

IN THE SEYCHELLES COURT OF APPEAL

Reportable

[2021] SCCA 33 (13 August 2021)
SCA 12/2019
(Appeal from XP201/2018)

In the ex parte matter of

ANDRÉ BAILLON
(rep. by Phillippe Boulle)

Appellant

Neutral Citation: *Ex Parte André Baillon* ([2021] SCCA 33 (13 August 2021) SCA 12/2019 (Arising in XP 2011/2018))

Before: Fernando, PCA, Twomey, JA and Robinson JA

Summary: Appeal against the decision of Supreme Court dismissing application for appointment of executor – conditions to be satisfied for appointment of executor by court – Articles 1026 of the Civil Code of Seychelles - representation

Heard: 5 August 2021

Delivered: 13 August 2021

ORDER

The appeal is allowed and the Master's decision is set aside. André Baillon is appointed as executor of the Estate of the deceased, Jean, Jacob, Melchior Pool.

TWOMEY JA

Introduction

[1] The Appellant, André Baillon, applied to the Master in the court a quo to be appointed as executor of his uncle's estate. His uncle, Jean Pool, had passed away on 30 October 2012 (hereafter the deceased). The Master refused the application.

The application in the court a quo

[2] In the petition filed for his appointment, the Appellant averred that the deceased's only heirs were his siblings. He named them in Paragraph 4 of the petition as follows:

- 1) *Mrs. Margaret Elizabeth Adeline*
- 2) *The late Louise Agathe represented by Mrs. Kathleen Boullé, née Pillay - executrix of her estate*
- 3) *The late Marie Julie Baillon represented by Mrs. Marylene Michaud- executrix of her estate*
- 4) *The late Florent Pool represented by Mrs. Lindy George – executrix of his estate*

[3] In the attachments to the petition, the following documentation relevant to the Appellant’s application was also attached:

- (i) *Certificate of death of Jean, Jacob, Melchior Pool certifying that his death occurred on 30 October 2012*
- (ii) *Order of the Supreme Court appointing Kathleen Boullé as the executor of the estate of one Louise Agathe Pillay, née Pool, who passed away on 7 December 2017*
- (iii) *Order of the Supreme Court appointing Marylene Michaud as the executor of the estate of one Marie-Julie Baillon who passed away on 14 January 2010*
- (iv) *Will of one Florent Josef Pool and affidavit of one Lindy George in which she avers that she is the executor of Florent Pool’s estate.*

[4] No hearing was held in the court *a quo* in respect of the Appellant’s application, the learned Master satisfying himself with only raising the issue of who the legal heirs were and how they were represented.

[5] In his Order dated 15 March 2019, the learned Master stated:

“[3] On the face of the pleadings, therefore, the only surviving heir of the late Jean, Jacob, Melchior Pool who died on the 31th (sic) October 2012 is his sister Margaret Elizabeth Adeline. The other siblings named in paragraph [4] above, have all passed away.

[4] It is trite law that dead people cannot inherit in their own name. Article 739 of the Civil Code of Seychelles Act, allows a person to stand in the place of an heir who is deceased at the opening of the succession. That being the case, therefore, the deceased heir’s degree (sic) and rights accrue to his representative. Representation occurs in the descending or collateral lines. That, therefore, places children of a deceased heir in the position of that heir. It, therefore, follows, that for a person to be an heir, that person must have capacity to inherit,

and to inherit, a person must be in existence according to Article 725 of the Civil Code of Seychelles.

[5] According to the documents produced in support of the application by petition to appoint André Baillon as executor to the succession of the late Jean, Jacob, Melchior Pool, the late Marie-Julie Baillon was not even an heir at the time of her death to be so represented. That is so because, by virtue of Article 718 of the Civil code of Seychelles, succession opens upon the death of a person, and the late Marie Julie Baillon having passed away on the 14 January 2010 predeceased the late Jean Jacob Melchior Pool who passed away on the 30 October 2012.

[6] Therefore, on the face of the pleadings, this application for the appointment of André Baillon as executor to the succession of the late Jean, Jacob, Melchior Pool fails because the pleadings do not disclose the names of all the heirs entitled to inherit for the succession. The application is therefore dismissed.

The grounds of appeal

[6] From this decision the Appellant has appealed on the following grounds:

- 1) The finding of the learned Master that ‘the only surviving heir of the late Jean, Jacob, Melchior Pool who died on the 31st October, 2012 is his sister Margaret Elizabeth Adeline “ is erroneous as it fails to include those entitled as heirs through the legal rights of representation.*
- 2) The finding of the learned Master that “the late Marie-Julie Baillon was not even an heir at the time of her death to be so represented” is a misinterpretation of the law as representation whereby, a contrario, only persons who are dead at the opening of the succession may be represented.*
- 3) Articles 718 and 725 of the Civil Code evoked by the learned Master is erroneously applied to the rights or representation, by ignoring the legal principle that a person alive at the time of inheritance from a deceased person, cannot be represented after the former’s death in respect of what would be an acquired inheritance right.*
- 4) The learned Master erred in dismissing the petition, based on the finding that the petition “fails because the pleadings do not disclose the names of all the heirs entitled to inherit from the succession” which is erroneous as it fails to apply the law which provides that heirs should act through an executor.*

- 5) *The legal points taken against the Petition without giving the Petitioner the opportunity of being heard thereon, is an erroneous process of adjudication.*

Grounds 1, 2 and 3 – the deceased’s only heir is Margaret Elizabeth Adeline, Marie Julie Baillon was not even an heir at the time the deceased passed away and the rules relating to representation.

- [7] In support of the first ground of appeal, the Appellant submits that the finding by the learned Master in this regard is confusing as it attributes Margaret Adeline’s right of inheritance as in some way different to that of the other heirs who were alive at the time the deceased passed away. With respect to ground 2, learned Counsel for the Appellant submits that the law on collateral succession is set out in the provisions of the Civil Code. As for ground 3, Counsel submits that the learned Master fails to take into account the provisions of Articles 718 and 725 of the Civil Code and does not take into account the heirs by representation of the late Marie Julie Barallon.
- [8] We agree. Margaret Adeline is not the only surviving heir of the deceased. The pleadings and supporting documentation sustain the fact that at his death, the deceased was not only survived by Margaret Adeline, his sister, but also by Florent Pool, his brother, Agathe Pillay his sister and the children of his sister Marie-Julie Baillon who had predeceased him.
- [9] Our law makes it clear that collateral succession devolves both on the deceased’s siblings and if they have predeceased the deceased, onto their children:

“Article 731: Succession shall devolve upon the children and other descendants of the deceased, his ascendants, his collateral relatives and upon the surviving spouse in accordance with the order and rules hereinafter established.

...

Article 739: Representation is a legal fiction the effect of which is to put the representatives in the place, degree and rights of the person represented.

...

Article 742: In the collateral line, representation is admitted in favour of the children and the descendants of brothers and sisters of the deceased, whether they come to the succession concurrently with the uncles or aunts or whether, all the

brothers and sisters of the deceased having died before, the succession devolves upon their descendants in equal or unequal degrees.

...

Article 750: If the father and mother of a person have predeceased a person who dies without issue, his brothers, sisters or their descendants shall be called to the succession to the exclusion of ascendants and other collaterals.

They succeed either in their own right or by representation ...” (emphasis added)

- [10] It would appear that the learned Master made a fundamental error in law in inferring that collateral succession only devolves on siblings and ceases at their death even if they have children. The provisions of Article 739 above, as submitted by Counsel, make it clear that heirs by representation inherit the right of the deceased’s sibling which they had while alive, a contingent right of inheritance from their brother who had no children which devolved on their children when the brother they predeceased passed away. The first three grounds of appeal are upheld.

Ground 4 – the dismissal of the petition because the pleadings do not disclose the names of all the heirs entitled to inherit

- [11] Counsel for the Appellant has submitted that the absence of the names of the heirs should not defeat a petition for appointment of executor in view of Articles 724, 774 and 1029 of the Civil Code. It cannot be gainsaid that the only material issue for the appointment of an executor is that the applicant should have a lawful interest.
- [12] It is important at this juncture to bring to light Article 1026 of the Civil Code. It provides:

“If the succession consists of immovable property, or of both immovable and movable property, and if the testator has not appointed a testamentary executor or if an executor so appointed has died or if the deceased has left no will, the Court shall appoint such an executor, at the instance of any person or persons having a lawful interest. A legal person may be appointed to act as an executor. But a person who is subject to some legal incapacity may not be so appointed.”

The above provision has been interpreted by countless authorities – under Article 724 (4) of the Civil Code, heirs do not inherit property as of right (*saisine de plein droit*) in Seychelles. When the succession consists of immovable property, the property vests in an executor who acts as fiduciary for the heirs. The purport of Article 1026 is to ensure that

the court is satisfied that a person who applies to be the executor of a deceased's estate, has a lawful interest in so doing and is not subject to some legal incapacity preventing him from exercising his duties which are laid out in other provisions of the Civil Code (see *Hoareau v Hoareau* (1985) SLR 112, *Christmas Securities (Seychelles) v Gedeon* (1979) SLR 17, *Ex Parte Jean*, (unreported) CV 70/1993, *In the matter of the Estates of the late Louis Joseph Maxime Larue and Emmeline Beronis Larue Nee Pool* (MC68/2018) [2018] SCSC 2018 (25 November 2018)).

- [13] In *Essack v Fernandez* (16 of 2005) (16 of 2005) [2006] SCCA 18 (28 November 2006), the Court of Appeal had to determine the meaning of 'lawful interest' in Article 1026 and held in that respect that:

"[It] transpires that a person with a lawful interest within the meaning of Article 1026 is not somebody who has an actual or potential hereditary right in the estate to be administered. It is someone who in good faith has a legitimate concern that in the administration of that particular estate, the provisions of the law will be complied with. An actual or potential heir may be one such person but not necessarily so. That is, indeed, reflected in all the decisions given by the Supreme Court on the matter."

- [14] Hence once the Court is satisfied that the two conditions are met, that is, that the applicant has a lawful interest as defined above and is not subject to a legal incapacity, the Court is bound to appoint the executor to ensure that the estate of the deceased is wound up and distributed according to the rules of succession. This ground of appeal also succeeds.

Ground 5 – failure to hear the Petitioner on a legal point raised by the court itself

- [15] Counsel has submitted in respect of the above ground, relying on the authority of *Morin v Ministry of Land Use and Habitat* (unreported) CA 9/2005, that it is a fundamental principle of law, norms and traditions that judges are required not to take a legal point *suo motu* against a litigant without first having given the litigant an opportunity to be heard, a principle which was breached in the present matter. We agree and see no need to restate what is trite law.
- [16] For all the above reasons, this appeal is allowed. We have no difficulty in the circumstances and having perused the Petition and the supporting documentation to grant

the Appellant's prayer that the Appellant, André Baillon, be appointed as executor of the estate of the late Jean, Jacob, Melchior Pool.

[17] We therefore make the following orders:

1. The appeal is allowed and the Master's decision is set aside.
2. André Baillon is appointed as executor of the Estate of the deceased, Jean, Jacob, Melchior Pool.

Dr. Mathilda Twomey JA

I concur

A. Fernando, President

I concur

F. Robinson, JA

Signed, dated and delivered at Ile du Port on 13 August 2021.