

Mussard v Laurencine

(2010) SLR 414

Basil HOAREAU for the appellant
Frank ELIZABETH for the respondent

Judgment delivered on 10 December 2010

Before MacGregor P, Hodoul, Domah JJ

The parties are former spouses whose divorce was pronounced by the Supreme Court. This appeal by Lucie Suzanne Mussard concerns two property settlement orders made by Judge Renaud, then ACJ.

The orders are set out *in extenso* as follows:

- a) The immovable property parcel S 1279 valued at R 432,000 be shared on the basis of half share each subject to an adjustment of R 50,000 in favour of the respondent. The applicant (Ms Lucie Suzanne Mussard) shall be entitled to R 166,000 and the respondent shall entitled to R 266,000; and
- b) The respondent, being the party who had been occupying the property in issue since the appellant left to live with her concubine (sic) elsewhere, shall have the option to remain in possession of the property parcel S1379 and to buy out the half share of the applicant within six month from today, failing which, the applicant shall thereafter have the option to buy out the half share of the respondent and thereupon take vacant possession of the property in issue.

The appellant avers that the respondent failed to exercise the option he had to purchase her share during the delay of six months set by the Court. The respondent disputes this averment and maintains that the law is on his side and that the appellant may still be compelled to sell him her share.

We believe that the position of the parties is best set out by themselves in their respective affidavits.

The affidavit of Lucie Suzanne Mussard dated 12 June 2008 avers the following:

1. I am the deponent above-named.
2. On the 13th of December 2006, the Supreme Court, presided by Renaud J, gave judgment in the case that I had brought against my former husband, Mr. Paul Laurencine, in respect of adjustment of matrimonial property. The said case was case number 133 of 2000.

3. In the said judgment, a copy of which is attached herewith as A1, Renaud J, inter-alia, made the following orders:
... ..
4. Mr. Paul Laurencine was thus given the option, to buy my share in parcel S1379 for a period of 6 months, from the 13th of December 2006. In other words, Mr. Paul Laurencine had until the 13th June 2007, to exercise that option, after which time I had the option to buy his share in the property at the price of R 266,000.
5. By the 13th June 2007, Mr. Paul Laurencine has failed altogether to exercise his option to purchase my share in the property.
6. After the said date, i.e., the 13th June 2007, I attempted to contact Mr. Paul Laurencine on several occasions for him to transfer his half share of the property to me and for me to pay him the sum of R 266,000 in the exercise of my right as per the judgment. However, all attempts to contact Mr. Laurencine were futile.
7. Eventually, I had no option but to deposit the sum of R 266,000, at the Registry of the Supreme court, for the benefit of Mr. Paul Laurencine.
8. The sum of the R 266,000 was deposited with the Registry of the Supreme Court by a cheque dated the 26th of November 2007, from Chetty & Hoareau Chambers, after I had deposited the said sum into the Client's Account of Chetty and Hoareau Chambers.
9. By a letter dated, the 13th of December 2007, from Attorney-at-Law, Basil Hoareau addressed to Mr. Paul Laurencine, he was informed that the sum of R 266,000 had been deposited at the Registry of the Supreme Court by myself, representing the payment in respect of his share in the property and consequently he should transfer his share in the property to me. It is now shown to me, produced and exhibited herewith as A2 a copy of the said letter.
10. Despite this letter, Mr. Paul Laurencine failed to transfer his half share in the property to me.
11. In the end, I had to apply to the Land Registrar, under Section 75 of the Land Registration Act, to register the half share of the property which is registered in Mr. Laurencine's name to me.
12. I have also applied for a writ of execution to be issued by the Registrar of the Supreme Court, to have Mr. Laurencine forcibly removed from the house situated on the property.

13. I have been informed and verily believe that as from the 13th of June 2007, Mr. Laurencine has no right to purchase my half share in the property, as per the judgment of Renaud J, dated the 13th of December 2006.
14. The averments contained in the above paragraphs 1 to 13 are true to the best of my knowledge, information and belief.

The affidavit of Paul Laurencine dated 6 March 2008 avers the following:

1. I am the deponent above-named.
2. That on the 13th December 2006 the Supreme Court ordered me to pay the sum of R 266,000 to the applicant and thereafter for the applicant to transfer her undivided half share in the said title No.S1379 in my sole name.
3. I aver that I have complied with the said order and deposited the said sum with the Registry of the Supreme court for and on behalf of the applicant.
4. I am now desirous that the applicant transfers her half undivided share in the said property to my sole name as ordered by the Court.
5. That in all the circumstances of the case it is just and necessary for the Supreme Court to make an order compelling the applicant to transfer and cause to be registered, her undivided half share in the said property to my sole name.
6. Failing which, it is just and necessary for the court to make an order ordering the Land Registrar to rectify the Land Register by registering myself as the sole owner of the whole title S1379 forthwith.
7. That all the statements contained herein are true and correct to the best of my information, knowledge and belief.

After having gone through the content above, the Judge made the following decision:

In the circumstances of this case, I believe that it is fair, just and necessary that I vary the time given to Mr Laurencine to satisfy the order of the Court by extending the 6 months period to 18 months thus allowing Mr Laurencine to deposit the money on or before 13 June 2008. The effect of this variation is that Mr Laurencine had made the necessary payment of the half share of Mrs Mussard within time. Mrs Mussard may collect the sum deposited at the Registry of the Supreme Court.

In view of the variation I now make the following orders:

1. I hereby order Mrs Lucy Suzanne Mussard to transfer her half share in Title No S 1379 to Mr Paul Laurencine within 14 days from today.
2. Should Mrs Mussard fail to do so, I further order the Land Registrar to rectify the Register by registering Mr Paul Laurencine as sole owner of the said Title No S1379.

Having made the above orders in the disposal of the Notice of Motion of Mr Laurencine I do not see the necessity of adjudicating on the Application of Mrs Mussard. Mrs Mussard may collect the deposit she made at the Supreme Court Registry.

The appellant was dissatisfied and aggrieved by the judgment of the trial Judge and has now appeal to this Court on the following grounds:

1. The order of variation of the 6 month period to 18 months made by the learned acting Chief Justice, is ultra petita as the respondent did not pray for such an order nor did any of the three prayers prayed by the respondent permit the trial judge to make such an order.
2. The learned trial judge erred in law in that the learned trial judge was functus officio and did not have any power to amend and/or vary the initial judgment of the 13th of December 2006 in the circumstances of the case.
3. The learned trial judge erred in law and/or in contravention of Article 19 of the Constitution, namely the right to a fair hearing, in that the learned trial judge failed to properly and adequately consider the affidavit in reply sworn by the appellant and the attached exhibits, in considering the motion filed by the respondent.
4. The learned trial judge erred in law and in equity, namely by not taking into account all the maxims and principles of equity in purporting to exercise the equitable powers of the Supreme Court in varying the judgment of the 13th December 2006.

We have gone through the record of proceedings and the submissions of counsel on either side. We take the view that this appeal should succeed on all four grounds raised above.

Ground 1

The matter which the respondent sought from the Judge was not one for variation as such but for giving to him a second judgment amending his first judgment under the guise of a variation. Variation is with respect to an ancillary matter relating to the parties such as custody of children, continuing and current benefits such as rentals and profits, subsisting maintenance arrangements etc. This was not an ancillary matter. Even then variation relates to matters which are of a continuing, live,

dynamic, current and subsisting nature. There cannot be a variation of an order which was of a static and time-bound nature. To pay a certain sum of money within six months, failing which one loses one's option is a right prescribed in time. It could not be amended without the consent and agreement of parties or by the Court on a *de minimus* rule, that is there was only a day or two beyond the time given. The Judge misdirected himself when he considered that the nature of the order being asked was one of variation. In fact that was not the motion of the respondent. There is substance in the argument that the order made was *ultra petita*.

Ground 2

The decision of the Judge is also challenged under this ground on the basis that the Ag Chief Justice was *functus officio*. This ground also succeeds. We note a number of irregularities in the procedure leading to the second judgment. The manner in which the Court was re-seized of a matter already determined and disposed of by a previous judgment which for all intents and purposes had become executory by effluxion of time, inaction by the respondent and due action by the appellant boggles the mind. The case file of CN 133/00 could not have been picked out from the graveyard and pumped into life. If that precaution had been taken, the mess in the process that followed is unlikely to have occurred.

Indeed, by the time the respondent made his application on 12 March 2008 to which an objection was raised by the appellant, the rights had already accrued to the appellant by the inaction of the respondent to exercise his right of option within the six months allowed to him. His right had effectively lapsed and that of the appellant had begun. CN 133/00 was by that time for the purposes of the Registry a dead file, only due for execution along the term laid down in the order.

As such, the Ag Chief Justice had become *functus officio* and could not have entertained the motion made by the respondent. It could only have allowed the motion of the appellant. In this sense, the Ag Chief Justice misdirected himself when he considered that since the application of the respondent was made on 12 June and the application for execution of appellant was made on 24 June, the respondent's motion should have been considered first. It was not a question of who was first in the queue but whose right had lapsed and whose right was subsisting.

Ground 3

There is substance in the argument raised under Ground 3 that the appellant did not benefit from a fair trial inasmuch as chronology was given precedence over the appellant's rights and objections. The Ag Chief Justice stated that there was no necessity of considering her application since the motion of the respondent had succeeded. Her rights should have been taken into account. When the court ignored her voice, the court failed to afford to her a fair trial.

Ground 4

The Judge, intent upon doing justice not based on law and equity but a personal view of the situation as is evident from the reasons he gives, assumed jurisdiction on the basis that the Court has inherent powers to extend the date upon which a party

has to satisfy an order already made where it considers that that is necessary. That is stretching the concept of both law and equity to pernicious limits.

In law, we have to say that this was not a case of extending the date of compliance of an order of an administrative or quasi-administrative order where discretion is in-built. It was the case of a court having adjudged the rights of parties with respect to an option. There had been no appeal on that order. The judgment had become executory. There was no basis in law for reopening it.

In equity, it is a known principle that equity does not come to the rescue of the indolent but the vigilant. This was a case of flagrant indolence by the respondent and judicious vigilance by the appellant. She attempted to contact the respondent to pay him his share in vain and she had no option but to deposit, on 26 November 2008, the sum of R 266,000 at the Registry of the Supreme Court for the benefit of the respondent. It is upon the failure of the respondent to exercise his option and to respond to communication that the appellant applied to the Land Registry under section 75 of the Land Registration Act and has moved for execution. Up until then, there was complete inaction and laches from the part of the respondent which disentitles him to equity considerations. Equity follows the law.

To equity, one comes with clean hands. In his affidavit dated 6 March 2008, the respondent, then applicant stated that he had “complied with the said order and deposited the said sum with the Registry of the Supreme Court for and behalf of the Applicant.” That is, to say the least, misleading the court, the more so in an affidavit with a half-truth overlooking the material part that he was only able to do so long after the critical date had passed.

There are other equitable considerations which militate in favour of the appellant. She gave considerable latitude to the respondent before she proceeded to exercise her right on the judgment. If it was true that the respondent had problems of gathering finances, it was open to him to proceed to court within the six months, which he did not do.

For all the reasons given above, we allow the appeal. The motion of Mr Laurencine was completely out of order in the circumstances and should not have been entertained at all by the Judge.

We accordingly reverse the decision of the Judge and declare that the respondent has lost his right of option for not having exercised it by 12 March 2007 and, accordingly, order that the appellant having done all that is required of her as per the order made on 13 December 2006, is entitled to parcel S 1379 and the house situated thereon.

In light of what we have stated above, the only remedy of the respondent is his entitlement to collect the cheque deposited in the judgment sum at the Registry of the Supreme Court. His advanced age is no barrier to his enjoyment of the proceeds. With costs.

Record: Court of Appeal (Civil No 39 of 2009)