IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] SCCA 38 (25 August 2023)
SCA 14/2022
(Arising in MA 188/2018 out of DV134/2016)

MARIE-THERESE HOSSEN **Appellant**

(rep. by Mr. Sundaram Rajasundaram)

And

BENJAMIN CHOPPY **Respondent**

(rep. by Aaishah Molle)

Neutral Citation:	*Hossen v Choppy (*SCA 14/2022) [2023] SCCA 38 (25 August 2023) (Arising in MA 188/2018 out of DV134/2016)
Before:	Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza, JJA
Summary:	Matrimonial Causes Act- petition for division of matrimonial property- when time barred - Matrimonial Causes Rules - defective affidavit- time bar- inordinate delay in bringing suit form ancillary relief after divorce.
Heard:	10 August 2023
Delivered:	25 August 2022

ORDER

The appeal is dismissed in its entirety. Each party to bear their own costs.

JUDGMENT

DR. M. TWOMEY-WOODS JA

(Robinson and Dr. Tibatemwa-Ekirkubinza JJA concurring)

Background

[1] The parties in this case were married on 21 August 1969. They had two sons born in 1971 and 1973. They lived together after the marriage, first at Pointe Conan in a cottage on Parcel H1829, which belonged to the Respondent, Mr. Choppy and subsequently in a rented house

at Foret Noire. Mr. Choppy left the jurisdiction in 1977, and they never lived together as a couple and family ever after. At the age of eighty-one and after thirty-nine years of living apart, Mrs. Hossen filed for divorce. A decree absolute of the divorce was issued on 6 January 2017.

[2] On 24th July 2018, Mrs. Hossen filed a notice of motion supported by an affidavit in which she moved the court:

> *"for an order that the property known as Title H1829 and H5013 situate at Anse Etoile, Mahe, presently registered in the name of P.R.G. Investment Company Limited and LD168 be assessed by a valuer, and this Honourable court orders the Respondent to pay the Applicant her share upon the determination of her beneficial entitlement after taking into consideration all relevant factors of which she estimates would exceed 75% of the value of the property and movables for which the Respondent shall pay the Applicant as per further order of this Honourable Court."*

[3] Attached to the Notice of Motion is an affidavit in which Mrs. Hossen averred that she had maintained the children on her own during the subsistence of the marriage, that she had contributed financially to their education and professional careers without any support from her spouse and that she had contributed to properties, businesses, vehicles, and bank accounts of her spouse. She has also averred that she had preserved and maintained the property known as Le Surmer, comprised in Titles H1829 and H5023 during her spouse's absence from the jurisdiction. She further averred that she had paid off her spouse's debts in Barclays Bank, British Motors, and the Toyota agent. In conclusion, she claims that Parcels H1829 and H5023 were sold in 2011 for SCR 20 million and that she was entitled to 75% of the proceeds.

[4] Confusingly this affidavit is titled:

> *"Affidavit (in support of my petition for share in matrimonial home dated 2 October 2017)."*

It is relevant to note that no affidavit dated 2 October 2017 exists.

[5] Mr. Choppy, in his Answer denied that Mrs. Hossen had contributed to the acquisition of any of his properties and businesses and was entitled to any share. He avers that he maintained the children and contributed to their education, and left several businesses behind, from which she reaped the profits when he fled Seychelles because of political persecution. It is his averment that in his absence, she also collected rent from Le Grand Trianon, a leased property at Anse Forbans and the profits from a car business and a boat he owned. He further avers that from these profits, she bought a property, V3232, in 1980 in her own name. He avers that Parcel H1820 was not matrimonial property and additionally that Parcel H5013 was acquired by himself through reclamation from the sea. He further avers that his spouse mismanaged the properties and businesses and that he had to singlehandedly renovate and refurbish the properties when he returned to Seychelles in 1991. For this purpose, he indebted himself in the sum of SCR 754,000 to the Development Bank. He could pay off his loan only when he got his share of the inherited family property.

The decision of the court *a quo*

[6] The learned trial judge's decision was to the effect that:

1. With regard to the prayer concerning movables, no consideration of the same could be made nor an order issue in respect of the same in the absence of the specification of the movables or adduction of relevant evidence.

2. With regard to Parcel H1829, although Mrs. Hossen did not contribute to its purchase and its "extension by way of reclamation or to the construction of the complex thereon in terms of funds, [she]did contribute both in monetary terms albeit in a lesser amount than [Mr. Choppy] to the household and family expenses, and in-kind to taking care of the family and as such [was] entitled to a share of the proceeds of sale thereof."

i. The ascertainment of her share would be affected because although she had not lived in or maintained the property after Mr. Choppy left Seychelles in 1977, she had been

appointed to collect the rent. Her power over the property ended in 1970 when her authority to manage the same was revoked.

ii. Her share in the property would also reflect her industry in bringing up two small children financially on her own as well as "the love, care and affection given to them, the time spent with them, helping them with homework, taking care of them when they were sick, teaching them life skills and values and energy bringing them up to be valuable members of society…"

iii. She had received no income from Mr. Choppy in respect of the businesses in Le Surcouf and Le Grand Trianon.

iv. There is no evidence regarding income derived from the rent of Parcel T407 at Anse Forbans.

v. With respect to the car hire business and its subsequent sale, she received benefits from it for at least two years after Mr. Choppy left Seychelles and benefitted from the sale of the cars. These benefits cannot be quantified.

vi. In respect of the period from 1991 when Mr Choppy returned to Seychelles to the time he sold Parcel H1829, Mrs. Hossen did not contribute to its refurbishment, improvement and/or enhancement in value. However, consideration must be given to the fact that during that period, the children were still finishing their secondary and third-level education, and Mr. Choppy contributed financially. In the absence of clear evidence, none of the parties' contributions can be quantified.

vii. With regard to Parcel H5013, the works to reclaim it from the sea began in 1999, some twenty years after the parties had ceased living together, and the children were then adults in employment. In the circumstances, Mrs.Choppy is not entitled to a share of the proceeds.

3. Therefore, although Mrs. Choppy has a share in the proceeds of the sale of Parcel H1829 and the development thereon, and deduction had to be made in respect of SCR 75,000 given

to her by Mr.Choppy in respect of its sale together with Parcel H5013, and other contributions to their children, her exact share in the sale proceeds could not be ascertained.

4. Ultimately, as the petition was filed out of time in terms of the provisions of Rule 34 of the Matrimonial Causes Rules and no leave was sought to excuse the delay, the Petition in its entirety was dismissed.

The appeal before us

[7] Mrs. Hossen has appealed the decision of the court *a quo on* the following grounds:

1. *The learned trial judge despite having recognised that the Respondent had neither raised in the pleadings /response as a plea in limine litis nor on the merits at the time of evidence the issue of time limit, wrongly took cognisance of the said issue as raised only in written submissions of the Respondent's attorney and erroneously decided that the Appellant' ancillary application for settlement of the matrimonial home as time barred, consequently wrongly dismissed the Applicant's application. The decision of the learned judge is clearly ultra petita.*

2. *The learned judge's decision followed by her cognisance that the Appellant may have a case in her claim and by analyzing the Appellant's case on the merits in itself would show the court's mind that the Appellant had got merits in her claim. (sic)*

3. *The learned judge erred on the issue of lack of valuation report while recognizing the admission of both parties that the properties in question were sold prior to material times of the claim, thus the Appellant cannot cause a valuation report on Titles H1829 and H5013 when they were sold for R20,000,000 to a third party, PRG Investment Company Limited, so also Title LD16. The learned judge failed to appreciate that the value of 20,000,000 in itself is a valuation, and the dismissal of the appearance claim on the ground of lack of valuation report is thus erroneous. (sic)*

[8] Therefore, the two issues before this Court arising from the grounds of appeal are narrow: first, was the application time-barred? And if not – secondly, having found that Mrs. Hossen was

entitled to a share in the matrimonial properties, was the learned trial judge in error not to grant such a share based on the available evidence before the court?

[9] Before I address these grounds, I must consider a threshold issue. The application for ancillary relief has to be grounded in an affidavit. In the present case, the application is defective as it refers to an affidavit that is not before the court and for which no amendment was sought or given. This is at the very least problematic, if not fatal, for the suit for the reason that affidavits are sworn evidence and this court cannot waive statements that are untrue, incorrect or inaccurate (see in this respect, *Savoy Development Limited v Salum SCA MA16/2021, Lablache de Charmoy v Lablache De Charmoy* (SCA 8 of 2019) [2019] SCCA 35 (16 September 2019) *Petrescu v Iliescu* (SCA MA 3 of 2021) [2023] SCCA 5 (13 April 2023).

[10] Nevertheless, I now examine the points raised in the appeal.

Submissions and Discussion

Ground 1- Was the application time-barred?

[11] Both delay and time bar have multifaceted implications and consequences in the present case. The divorce petition filed after thirty-nine years of the parties separating only contained a prayer for the dissolution of the marriage. The application for valuing and division of the matrimonial property was filed eighteen months (incorrectly calculated as two and half years by the trial judge) after the decree absolute was granted. In closing submissions, Counsel for Mr. Choppy, for the first time, raised the issue of time bar in relation to the application for ancillary relief and failure by Mrs. Hossen to apply for leave of the court to file the same.

[12] Let us examine the law on this issue. Section 20(1)(g) of the Matrimonial Causes Act provides in relevant part:

"*Financial relief*

Subject to section 24, on the granting of a conditional order of divorce or nullity or an order of separation, or at any time thereafter, the court may, after making such inquiries as the court thinks fit and having regard to all the circumstances of the case, including the ability and financial means of the parties to the marriage…

...

(g) make such order, as the court thinks fit, in respect of any property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child."

[13] In addition, the Matrimonial Causes Rules provide:

4. Claim for ancillary relief not included in the petition

(1) Every application in a matrimonial cause for ancillary relief where a claim for such relief has not been made in the original petition, shall be by notice in accordance with Form 2 issued out of the Registry, that is to say every application for:

…

an order in respect of any property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party …

34 (1) An application … in relation to property… where a prayer for the same has not been included in the petition for divorce or nullity of marriage, may be made by the petitioner at any time after the expiration of the time for appearance to the petition, but no application shall be made later than two months after order absolute except by leave.

[14] In respect of these provisions, the learned trial judge ruled;

"In the present case…the issue of non-compliance with the statutory limit for filing the petition was raised by the respondent's counsel albeit only at the stage of submissions. In my view, it shows lack of diligence on the part of the petitioner's counsel that leave was not sought before proceeding to file the petition more than two and a half years out of time. Had leave been sought the court could have considered the reasons for the delay and depending on whether or not it considered that such reasons justified the delay, either granted or refused leave. ...I find that the filing of the petition out of time without seeking leave of the court is fatal to the petition which stands dismissed…"

[15] Hence a limitation period of two months is allowed for the application for property division after the grant of the decree absolute. In the present case, it was filed sixteen months late, and no leave to excuse the delay was sought.

[16] Mr. Rajasundaram learned Counsel for Mrs. Choppy, has submitted that the dismissal of the petition on this basis was *ultra petita* in that the Respondent did not raise this issue in his answer or during the proceedings. The breach of the rules, in his view, was therefore waived. He further submits that the court cannot of its own take judicial notice of prescription in respect of a claim in contravention of the provisions of Article 2223 of the Civil Code.

[17] Ms. Molle learned Counsel for the Respondent, has contended, on the other hand, that the learned trial judge was correct to find that the Matrimonial Causes Act is a special law prescribing the modalities of its own time limitation as opposed to the general rule relating to prescription as contained in the Civil Code. She added that in any case, the definition of 'proceedings' as adopted and endorsed by this Court in *Eastern European Engineering Ltd v Vijay Construction (Proprietary Limited)* |SCA MA 35/202] from *Marin v The Queen* [2021] CCJ6 would include:

"…steps from filing, through hearing, judgment, appeal to final disposition. in short…all parts, processes and procedures, from first filing to the final disposition of a lawsuit…" and would therefore include submissions of the parties in relation to the proceedings as well."

[18] I agree with the submissions of Ms. Molle above and see no reason to interfere with the learned trial judge's finding on this issue. I need say no more about this specific ground apart from dismissing it.

Grounds 2 and 3 -Granting a share of the matrimonial property

[19] Having found that the action is time-barred, the consideration of the other grounds of appeal would be purely academic. Still, there is a crucial issue meriting the consideration of this Court. It concerns the elephant in the room, which no one wants to address. It is the issue of opportunistic matrimonial property claims.

[20] The purpose of the provisions for ancillary relief in the Act is as stated in *Renaud v Renaud* SCA 48 of 1998, namely:

"*to ensure that upon the dissolution of the marriage, a party to the marriage is not put at an unfair advantage in relation to the other by reason of the breakdown of the marriage and, as far as such is possible, to enable the party applying to maintain a fair and reasonable standard of living commensurate with or near to the standard the parties have maintained before the dissolution*."

[21] Ancillary relief orders for the division of matrimonial property are sought after most divorces. Matrimonial property is generally defined as property held in the joint names of the spouses and *any property acquired during the marriage from their combined efforts but not those that are the separate property of one of the spouses. The* apportionment of shares where the matrimonial property is in the name of one party to the marriage only has imposed duties on the court as expressed in *Lepathy v Lepathy* [2020] SCSC 142 (23 February 2020), namely:

"[33] … to consider the assets held in the name of one spouse as that spouses' property unless it is established that that was not the intention of the parties (see Etienne v Constance (1977) SLR 233 and Maurel v Maurel (1998-1999) SCAR 57. However, it is also firmly established in Seychellois jurisprudence that where the legal ownership of a matrimonial asset is vested solely in one party, but there is overwhelming and convincing evidence that the other party made significant contributions towards the matrimonial asset in issue, the matrimonial property should be vested in both parties given the express terms of section 20 (1) of the Matrimonial Causes Act giving a large discretion to the court with regard to all the circumstances of the case (Esparon v Esparon (1998-1999) SCAR 191).

[34] Contributions to matrimonial property as submitted by Counsel for the Applicant are not only in monetary terms but may consist of contributions in terms of love, friendship, security, commitment, moral and emotional support as well as the maintenance of the home and bringing up the children of the marriage (See Chetty (supra) Desaubin v Perriol (1996) SLR 90 Samori v Charles (2012) SLR 371."

[22] And the reason why a time limit is set in the rules for bringing such claims is obvious. In every dispute, there must be both resolution and finality. It is patently unfair to allow claims to be made after long periods apart and where one party inevitably has been lulled into a false sense of financial stability (see the dicta of Omrod J in this context in *Chaterjee v Chaterjee* [1976] Fam 199, (1975) FLR Rep 134).

[23] Equally, the dicta by Lord Guest in the case of *Ratnam v Cumarasamy [1964] 2 All ER933,* although in a different legal context, is relevant –

"Rules of Court must prima facie be obeyed .... If the law were otherwise a party in breach would have an unqualified right to extension of time which would defeat the purpose of the Rules which is to provide a timetable for the conduct of litigation ...."

[24] What could amount to an opportunistic ambush on one's spouse's personal property is even more concerning. When a marriage is over, the community of property regime enjoyed by both parties should also be given a dignified burial.

[25] There are obvious difficulties for the court regarding historical valuations, retrospective analysis of property value fluctuations, and post separation accrual of assets that are not easily surmounted.

[26] In explaining the difficulties caused by a delay of 6 years for making a claim for a share in a matrimonial home, Booth J in *D v W (Application for Financial Provision: Effect of Delay)* [1984] Fam Law 152 stated:

"There are certain detrimental consequences of delay. The first is that delay engenders bitterness and hostility between the parties which is detrimental to the whole fairly and, in particular, to any children of the family. The husband in this case is aggrieved at the attack that is now made upon the home in which he has been living for the past 10 years. The wife, on the other hand, feels deprived of her money and the right to live there. The delay inevitably increases costs. It leads to a multiplicity of affidavits which are filed in order to deal with the ever-changing position of each of the parties. Inevitably, it lead to an exchange of

correspondence over a protracted period between solicitors and, no doubt, also leads to attendance of the parties upon the solicitors. And all those matters add up in costs.

Further, with the change in property values and with inflation as it is in our present economic situation, as well as with the changes in the parties' own situation and the commitments they take upon themselves, the whole case can be materially altered, and the ability of the parties to cope with any orders that the court might otherwise properly have made upon the merits of a case may be put in jeopardy. Indeed, delay can put the court in the simple position of not being able to do justice between the parties according to the merits of each case. Unless it can be clearly shown that one party bears the greater responsibility for the delay that does the other, the court may be left with no alternative but to make an order which does not reflect the merits of the case."

[27] Similarly, in *Rossi v Rossi* [2006] EWHC 1482; [2007] 1 FLR 790, Mostyn QC made the point that:

" Almost every other field of civil litigation has statutory anti-delay measures in the form of limitation periods. Even where limitation periods do not exist the equitable of doctrine of laches may apply to debar a delayed claim. Limitation periods and the doctrine of laches embody the public policy consideration … namely that the longer the lapse of time the more confident a party should be that no claim will be initiated against him, and the more secure he should feel that his financial structures will not be disturbed."

[28] For these reasons, parties should be encouraged to finalise all matters as expeditiously and comprehensively as possible after a divorce. I note that the claim is bought by an 81-year-old spouse, nearly forty years after living apart from her husband. The property she claims a share in has been in the hands of a third party since 2011. The claim in this respect, is not only untenable but unfair and unjust.

[29] In the circumstances, I have no hesitation in dismissing this appeal in its entirety. As this is a family matter, each party shall bear their own costs.

Dr. M. Twomey-Woods, JA.

I concur

F. Robinson, JA

I concur

Dr. L. Tibatemwa-Ekirikubinza JA

Signed, dated and delivered at Ile du Port on 25 August 2023.