IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2021] SCCA 46 **(**13 August 2021)
SCA 64/2018
(Appeal from MC 25/2018)

In the matter between

JOSE HETIMIER — **Appellant**
(rep. by Mr Charles Lucas)

and

WILTA CONSTANCE
(rep. by Mr Brian Julie) — **First Respondent**

SHANNON CONSTANCE
(rep. by Mr Brian Julie) — **Second Respondent**

Neutral Citation: Hetimier v Constance & Anor (SCA 64/2018) [2021] SCCA 46 **(** 13 August 2021) (Arising in MC 25/2018)
Before: Fernando President, Robinson, Tibatemwa-Ekirikubinza JJA
Summary: *Les référés - arts. 806 - 811 C. Pr. c. - Writ habere facias possessionem* **-** *res judicata* **-** urgency: alternative remedy **-** Appeal partly succeeds **–** With costs
Heard: 3 August 2021
Delivered: 13 August 2021

ORDER

(1) Appeal partly succeeds
(2) Decision of the learned Judge upheld
(3) With costs

JUDGMENT

ROBINSON JA (FERNANDO PRESIDENT, TIBATEMWA–EKIRIKUBINZA JA concurring)

The Background

1. This is an appeal from a ruling of a learned Judge of the Supreme Court on the 31

October 2018, in which the learned Judge dismissed the appellant's application for a writ *habere facias possessionem* filed on the 28 March 2018 (MC25/2018), in respect of parcel PR4386 and a house situated thereon (hereinafter referred to as the "*Property*"). The appellant is the owner of the Property, which the respondents are occupying. The learned Judge also upheld a preliminary objection based on *res judicata.* The learned Judge concluded that an alternative legal remedy is available.

2. The appellant had filed an earlier application (MA 33/2017) for a writ *habere facias possessionem* on the 17 May 2017, concerning the Property against Wilta Constance, the first respondent in this appeal, which was dismissed on the 10 November 2017, on the basis that there are serious issues to be tried.

3. The first respondent and three of her siblings filed a plaint on the 8 September 2017 (CS 89/2017), which was later amended, on the basis that the transfer of the Property was a *disguised donation.* The Supreme Court on the 15 November 2017, struck out the amended plaint on the ground that it was *"not in order*[1]*".*

The Appeal and Analysis

4. The appellant has appealed the learned Judge's decision dismissing his application for a writ *habere facias possessionem* (MC25/2018) under seven grounds of appeal, which we found to be lengthy and repetitive. Those grounds are as follows —

> *"1. The learned trial Judge was wrong to uphold the submissions of the Respondent in paragraph 12 of her judgment that "the current application is indeed res judicata.* […]*".*
>
> *2. The learned Judge was wrong to draw the adverse inference at paragraph 11 of her judgment that the application by the Appellant in MA33/17 "was listed as an MA indicating that it is an application arising out of a main case" when it was in fact an originating cause of action with a prayer seeking a finality unlike her suggestion for the Appellant to seek an alternative remedy in paragraph 12.*
>
> *3. The learned trial Judge erred in law by shifting the burden on the Appellant to*

[1] Proceedings of the Supreme Court of Wednesday 15 November 2017 at 3 p.m. at p. 4 of 5, and at p. "E4" of the appeal brief.

exhaust alternative legal remedies in paragraphs 15 and 16 of her judgment, when on the 15th November 2017, she had already made in SC89/2017 that the Respondents' actions against the Appellant for reduction and donation deguisee were not maintainable in law since he was a third party and not a co-heir.

4. *Having made findings cited in paragraphs pages 3 and 5 of annexure 4 (proceedings of CS89/2017), the learned Judge failed to take into consideration that the Respondent did not have any interest in PR4386 or its sale. Thus no locus standi to canvass the defence/claim of reduction or setting aside the sale of land anymore.*

5. *The learned trial Judge erred in paragraph 16 of the judgment when she found that there an alternative legal remedy was still available to the Appellant, while the only issues arising were a claim under principles of succession which had been dealt with and an alleged fraud since 1992 advanced by the Respondent in CS89/17 that was time-barred. No alternative remedy is available to Appellant save for this writ.*

6. *The learned Judge was wrong to conclude that the merits of Plaint CS89/17 which was alleged serious defence of the Respondent had yet to be decided when she had already dismissed the case on lack of pleadings required to establish paternal descent and a filial link between the Appellant and the Respondents' father while the Appellant had attached his birth certificate to his Defence and Plea on file for her consideration.*

7. *The learned trial Judge ought to have granted the Appellant's prayers since the Respondent failed to advance any defence to the application whatsoever.*

Ground 1 of the grounds of appeal

5. With respect to the first ground of appeal, we consider whether or not the learned Judge was correct in concluding that MA33/17 had acquired the status of *l'autorité de la chose jugée* and, thus, upholding the preliminary objection based on *res judicata*.

6. We observe that the respondents did not raise a preliminary objection in their response, dated 20 August 2018 (MC25/2018), to the effect that the judgment of the learned Judge (MA33/2017) was *resjudicata*. The respondents' preliminary objection concerned the plaint filed on the 8 September 2017 (CS 89/2017). In that regard, we conclude that the

learned Judge was wrong to make such a finding in the absence of a preliminary objection to that effect.

7. For the reason stated above, we allowed the first ground of appeal.

Ground 2 of the grounds of appeal

8. The second ground of appeal is concerned with the observation of the learned Judge contained in paragraph 11 of her ruling: *"I note that the application was listed as an MA indicating that it is an application arising out of a main case".* Having considered this ground of appeal and the written and oral submissions of Counsel for the appellant prudently, we conclude that the contention raised in this ground is immaterial given our finding concerning ground 1. Moreover, it adds nothing to the appellant's appeal.

9. We dismiss the second ground of appeal.

Grounds 3, 4, 5, 6 and 7 of the grounds of appeal

10. Under grounds 3, 4, 5 and 6 of the grounds of appeal, Counsel for the appellant in his heads of argument essentially contended that the learned Judge was wrong to conclude that an *"alternative legal remedy is still available"* as she had dismissed the case (CS89/2017) against the appellant.

11. The proceedings revealed that the learned Judge dismissed the case (CS89/2017) without hearing its merits on the basis that the respondents' plaint was *"not in order"*. It is not clear why the learned Judge adopted this approach in dealing with CS89/2017. Nonetheless, having considered the proceedings of CS89/2017 with care, we are satisfied that the learned Judge was not in error in failing to be persuaded by the outcome of CS89/2017.

12. We turn to the principles applicable to an application for a writ *habere facias possessionem*. In *Delphinius Turistica Maritima S.A. v Villbrod [1978] SLR 121*, Sauzier J, as he was then, stated —

> *"[…]. A writ habere facias possessionem may be issued on the application of an owner, the lessor of the property, when the court is satisfied that the respondent to the application has no serious defence to make thereto".*

For instance, in *Faiz Mubarak Ali v Hairu Investment Management Services SCA 25/2018*, (10 May 2019), this Court accepted the pronouncement of Sauzier J in **Delphinius Turistica Maritima S.A**. The Court stated —

> *"9. The remedy sought is essentially one derived from the French law of "Les Référés", which provides a remedy to an owner of a property with a clear title. In applying that law, the Seychellois courts have repeatedly held that an applicant for a writ habere facias possessionem has first to establish a clear title to the possession of the property concerned and that, if he succeeds, his application will be granted, unless the respondent shows that he has a serious and bona fide defence.*

13. In the present case, we observe that the learned Judge has applied the requirement of urgency by concluding that the appellant should pursue an alternative legal remedy. It is correct to state that, for historical reasons, the jurisdiction of a Judge of the Supreme Court of Seychelles to grant a *writ habere facias possessionem* is rooted in his or her jurisdiction as *juge des référés - arts. 806 - 811 C. Pr. c.* - dealing with matters of urgency*: see* **Delphinus Turistica Maritima S.A.**.

14. Applying the principles to this appeal, we conclude that the learned Judge cannot be faulted for deciding that the appellant pursue an alternative legal remedy. The affidavit evidence of the appellant revealed that the respondents have been in occupation of the Property since 2013. The appellant filed his first application for a *writ habere facias possessionem* on the 17 May 2017, which was dismissed. We observe that the appellant did not then appeal the learned Judge's order dismissing his application but filed a second writ on the 28 March 2018.

15. It follows, therefore, that the contention of the appellant raised in ground 7 of the grounds of appeal is inconsequential.

16. Thus, we reject the appellant's contentions in grounds 3, 4, 5, 6 and 7 of the grounds of appeal and dismiss the said grounds of appeal.

The Decision

17. For the reasons stated above, the appeal partly succeeds. Thus, we uphold the decision of the learned Judge that the application for a writ *habere facias possessionem* (MC25/2018) be dismissed on the ground that the appellant should pursue an alternative legal remedy.

18. With costs.

Robinson JA ________________________

I concur ________________________
Fernando President

I concur ______________________
Tibatemwa-Ekirikubinza JA

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