IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2020] SCCA …
SCA 41/2017

In the matter between

CECILE BONIFACE **Appellant**
(rep. by Alexandra Madeleine)

and

GONSALVES MALVINA **Respondent**
(rep. by Alexandra Benoiton)

Neutral Citation:	*Boniface v Malvina* (SCA14/2017) [2020] SCCA 21 August 2020
Before:	Fernando PCA, Twomey JA, Tibatemwa- Ekirikubinza JA
Summary:	Points of law – ss 90 -91 Seychelles Code of Civil Procedure – proceedings relating to property of a party to a marriage – writ facias possessionem.
Heard:	10 August 2020
Delivered:	21 August 2020

ORDER

The appeal is allowed. The orders of the learned trial judge are set aside. The plea in limine litis with regard to the plaint both not disclosing a cause of action against the defendant and being bad and unsustainable in law succeeds. The Appellant is granted with costs.

JUDGMENT

TWOMEY JA

[1] This is an appeal of the ruling of S. Govinden J of 9 November 2017. In that ruling, S. Govinden J dismissed the preliminary objections of the defendant (now Appellant) and went on to order the defendant to vacate the property at issue.

[2] By way of background, the Appellant and Respondent were married for 22 years: they married on 5 November 1987 and obtained an order for conditional divorce on 17 November 2009, which was made absolute on 11 January 2010. The property at issue is the house in which the couple lived and brought up their two children. It is not disputed that the house was, and remains, in the sole name of the ex-husband who acquired the land in 1982 before the parties' marriage and built a house thereon. Following the divorce, no proceedings were brought by either of the parties to divide the matrimonial property. The ex-wife remained in the house with their children who were both minors at the time (but are now both adults).

[3] The original plaint, the subject matter of the present appeal, was filed by the plaintiff (now Respondent) on 27 April 2016. He sought an order requiring the defendant, his ex-wife, to vacate the house. The defence, dated 9 November 2016, raised pleas in *limine litis* with regard to the plaint, namely that it did not disclosing a cause of action, and that it was bad and unsustainable in law. It also prayed that the Court dismiss the plaint and adjust the matrimonial home in the defendant's favour, with an order that the plaintiff transfer the home into the name of the defendant upon the defendant paying the plaintiff SCR175, 000.

[4] In a ruling on the defendant's preliminary objections dated 9 November 2017 – the subject of the present appeal – Andre J determined that:

> *"In my final analysis as above-explained and illustrated in this regard, I find that the preliminary objection raised by the Defendant fails and is accordingly dismissed.*
> *It follows, further, having regards to the Statement of Defence of the Defendant 'on the basis that the property is the matrimonial home', that there is no raison d'être in the circumstances for this Court to continue to hear this matter on the merits, hence the Defendant is hereby ordered to vacate the dwelling house forthwith."*

[5] The defendant appealed the ruling and, in the interim, applied for a stay of execution. This was granted the learned trial judge on 2 March 2018.

[6] The grounds of appeal can be briefly summarised as follows: that the judge erred for failing to hear the matter on the merits despite finding that the house was matrimonial property; ordering the appellant to vacate the house without jurisdiction; finding that it could grant the prayer despite finding that a writ *habere facias possessionem* ought to have been filed; and for incorrectly applying foreign jurisprudence.

Issues arising from the grounds of appeal

Matrimonial property

[7] The Appellant identified the house as matrimonial property in her statement of defence. This was reiterated in Counsel's closing submissions in the court a quo and in the skeletons heads of argument before this court. However, it must also be noted that Counsel for the Appellant failed to make a counter claim under the Matrimonial Causes Act, 1992 (the MCA) to this effect but prayed the Court nevertheless to "adjust the matrimonial home in her favour…"

[8] During the hearing on preliminary objections (20 February 2017), Counsel for the Respondent submitted that the time for filing such a claim under the MCA was time-barred. The Court, however, correctly noted that leave could be granted if good reasons are shown (see Matrimonial Causes Rules, 1993, particularly sections 34(1) and 20). In response to this, Counsel for the Respondent argued that the property was not matrimonial property.

[9] In her ruling, Andre J identified the 'crucial issue' as being whether the house in question is 'a matrimonial home'. In the absence of a definition in the MCA, she referred to US, English and French law. She concluded:

> *As Seychelles civil law is based on the French law, the conclusion is that the property in question cannot be regarded as matrimonial property for the property was bought and the house erected thereon prior to the marriage.*

[10] This seemed to have formed the basis of her conclusion 'that there is no raison d'être in the circumstances for this Court to continue to hear this matter on the merits'.

[11] With respect to the learned trial judge, this finding is wrong law on several aspects. First, there is a large body of local jurisprudence regarding the provisions of the MCA – making it unnecessary to refer to foreign case law. Secondly, Seychelles has rejected the French doctrine of community of property in respect of matrimonial property: *Maurel v Maurel* (1998-1999) SCAR 57, *Etienne v Con*stance (1977) SLR 233 at 240. It is thus incorrect to rely on French law in this regard. Thirdly, it is not necessary to identify whether the property is 'matrimonial property' for the purposes of applying the MCA. Section 20(1)(g) of the MCA states:

> *20. (1) 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.* (Emphasis added).

[12] The Court thus should not refer to 'matrimonial property', but simply 'property of a party to a marriage'. In the same regard, it matters not whether the property was bought by the Respondent before the marriage. The house in the present case clearly falls within the scope of the MCA, and can be subject to a property order following the breakdown of the marriage.

[13] In the circumstances, the correct course of action would have been for the plaint to be dismissed and for an action to be brought under the MCA for the division of the house pursuant to the MCA – seeking leave from the Court to do so out of time.

Writ habere facias possessionem

[14] The Appellant also submits that the Supreme Court Judge erred by not dismissing the plaint, despite her finding that the plaintiff should have filed a writ *habere facias possessionem.*

[15] In the hearing on preliminary objections (20 February 2017), Counsel for the defendant submitted that only the Rent Control Board had jurisdiction to evict the defendant, not the

Supreme Court. He further noted that the proper course of action would have been for the plaintiff to seek a writ *habere facias possessionem*.

[16] In its ruling, the Court noted that the plaintiff should have sought a writ *habere facias possessionem.* However, it noted that: (para. 25)

> *"I am inclined to agree with Counsel for the Defendant that a writ habere facias possessionem ought to have been filed, however, I am of the view that this Court has been granted enough power to be able to grant what has been prayed for."*

[17] The Court cited section 22 of the Seychelles Code of Civil Procedure (SCCP) and section 5 of the Courts Act, 1964 in support of this conclusion. Section 5 of the Courts Act establishes the jurisdiction of the Supreme Court in civil matters, which is broad.

> *"Section 5: The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles relating to wills and execution of wills, interdiction or appointment of a Curator, guardianship of minors, adoption, insolvency, bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters that may be the nature of such suits, actions, causes or matters, and, in exercising such jurisdiction, the Supreme Court shall have, and is hereby invested with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England."*

[18] Section 22 of the Seychelles Code of Civil Procedure (SCCP) provides that:

> *'All civil and commercial suits, actions, causes and matters shall be brought before the Supreme Court, save in cases where other provisions is made by law.'*

[19] In this respect, while the Supreme Court may have had jurisdiction to issue a writ *habere*, the same was not applied for and the plaint appears to have been improperly constituted and should have been struck out (see Section 71 and 92 of the SCCP).

[20] Further, had the plaintiff sought a writ *habere facias possessionem*, it would have been apparent that the Court was not in a position to issue such a writ. In order to issue the writ, the Court would have had to satisfy itself that the defendant did not have substantial

grounds indicating that she had a bona fide, genuine, serious and/or a valid defence before issuing the writ (*Delphinus Turistica Maritime SA v Villebrod* (1978) SLR 28 at 121; *Dhanjee v Habib Bank* (1989) SLR 169; A*h-Tou Vs Dang Kow* (1987) SLR 117, *Fikion v Cecile and Others* (Civil Side No 22 of 2011) [2011] SCSC 47 (28 July 2011). The defendant, however, did have a bona fide defence to the writ pursuant to the MCA.

[21] In such circumstances, the application for a writ (although as pointed out above there was none in the instant case) should have been refused and the Applicant would have had to pursue a regular action to obtain an alternative remedy (See *Hodoul v Kannu's Shopping Centre* (CS 293/2006) [2007] SCSC 126 (23 February 2007).

[22] The issue of a writ *habere facias possessionem* is a special remedy available and reserved to anyone who is dispossessed otherwise than by a process of law, and, is available to a party whose need is of an urgent nature and who has no other equivalent legal remedy at his disposal. This was patently not the case in the instant suit nor had there been a prayer for the same in the plaint. The learned trial judge therefore clearly acted *ultra petita* in granting the same.

[23] Given my findings on the grounds of appeal above, the appeal is allowed. The orders of the learned trial judge are set aside. The plea in *limine litis* with regard to the plaint both not disclosing a cause of action against the defendant and being bad and unsustainable in law therefore succeeds as the property in question was clearly property of a party to a marriage.

[24] The Appellant is granted costs.

Signed, dated and delivered at Ile du Port on 21 August 2020

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Twomey JA

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I concur Fernando PCA

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I concur Tibatemwa- Ekirikubinza