, Amooti Turyahikayo Betty, the Administrator General called them for a family meeting pertaining to the deceased's property. He further states that he was chosen to be a coordinator of the mother's estate. In the submissions in reply the respondent invited court to dismiss this miscellaneous cause on the ground that the matters pertaining to the property of the late Amooti 20 Turyahikayo Betty is still being handled by the Administrator General as they follow the steps that have to be taken in respect to the estate of the person that has died intestate. I respectfully do not find that these arguments by the respondents have a bearing on the matter now before court that relates to land that is owned under

a joint tenancy as I have already found above. \$25\$

I am of the considered opinion that once a joint tenancy is proved to exist then at the death of a former co-proprietor, his or her interest, in the land does not move to their estate. In the same vein the Administrator General will not have any jurisdiction over the deceased co-proprietors interest in the land because it's not part of the deceased estate considering that the right to survivorship crystallises at death of the former co-proprietor, thereby moving the deceased's former interest to the surviving proprietors that held the land with the deceased under a joint Must tenancy.

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Lastly, I will also address the respondents claim in paragraph 13 of his affidavit in reply and contained a document dated 10-8.2006 attached as annexure F to the affidavit in reply that the late, Amooti Turyahikayo Betty gave him land that is now comprised in the land held under joint tenancy.

In principle, land held under a joint tenancy can not be given out while the joint subsists. In Uganda, if a person registered as a co-proprietor on a title desires to give out their interest in land held under joint tenancy, they have to first carry out a severance of the joint tenancy by;

\$(1)\$ ....

A. The written consent of the joint proprietors to the Registrar to make it land held as tenants in common. This is in line of section 57 (2) of the Registration of titles Act that states that:

"57. Effect of insertion of the words "no survivorship"

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- (2) Two or more joint proprietors of any land or of any lease of freehold land may by writing under their hands direct the registrar to enter the words "no survivorship" upon the certificate of title or instrument relating to the property."

B. A joint owner of the land making an application to the High court seeking an 20 order of severance of the joint tenancy in the interest of justice. The applicant would have to convince the court on the balance of probabilities that there is good reason to justify the severance of the joint tenancy and the High court would if convinced, invoke its inherent powers to order severance of the joint tenancy as was ordered His Lordship Stephen Mubiru 25 in OLUM ZACHARY V BONGOMIN JOHN & 4 ORS HIGH COURT CIVIL APPLICATION NO. 120 OF 2015 and His Lordship Justice Benard Namanya in KIYIMBA LUBEGA HIGH COURT MUKUBA CHARLES VS JULIUS MISCELLANEOUS CAUSE NO 107 OF 2022.

The evidence on court record shows that there is a disagreement in the ownership and use of the suit land that is escalating into animosity with allegations of some parties hiring strangers to beat up land co owners (See paragraph 8,9 & 11 of the applicant's affidavit in support and paragraph 11 and 18 of the respondent's

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affidavit in reply). There are also claims to part of the land by the respondent that are in breach of the principle of joint tenancy under which the land is held (See paragraph 5 and 14 of the respondent's affidavit in reply).

- I find that it is in the interest of justice that the suit land that is now held equally by \$\mathsf{S}\$ Asimwe Wilson, Kengonzi Tumusiime Barbra, Tumwine Wills and Birungi Doreen under a joint tenancy, have the joint tenancy severed so that each co-owner holds their own portion in the land individually to avoid further animosity.

- In the conclusion the application is granted and I order that; 10
- 1. The land comprised in Freehold Register Volume 1162, Folio 5, Plots 6 and 12 Bulemba Crescent and Plot 231 Bulemba Road measuring 0.327 hectares was as of 14 July 2022 at 11:30am when Turyahikayo Betty Amooti died held by Asimwe Wilson, Kengonzi Tumusiime Barbra, Tumwine Wills and Birungi Doreen under a joint tenancy.
- 2. That the joint tenancy of Asimwe Wilson, Kengonzi Tumusiime Barbra, Tumwine Wills and Birungi Doreen in land comprised in Freehold Register Volume 1162, Folio 5, Plots 6 and 12 Bulemba Crescent and Plot 231 Bulemba Road measuring 0.327 hectares is hereby severed.
- 3. The land comprised in Freehold Register Volume 1162, Folio 5, Plots 6 and 20 12 Bulemba Crescent and Plot 231 Bulemba Road measuring 0.327 hectares shall be subdivided into four equal parts owned by each of the co-owners, who are Asimwe Wilson, Kengonzi Tumusiime Barbra, Tumwine Wills and Birungi Doreen.
- 4. That the subdivision in (3) above will take into account areas that each of the \$25\$ co-owners have greater attachment by virtue of development.
- 5. That each co-owner shall meet their costs of processing his or her individual certificate of title.
- 6. Each party shall cater for their own costs.

Wustigtz-..... NSHIMYE ALLAN PAUL M. JUDGE 10-11-2023

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Prepared on 14 October 2026 · Esheria