

to a decree nisi to be made absolute in three months. She will have the custody of the children and the costs of the petition.

*Order accordingly.*

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**BASMA v. BASMA**

SUPREME COURT (Beoku-Betts, J.): January 23rd, 1952  
(Civil Case No. 79/51)

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[1] **Land Law—tenancy in common—partition—order for sale by court—applicant entitled to order for sale unless good reason to contrary—what amounts to good reason to contrary:** Since s.4 of the Partition Act, 1868 is imperative, a party who applies to a court for the sale of property instead of its partition is entitled to an order for sale unless the other party shows, or the court finds, good reason why the property should not be sold; and good reasons against sale are deemed to exist if, for instance, it is shown that great hardship would thereby be inflicted on one of the parties, or the party requesting sale is actuated by vindictive motives, or the property is unsaleable by reason of a right of entry, or the value of the property would depreciate (page 166, lines 25-36).

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[2] **Land Law—tenancy in common—partition—order for sale by court—preferable for court to order sale by public auction to highest bidder—co-owners have right to bid and proceeds should be paid into court:** Where a court makes an order for the sale of co-owned property under s.4 of the Partition Act, 1868, it is preferable for it to order sale by public auction to the highest bidder, which gives each party the right to bid for the whole property, and proceeds to be paid into the court (page 167, lines 17-20; lines 33-38).

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The plaintiff brought an action against the defendant for an order for the sale of property which they co-owned.

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The plaintiff owned two-thirds and the defendant the remaining one-third of certain property and each wanted to acquire the other's interest. The plaintiff instituted the present proceedings to obtain an order for the sale of the property under s.4 of the Partition Act, 1868, and contended that under the terms of that section he was entitled to an order if the defendant, or the court, could not show good reason to the contrary. The defendant opposed the sale and maintained that it was more beneficial to the parties for the property to be partitioned in their respective interests, and that he had a right to insist on partition.

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**Case referred to:**

(1) *Michel v. Khoury* (1944), 10 W.A.C.A. 286, distinguished.

**Legislation construed:**

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Partition Act, 1868 (31 & 32 Vict., c.40), s.4:

The relevant terms of this section are set out at page 166, lines 20-24.

*Miss Wright* and *C.B. Rogers-Wright* for the plaintiff;  
*R.B. Marke* for the defendant.

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BEOKU-BETTS, J.:

In this action, the plaintiff, who is the owner of two-thirds of a property at Nos. 2 and 2(a) Kissy Street, Freetown, claims that the court should order a sale of the premises, while the defendant, who is entitled to the other third, opposes the sale and contends that it is more beneficial for the property to be partitioned to the parties in their respective proportions or interests.

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The plaintiff bases his application on s.4 of the Partition Act, 1868, which provides:

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"[I]f . . . the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property . . . request . . . sale . . . instead of a division of the property . . . the court shall, unless it sees good reason to the contrary, direct a sale . . . ."

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The notes of Carson, *Real Property Statutes*, 1st ed., at 733 (1902), and 24 *Halsbury's Laws of England*, 2nd ed., at 380, are that s.4 of the Partition Act is imperative, that the court *shall* grant a sale unless a good reason exists or is shown to the contrary. On such an application, therefore, the plaintiff would be entitled to an order for sale unless the defendant shows good reasons to the contrary or the court considers good reasons exist why the property should not be sold. Good reason against a sale would exist if it were shown that great hardship would be inflicted on one of the parties, or that the party requesting the sale was actuated by vindictive motives, or that the property was unsaleable by reason of a right of entry, or that the value would depreciate, or on other grounds.

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Learned counsel for the defendant, in opposing the sale, relied on the case of *Michel v. Khoury* (1). But unfortunately learned counsel failed to observe what the judgment referred to. In the headnote of the report the following is stated (10 W.A.C.A. at 286): "*Held further* that sections 2, 3 and 4 of the Partition Act, 1868

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. . . have no application because they depend upon request from party having the right to make it . . . .” In the judgment the President said, *inter alia* (*ibid.*, at 287):

“In our view none of the sections 2, 3 and 4 of the Partition Act, 1868 . . . have any application to this case, because the operation of all of them depends upon a request from a party or parties having a right to make it, that the Court will order sale instead of partition.” 5

The case therefore does not apply to a case where the application is made under s.4 of the Partition Act and a party applies for or requests a sale. It seems clear that the plaintiff has a right to an order for sale unless, as I have stated before, good reasons exist or have been shown to exist to the contrary. 10

I have considered the evidence and I do not think that good reasons exist why there should be a partition instead of a sale. Both parties are desirous of buying the interest of the other. The best way to do it is to treat the property from a commercial point of view and have the property sold in the open market where the highest bidder will be the owner. I have considered the fact that the defendant has lived in the property and has traded there for some time, but until 1946 when he became by law entitled to one-sixth he was a tenant. The plaintiff has also been entitled to his rights since 1946. I do not consider there is any evidence to prove that the plaintiff has acted from vindictive motives. 15 20

It appears there was a dispute between them which ended in the Privy Council deciding that the plaintiff was entitled to two-thirds of the property and the defendant to one-third. I see nothing vindictive in the plaintiff asking that his share should be ascertained by a sale of the property. That right he has given to him by s.4 of the Partition Act. 25 30

After considering the whole case, I do not think good reason exists or has been shown why the plaintiff should not get the right he is entitled to. I therefore order that the property be sold by public auction, the parties to have the conduct of the sale. If they cannot agree as to this within seven days, then application is to be made to the court when necessary direction will be given. The whole of the proceeds of sale should be paid into court and each party is to have the right to bid. 35

I order that the Master and Registrar do hold an enquiry as to what is due from the defendant to the plaintiff for the occupation of the two-thirds share of the plaintiff from November 29th, 1946, 40

or such period that the parties agree upon or may be proved. The costs of all parties are to be taxed as between solicitor and client and paid out of the proceeds of the sale. Liberty to apply.

*Order accordingly.*

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KANGAMA v. ALEXANDRIA

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SUPREME COURT (Luke, Ag.J.): January 28th, 1952  
(Civil Case No. 107/51)

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[1] **Armed Services—discipline—redress of wrongs—procedure—statutory procedure as bar to civil proceedings must be specifically pleaded:** Where a civil action is brought by and against persons who are governed by the provisions of the Royal West African Frontier Force Ordinance (*cap.* 204), the defendant will be estopped from raising at the trial the defence that their relationship in such a matter should be regulated by s.43 of the Ordinance dealing with the redress of wrongs unless such a defence has been specifically pleaded under O.XVI, r.11 of the Supreme Court Rules, 1947 (page 172, lines 16–23).

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[2] **Civil Procedure — pleading — matters which must be specifically pleaded—statutory procedure barring civil proceedings between soldiers:** See [1] above.

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[3] **Land Law — licences — revocation — licensee entitled to reasonable notice of revocation to remove his property from land:** A licensee whose licence is revocable is entitled to reasonable notice of revocation to afford him sufficient time to remove his property from the land, and he therefore cannot be a trespasser on the land until such notice has been given (page 171, lines 20–36).

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[4] **Tort — conversion — elements — intended conversion of goods to another's use or destruction of goods to prejudice of owner:** In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, either by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner (page 171, lines 13–17).

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[5] **Tort—damages—measure of damages—detinue—market value of goods at date of judgment:** In an action in detinue, the damages awarded to the plaintiff in the event of the defendant's failure to return the goods are the market value of the goods assessed as at the date of the judgment in his favour and not at the time of the defendant's refusal to return them; and the same principle applies

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