IN THE SEYCHELLES COURT OF APPEAL

Mary Quilindo

Wilson Quilindo

William Quilindo

Steven Quilindo

Robert Quilindo

Jennifer Quilindo **Appellants**

V

Sandra Moncherry

Barbara Moncherry **Respondents**

SCA 29 of 2009

[Before: MacGregor PCA, Domah and Twomey JJA]

B. Hoareau for the Appellant

S. Aglaé for the Respondent

Date of hearing: 4th December 2012

Date of judgment: 7th December 2012

JUDGMENT

Twomey, JA

1. The Respondents, two sisters, filed an *action en recherche de paternité naturelle* in the Supreme Court. They averred in their petition that Gerald Maxime Quilindo, deceased was their father and

> "they lived with the deceased and that during his lifetime he treated them as his children and in his capacity as father provided for and contributed to their maintenance and education

...they have public documents as well as other documents which establish that the deceased was their father.
...they have always been recognised as the children of the deceased in society and by his family.

The facts

2. During the trial both Respondents deponed as did their mother and were vigorously cross-examined. The evidence they adduced showed that their mother, Madeleine Moncherry, was married to Patrick Valentin in 1973 and that the marriage was subsequently dissolved in 1979, although the parties had ceased cohabitation since 1974. The first Respondent, Madeleine's first daughter, was born in 1977 and her birth certificate originally bore the name of Valentin as a result of the operation of article 312 of the Civil Code which establishes the presumption that a child conceived during marriage is that of the husband (in the language of the Civil Code, his legitimate child). She subsequently changed her name by deed poll in 1982. The second Respondent was born in 1983 and there is no entry of a father's name on her birth certificate.

3. Evidence was adduced that Madeleine Moncherry was the concubine of Maxime Quilindo (the deceased) and that they lived *en ménage* for over 20 years with the full knowledge of his wife and legitimate children. They even visited and slept in the deceased's house at Ma Constance. The deceased's legitimate children visited them in their own home. The deceased and on some occasions the deceased's wife provided for their upkeep. The deceased wife visited the Respondent's mother as she was her seamstress.

4. They produced a large number of documents including their mother's divorce proceedings, the Supreme Court judgment in the matter and a discretion statement filed on record by the mother in which she claimed

> "After I had been compelled to leave the conjugal roof, I went to live at my mother's place. Seven months later I met a man, who offered to look after me and live with me. We stayed together as man and wife up to the end of 1977 during which time I gave birth to two children..."

5. Both Respondents produced their birth certificates which showed that their second names were of Chinese origin, in the case of the first Respondent *Melene* and the second respondent *Meyok* which they attributed to their father who was of Chinese extraction. The second Respondent also produced her baptismal certificate in which the name of the father was given as "Gerald Quilindo." A deed of transfer, dated 13th October 1993 was also

produced whereby Gerald Maxime Quilindo transferred parcel V1379 to their mother Madeleine Moncherry. A holograph will made by the deceased dated 8th April 1990 was also produced in which is stated:

> "I, Gerald Quilindo, a Seychellois of Ma Constance, Mahé, Seychelles, hereby make a will today on the 8thApril 1990 that the piece of land at Rochon plus the house etc will after my death belong to my mistress of 14 years, Madeleine Moncherry and her children...

A number of photographs were also produced showing the Respondents together with the deceased on different occasions of their lives.

6. None of the facts or documentary evidence was disproved by the Appellants nor in fact did any of them testify. The evidence of the Respondents therefore was uncontroverted. The main thrust of the Appellant's case was that the matter was wrong suited in that it should have taken the form of a plaint as opposed to a petition and that the Respondents had failed to prove their case and that in the case of the first Respondent she should have begun a suit in *desaveu de paternité* against Patrick Valentin before being able to start an action for *filiation* or ascertainment of paternity by the deceased.

7. Perera J in his judgement of 29th July 2009 found against the Appellants on the procedural issues and stated that

> "the legal principles have to be tested on the uncontroverted evidence of the Petitioners [now Respondents] and their witness. As regards possession of status, there is sufficient evidence that at least the family of Maxime Quilindo has recognised the Petitioners as his children.

And on the documentary evidence

> "... there is overwhelming evidence as to the paternal descent of Sandra Moncherry as the child of the late Maxime Quilindo and the Court makes a declaration accordingly...
>
> "As regards, the 2nd Petitioner[now 2ndRespondent] Barbara, the same considerations would apply...On a consideration of the totality of the evidence, the Court is satisfied that paternal descent has been established, and consequently declares that Barbra Meyok, Marguerite Moncherry is the child of Maxime Gerald Quilindo."

8. The appellants have appealed against this decision on three grounds namely:

1. The learned trial judge erred in law in holding that the Respondents had satisfied the requirements of Article 340 of the Civil Code, in order to prove that Mr. Maxime Gerald Quilindo is their father.

2. The learned trial judge erred in law and failed to properly apply the provisions of article 322 of the Civil Code in declaring the 1st Respondent as the daughter of Mr. Maxime Gerald Quilindo as one Patrick Valentin.

3. The learned trial judge erred in law in holding that the action to prove paternal descent had been properly instituted on the basis of a Petition.

The law

9. At this stage it is important to bring into view the relevant provisions of the Civil Code. Title VII of the Civil Code of Seychelles deals with Paternity and Descent. Chapter III is titled Illegitimate Children and Section I: The Legitimation of Illegitimate children. It contains 12 articles: 331 - 342. Of application to this case are the following provisions:

Article 340

1.It shall not be allowed to prove paternal descent, except:

(a) In cases of rape or abduction, provided that the time when the rape or abduction took place coincides with that of the conception.

(b) When an illegitimate child is in possession of status with regard to his natural father or mother as provided in article 321.

(c) In cases of seduction, provided that the seduction was brought about by fraudulent means, by abuse of authority or promise of marriage.

(d) When there exist letters or other writings emanating from the alleged father containing an unequivocal admission of paternity.

(e) When the alleged father and the mother have notoriously lived together as husband and wife, during the period of conception.

(f) When the alleged father has provided for or contributed to the maintenance and education of the child in the capacity of father.

...

3. An action under this Article may be brought -

(a) by the child's mother, even if she is under age, or by his guardian, at any time during the child's minority; or

(b) if the action has not been brought under sub-paragraph (a), by the child within 5 years of his coming of age or within 1 year of the death of the alleged father whichever is the later.

4. A child whose paternal descent has been proved under this Article is entitled to bear his father's name (in addition to a share in his father's succession under the title Succession).

10. Insofar as the 1st Respondent is concerned the following provisions from Chapter I in relation to *The Descent of Legitimate Children* born in wedlock is also of note

Article 312

1. A child conceived during marriage shall be presumed to have the husband as father.

2.Nevertheless, any presumption of law as to the legitimacy or illegitimacy of any person may, in any civil proceedings, be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption.

...

Article 322

No one may claim a status contrary to that which his act of birth confers upon him or to the possession of status corresponding to it.

Conversely, no one may contest the status of a person who has possession thereof corresponding to his act of birth.

Ground 1

11. The Appellants submit in the first ground that the Respondents have not discharged their burden of proof by not having satisfied the requirements of *article 340 of the Civil Code.* Their Counsel, Basil Hoareau, submits that under article 340, the applicant has to satisfy the requirements of at least one of the provisions (a-f) stipulated. He contends that they have failed in this case to prove either *possession of status, concubinage notoire* or the provision of maintenance by the father. We are not able to agree with him given the overwhelming evidence of these facts at trial. The learned trial

judge heard the petitioners (now Respondents to this appeal) and their mother and unreservedly accepted their testimony. We do not lightly interfere with findings of fact by trial judges unless there is a grave irregularity. We do not perceive any in this case and therefore accept his findings as outlined above. There was moreover documentary evidence and photographs of the Respondents at different stages of their lives. They bear a striking similarity to their father, now deceased, who had the same Asian physiognomical features they do. For these reasons we find that Ground 1 has no merit.

12. We do wish to point out however, that in this day and age it is high time that the laws are changed to introduce mandatory DNA testing in such cases.

Ground 2

13. The second ground of appeal raises the issue of status contrary to that stated on the *act of birth* contained in article 322 of the Civil Code and by implication also the presumption of parentage contained in article 312. It is the Appellants' contention that the 1st Respondent who was conceived during marriage and had the surname of her mother's husband (Valentin) entered on her birth certificate by virtue of their marriage cannot escape the presumption created by article 312 that she is indeed Valentin's *legitimate* child whilst simultaneously claiming that Maxime Quilindo is her father. For logical reason one cannot be acknowleged as the child of two fathers!

14. This is an interesting argument and would succeed were it not for the fact that no provision of the Code precludes an action to prove paternity which may have the result of annulling the status on the birth certificate. Article 312 (2) does not specify or limit who may bring an action to rebut the presumption under article 312 (1). Although it is correct that the case brought by the 1st Respondent is one for a declaration of natural paternal descent, it is not correct to conclude that the 1st Respondent is precluded from rebutting the presumption under article 312(1) unless and until she has undone her status as appears on her birth certificate. The Court can in this case pronounce against an official document as proof contrary to what is stated in the document has been brought. If the result of the granting of the remedy sought, in this case a declaration that Maxime Quilindo is the father of the 1st Respondent, is to change the status stated on the declaration of birth then so it should be.

15. Article 312(2) is not of French provenance but an English transplant. It is a faithful reproduction of *section 26 of the UK Family Law Reform Act 1969.* In *Marimba v Marimba 1979 SLR 37* Sauzier J stated that we are entitled to look at English judicial decisions to interpret that section. In that

case he quoted the authority of *S v S 1970 3 All ER 107* in which Lord Reid at page 109 stated:

> "That means that the presumption of legitimacy now merely determines the onus of proof. Once evidence has been led it must be weighed without using the presumption as a make-weight in the scale for legitimacy. So even weak evidence against legitimacy must prevail if there is no other evidence to counterbalance it. The presumption will only come in at that stage in the very rare case of the evidence being so evenly balanced that the court is unable to reach a decision on it. I cannot recollect ever having seen or heard of a case of any kind where the court could not reach a decision on the evidence before it."

16. S v S has been consistently followed. In *Re F (a minor) (Blood Tests: Parental Rights) [1993] Fam 314, 318* Balcombe LJ restated the rules of S v S:

> "(1) The presumption of legitimacy merely determines the onus of proof.
>
> (2) Public policy no longer requires that special protection should be given by the law to the status of legitimacy.
>
> (3) The interests of justice will normally require that available evidence be not suppressed and that the truth be ascertained whenever possible. In many cases the interests of the child are also best served if the truth is ascertained...

16. Ms Aglaé, for the Respondents has also relied on the Mauritian case of *Kanhye v Kanhye (1966) MR 68.* Although this case is based on French law its results are exactly the same as that that would be reached using English authorities. On the facts the case is indeed on all fours with the present one. Relying on *Note 287 of Dalloz, Répertoire Pratique Vo. Filiation:*

> "L'action en contestation d'état est recevable dans tous les cas, excepté celui où l'enfant a en sa faveur un acte de naissance et une possession d'état conforme. Ainsi, pour qu'il puisse y avoir contestation de son état, il faut que l'enfant ait seulement soit la possesson de cet état, soit un titre qui le lui reconnaise, sans une possession conforme."

Ramphul, Ag. J states:

> "It is therefore clear that the prohibition referred to in article 322 C.C. would find its application in the case of a child who has been declared

to the civil status officer as being the legitimate child of his parents and who has enjoyed the reputation of being their legitimate chid; but it would not apply to a child who has been so declared but has never been known or considered as the legitimate child of the parents named in his act of birth."

17. Hence for the prohibition of the provision of article 322 to apply two conditions must be satisfied: the possession of legitimacy as stated on the birth certificate and the reputation of legitimacy. In the present circumstances, this is clearly not the case. Although the first condition was met, the second clearly was not. The prohibition to contest status under article 322 therefore does not apply.

18. It is also noteworthy that *section 95 of the Civil Status Act (Cap. 34)* as amended in 2000 permits rectification of the act of birth by a judge to whom an application is made by any person. Presumably, this entitles the judge in a single pronouncement to rectify the act of birth by removing the name of the *presumed* father and to substitute in its place the name of the *biological* father.

Ground 3

19. Finally, the Appellants claim that this case is wrong suited. Counsel contends that an action to prove paternal descent can only be properly instituted by a plaint whereas in this case it was done by petition. It is trite law that a wrong suit is fatal to a claim. Counsel bases his submission on article 340 (3) under which this case is brought:

"An action under this article may be brought ..."

The definition of *action* according to counsel is that provided for in the definition section of section 2 of Civil Procedure Code:

"cause" shall include any *action,* suit or other original proceedings between a plaintiff an a defendant.

From this definition Counsel extracts a circular argument that actions to prove paternal descent must therefore be begun by plaint since section 23 of the Civil Procedure Code states:

"Every suit shall be instituted by filing a plaint in the registry."

20. On this issue the learned trial judge Perera stated and concluded as follows:

"Stroud's Judicial Dictionary, citing the case of Bradlaugh v Clarke 8. App. Cases 353, defines the term 'action" basically as a generic term

meaning litigation in a Civil Court for recovery of individual right or redress of individual wrong. Hence proceedings under either article 321 or 340 of the Civil Code are for declaration of status and not actions or suits to redress grievances or to recover right, which necessarily should commence by plaint and be opposed by a defence so that there would be litis contestation. Hence I hold that article 340(3) uses the term action in the generic sense not in the procedural sense as Section 25 of the Code of civil procedure, and that hence, the present proceedings initiated by petition and affidavit are not incompetent."

21. We agree with the learned trial judge that the word *action* in article 340 (3) should be given its generic definition but that does not solve the problem of pleadings as dictated by the Civil Procedure Code. There is no specific procedure in any law indicating how affiliation proceedings should be brought. Hence it would appear that the general rule of bringing such an action by Plaint under the Civil Procedure Code would apply. In England, however, affiliation proceedings are brought by petition. It would appear the same applies to Canada as is evident from the authorities submitted by Ms. Aglaé (see for example *O'Driscoll v McLeod 198610 BCLR (2d) 108*). It seems to be the same for other common law countries including the United States. It is easy to see where the confusion arises in Seychelles. The provisions relating to affiliation proceedings in the Seychelles Civil Code are both transplants from a civil law country (France) and a common law country (England). The Seychelles Code of Civil Procedure was also transplanted from England and one would assume that rules in relation to affiliation proceedings would therefore be similar to those in England. That would not seem to be the case.

22. In the case of *Médine v Vidot C.S. 266/2004 (unreported)* Karunakaran in a ruling in a similar case stated:

"...it is a truism that neither the Civil Code nor the Seychelles Code of Civil Procedure contains any explicit provision stipulating the procedure that should be adopted by a party while seeking a declaratory relief in respect of paternal descent under Article 340 of the Civil Code. It could even be perceived as an ambiguity in the statute... In the absence of it, when an ambiguity or silence or defect appears in a statute a judge cannot simply blame the draftsman or the lawmaker. He must set to work on the constructive task of finding the intention of the legislature, and he must do this, not only from the language of the statute, but also from a consideration of the fact that what if the makers of the statute had themselves come across this ambiguity, how they would have cleared it out. The judge must do as

they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases in the structure of the statute. Approaching this case on hand in that way, I cannot help feeling that if the legislature had known that someone might in future misconceive the procedure and seek a relief under Article 340 by way of an application, the legislature would have certainly, expressly stated in the statute itself that such a relief should be sought by way of plaint. In the circumstances, I conclude that a party seeking a declaratory relief in respect of paternal descent under Article 340 of the Civil Code, should commence the action by way of plaint. In my view, this is the proper procedure, which must be adopted in all cases of this nature, and failure to follow this procedure meant that the court has no jurisdiction to try the matter. *See, Choppy Vs. Choppy SLR 1956 p162.*"

23. The *Choppy* case did discuss the anomaly caused by the fact that the Civil Procedure Code enacted in 1920 contained procedures that were altered in subsequent legislation. The best example is the Matrimonial Causes Act which introduced the process for divorce by petition. That is not the case for affiliation proceedings. Although some English common law concepts were introduced in the Civil Code, corresponding procedural rules were not introduced by Act or amendment of the Civil Procedure Code. In the case of divorce where the procedure is clearly laid that actions are commenced by petition, failure to follow this mandatory provision would result in the Court having no jurisdiction in the case and the case being dismissed.

24. In the present case we do not find the matter as clear cut. True the Civil Procedure Code indicates that the matter should be brought by plaint but it also states that where there are other provisions made in law, section 22 does not have to be followed. As we have stated the introduction of English affiliation concepts logically implies English procedural rules. Can we as a Court of Equity (viz *sections 5 and 6 of the Courts Act (Cap. 52)* deny the Respondents the right to be heard because they have brought the action by petition instead of a plaint when the procedure for the same is not clear? We think not.

25. In a recent judgment of the Privy Council reacting to the Mauritian case of *Toumany and anor v Veerasamy [2012] UKPC 13* Lord Brown stated [21 - 24]:

"The Board has sought in the past to encourage the courts of Mauritius to be less technical and more flexible in their approach to jurisdictional issues and objections...Let the Board now state as emphatically as it can its clear conclusion on this appeal. In cases like

these, where mistakes appear in documentation as which particular jurisdiction of the Supreme Court has been involved, those mistakes should be identified and corrected without penalty unless they have genuinely created a problem) as soon as practicable and the court should proceed without delay to deal with the substantive issues raised before it on the merits."

The same analogy can be brought to this case. No prejudice whatsoever was suffered by the Appellants by the proceedings being initiated by petition instead of plaint. In fact the issue was not raised until at the close of the Appellant's case. Lord Brown considered these technicalities a blot on the record of Mauritius for the fair administration of justice. We do not need to fall in the same trap.

26. We are of the view that in affiliation proceedings until and unless procedures and forms of pleadings are clearly indicated, an applicant cannot be denied the right of hearing for want of proper pleadings. For the moment it would appear that either a plaint or a petition is acceptable as proper pleadings by which such action might be commenced.

26. In the circumstances this appeal is rejected in its entirety with costs to the Respondents.

Mathilda Twomey
Justice of Appeal

I concur

F. MacGregor
President, Court of Appeal

I concur

S. Domah
Justice of Appeal

Delivered at Victoria, Mahé, Seychelles, this 7th day of December 2012.