IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2021] SCCA 71 17 December 2021
SCA 35/2019
(Appeal from MA 198/2017)
(Arising in DV 04/2016)

Benet Duncan Accouche **Appellant**

(rep. by Mr. Joel Camille)

and

Audrey Hoareau **Respondent**
(rep. by Mr. Bryan Julie)

Neutral Citation: *Accouche v Hoareau* (SCA 35/2019) [2021] SCCA 71 (Appeal from MA 198/2017) (Arising in DV 04/2016)
17 December 2021
Before: Robinson JA, Tibatemwa-Ekirikubinza JA, Dingake JA
Summary: Dingake JA - Adjustment property orders after divorce, section 20(1)(g) of the Matrimonial Causes Act, abolishing of community in property, jointly owned matrimonial property, property owned solely by one of the spouses

Robinson JA – Rule 31 of the Seychelles Court of Appeal Rules, 2005, as amended – Case remitted to the Supreme Court for fresh hearing
Heard: 6 December 2021
Delivered: 17 December 2021

ORDER

(a) The appeal succeeds. The order of the court below granting the Respondent ownership of C 3992 is hereby quashed and set aside.
(b) We enter judgment in favour of the Appellant, namely that he is granted sole ownership of parcel C 3992.
(c) We further affirm that the Respondent is entitled to 50% of the jointly owned C 3963 and C 7772.
(d) There is no order as to costs.

JUDGMENT

DR. O. DINGAKE, JA

INTRODUCTION

[1] This appeal concerns division of property following divorce.

[2] The Appellant (Respondent in the Supreme Court) is Benet Duncan Accouche and the Respondent (Petitioner in the Supreme Court) is Audrey Hoareau.

[3] The parties met in 1996 and were married from 2003 until 2016 when their divorce order was made absolute. The family has three properties: jointly owned parcels C3963 (where matrimonial home is built) and adjoining C7772; and parcel C3992, which is solely owned by Mr Accouche.

[4] The parties have two children who are residing with their mother, the Respondent, in an accommodation provided to her by the employer. The Appellant has been solely occupying the matrimonial home since the parties' divorce.

[5] In 2017 Ms Hoareau applied to the Supreme Court for orders of transfer of land parcel C3992 to her with full lawful and beneficial ownership and sole occupancy. According to Ms Hoareau land parcel C3992 was part of the matrimonial property together with the other two land parcels C3963 and C7772.

[6] Mr Accouche disagrees and has filed a counter claim asking the Court to dismiss the Petitioner's claim for ownership of C3992 and to make an order under section 20 (1) (g) of the Matrimonial Causes Act in his favour and that, among other prayers, the Court declare his share in C3963 and C7772 to be over and above 50% and that Ms Hoareau has no share in C3992.

[7] On the 29th of May 2019 the Court delivered Judgment in favour of the Petitioner, granting her ownership of C3992 subject to any compensation for the current market value to be paid to Mr Accouche after valuation of the properties.

[8] Mr Accouche, prays that the Court of Appeal makes an order reversing the learned Judge's decision and enter judgment in favour of the Appellant on the basis of the Appellant's Counter Application in the case.

Background – Family Assets

Parcels C3963 and C7772

[9] The Appellant and the Respondent aver that they both jointly own parcel of land C3963 (Exhibit P2) where their matrimonial home is located. The parties also jointly own land C7772 which is adjoining to C3963. The C7772 plot was still not formally transferred to the parties, although paid for (see pages D6, D7, D8 of the Court of Appeal Bundles). The said properties were bought during their marriage.

[10] The parties took a joint loan in 2006 for the purchase of C3963 (Exhibit P3) for SCR632,000. The price of land as per Exhibit P2 was SCR765,000 and the Appellant averred that he was the one who paid the difference. The parties took another loan in 2010 for the purchase of C7772 and refinancing the C3963 Purchase Loan (Exhibit P15). The security was the C3963 land.

Parcel C3992

[11] The land parcel C3992 is owned solely by the Appellant (Exhibits P1 and D7) and was bought in 1997, just about one year after the parties met. Property was bought prior to their marriage, which was in 2003. The Appellant stated that he took a loan to buy the said property (Exhibit D9). The Loan was for SCR150,000 repayable at SCR5,348 per month together with "a negotiation fee of SCR1,500" charged to his account. Charge over the land was registered in 1997 (Exhibit D10).

[12] The Appellant stated during the Supreme Court proceedings that he solely discharged the said loan and the Respondent did not contribute anything toward the acquisition of the C3992 or loan repayments (page 168 of the Court of Appeal Bundle). The Official Discharge of Charge (Exhibit D11) is dated 27th October 2015 (stamped 20.11.2015), which was just about one year prior to the divorce. The Appellant, though, explained that

the SCR150,000 loan was actually discharged earlier than 2015 and that he paid it off in about 5 years (pages 169-170). He stated that the discharge is not automatic and only later he realised that the property was still subject to the charge. If that is so, the Appellant could have discharged the charge in 2002-2003 (prior to or around the time the parties got married).

[13] The Discharge of Charge states that 2 charges were discharged – Entry No.3 for the sum of SCR150,000 and Entry No. 4 for the sum of SCR110,000. The sum of SCR150,000 most likely refers to the initial loan that the Appellant took to purchase the land. From the provided documents by the parties, land parcel C3992 was also collateral in the loan taken solely by the Respondent in 2006 (Exhibit P6). The loan was for SCR110,000 creating mortgage over C3992 plus "householder's insurance with B.I.N." The document which indicates that the Respondent has consented to his property being subject to the mortgage is not attached. Therefore, Entry 4 Charge is most likely the said loan, which was discharged in 2015 according to the Discharge of Charge document.

[14] The land was further subject to the joint loan taken by the parties for 'Home Improvements' in 2008 (Exhibit P5). The loan was for SCR269,200 and states that the assets to be charged is "C3992 RSC R260,000".

[15] From the Discharge of Charge it appears that the initial loan taken by the Appellant and subsequent loan taken solely by the Respondent were discharged. The Respondent seemed to aver that since the loan was taken in her name against the property, somehow, she is entitled to the share in it. The issue of on which basis the bank permitted her to take loan using property belonging to another as collateral and whether the Appellant has consented to it was not elaborated upon further; and therefore there is no indication that simply because the land was put as collateral in the loan taken in her name, she somehow acquired the share in the property.

[16] Both parties stated that they intended to build a matrimonial home on C3992 but due to issues with access to road at that time, they did not proceed and instead jointly purchased

C3963 where matrimonial home was built. The land parcel C3992 appears to be empty with no dwelling upon it.

The Truck

[17] The Respondent stated during the Supreme Court proceedings that some of the money from joint 'Home Improvement' loan (Exhibit P5) abovementioned were used to buy a truck, which was owned solely by the Appellant and later sold by him for SCR170,000. According to the Respondent she has not received any portion of the proceeds of sale and the Appellant used it to finance a business loan (see pages 38-40 of the CA Bundle). During the course of proceedings, the Respondent abandoned arguments regarding portion from proceeds of sale for the truck in exchange that she only wants a property. The truck was mentioned in her Affidavit in support of the Petition, but was not included in the Petition itself.

Evaluation of C3963, C7772 and C3992

[18] During the Supreme Court proceedings Ms Hoareau stated that some time back C3963 was evaluated for SCR2,000,000; C7772 – for SCR450,000; and C3992 – for SCR3,000,000 (page 40-44 of the Court of Appeal Bundle). The Valuation Report (P15, Item, Item 2) contains valuation of C3963 and C7772 only (Item 2, valuation in 2011 contains the same amount as per testimony). Valuation for C3992 is not enclosed. It should be noted that the Supreme Court has ordered for the Valuer to be appointed twice, in 2018 and 2019 (see Order at pages 78 and 221), however, there is no recent Valuation Report enclosed with the file. From the proceedings on the 29th May 2019, which was the date for the judgment (page 216) it appears that the Report was still not provided, therefore at paragraph [17] of the Judgment the Trial Judge further ordered that valuation be carried out and compensation be made if either of the party's share exceeds the value of the properties granted to them.

[19] To sum up, the family assets are parcel C3963, where matrimonial home is built with adjoining land C7772 (subject to formal transfer of title). These properties are jointly owned by parties and bought during marriage (via loan). The land parcel C3992 was purchased by Mr Accouche in 1997, some nine years prior to the marriage. The property is in his sole name. Ms Hoareau was willing to let go of the claim over truck if she can get the property. Mr Accouche has indicated willingness to give Ms Hoareau C7772 plot of land, which is much less than half a share in jointly owned property.

[20] The Trial Judge has treated all three properties being part of matrimonial property and held that parties are entitled each one to 50% share each in the matrimonial property. As the Petitioner only asked for C3992 property, the Trial Judge has granted the full legal and beneficial ownership of the said land parcel to the Petitioner.

GROUNDS OF APPEAL

[21] The Appellant submitted seven grounds of appeal in the Notice of Appeal. These grounds may be conveniently grouped and linked to the main issues in contention.

[22] **Issue 1**: Which property is considered to be matrimonial property and whether C3992 can be subject to property adjustment order, considering it is owned by the Appellant:

> ***Ground 1*** – C3992 was purchased by the Appellant before marriage and could not have been considered as matrimonial property;
> ***Ground 2*** – Failure to assess evidence in coming to the decision to award the Respondent 50% share in C3992;
> ***Ground 4*** – Bias in ignoring Appellant's case on his Counter Application in decision to award C3992 to the Respondent;

[23] **Issue 2**: What are the shares of the parties in the jointly owned properties and whether the Appellant's share should be larger:

> ***Ground 3*** – Appellant was sole person paying outstanding loan in relation to C7772 and C3963 since 2006 and accordingly had greater share in joint property;

Ground 5 – Greater contribution in acquisition of jointly owned properties, C7772 and C3963;

Ground 6 – Failure to consider Appellant's willingness to compromise for the Respondent to be awarded C7772 along with the apportionments in monetary terms;

Ground 7 – Emphasis on consideration of school fees being paid by the Respondent and that same would have relieved the burden on the Appellant.

[24] Prior to the analysis of the main issues it should be noted that the Petitioner (now Respondent) had applied to the Supreme Court to make orders under "rule 4", which probably means Subsidiary Legislation: Section 27: Matrimonial Causes Rules (see B1 from the Court of Appeal Bundle), Rule 4: Claim for ancillary relief not included in the petition. The Petitioner appears to be referring to paragraphs (f), (j), (h) of Rule 4.

[25] In *Freminot v Pauline* (MA 169/2019 (arising in DS159/2016)) [2020] SCSC 190 (10 March 2020) the respondent moved for dismissal of the application on the basis that the applicant has failed to request leave of the Court as per Rule 34(1) of the Rules and the application was outside the prescribed time. Rule 34(1) states:

> *"Payment for spouse and relief in respect of property*
>
> *34. (1) An application for a periodical payment or lump sum payment in accordance with rule 4(1) (b) or (c) or in relation to property in accordance with rule 4(1) (f), (h), (i) or (j) where a prayer for the same has not been included in the petition for divorce or nullity of marriage, may be made by the petitioner at any time after the expiration of the time for appearance to the petition, but no application shall be made later than two months after order absolute except by leave."*

[26] The Court in *Freminot v Pauline* dismissed the application with costs, however, reserved the right to consider any further application for ancillary relief under the Matrimonial Causes Act and Rules and cautioned the Counsel to ensure compliance with the provisions of the said Act and Rules.

[27] In the case of *Boniface v Malvina* (SCA 41/2017) [2020] SCCA 11 (21 August 2020), the court noted the same irregularity in the proceedings in the Supreme Court (see paragraphs [8] and [13]) and stated that, "*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".

[28] Similar issue appears to be in the present case, where the Divorce Order was made absolute on 3rd August 2016 (page F of the CA Bundle) and Petition (B1-B2) was brought almost year later, in June 2017. The Court of Appeal Bundle does not have application for leave of Court in order to proceed with application outside the prescribed time. This point, however, was not brought up by the parties, and need not concern us.

Issue 1: Which property is considered to be matrimonial property and whether C3992 can be subject to property adjustment order, considering it is owned by the Appellant

[29] Community of property between spouses in Seychelles was abolished and unless spouses enter into a marriage settlement, property acquired by one spouse with their own money or resources remains personal property (*Maurel v Maurel* (1998-1999) SCAR 57, *Etienne v Constance* (1977) SLR 233 at 240; *Albert v Albert* (MA 39/2019 (arising in DV 97/2018)) [2020] SCSC 618 (01 September 2020) at paragraphs [91]-[93]).

[30] Section 20 of the Matrimonial Causes Act (the "MCA") provides for ancillary relief upon divorce and gives the court the power to order a settlement as appears appropriate to remedy an unfairness upon divorce:

> *Financial relief*
>
> *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.*

[31] Established case law indicates that the powers of the Court under section 20 are wide. In *Renaud v. Gaetan* SCA 48/1998 the Court of Appeal stated the following regarding the Court's powers under section 20 (1) (g):

> *"the powers of the Court pursuant to Section 20 (1) (g) of the Act must be read within the context of the totality of Section 20 of the Act which is designed for the grant of financial relief. Such relief may consist of some periodical payments (Section 20 (1) (d) or lump sum payment (Section 21 (1) (e)) for the benefit of relevant child or property adjustment order (Section 21 (g).)*
>
> *The purpose of the provisions of the subsections is to ensure that upon dissolution of the marriage, a party to a marriage is not put at an unfair disadvantage in relation to the other, by reason of the breakdown of the marriage and or as far as possible, to enable the party applying to maintain a fair and reasonable standard of living, commensurate with or near the standard the parties have maintained before dissolution."*

[32] The case of *Finesse v Banane* (1981) SLR 103 established that under section 20 the Court can order either spouse to pay to the other a lump sum under or direct one party to transfer to the other party such property as may be specified under section 20. In making either of the orders the court may have regard to the contributions made by each party to the welfare of the family, including any contributions made by looking after the home or caring for the family. It was emphasised that the court should seek to place parties, so far as is practicable and just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged the financial obligations and responsibilities towards each other (see also *Florentine v Florentine* (1990) SLR 141, which in addition held that it is desirable that the financial and proprietary interests of the parties should be determined with finality so that the parties may make a "clean break").

[33] In *Boniface v Malvina* (SCA 41/2017) [2020] SCCA 11 (21 August 2020) the Court of Appeal stated that the Supreme Court was wrong in relying on US, French and English law in order to define 'matrimonial property' and that it was not necessary to identify whether the property is 'matrimonial property'. It was stated that under section 20 for the purposes of applying the MCA, the Court should not refer to 'matrimonial property', but simply 'property of a party to a marriage'. It was held that the house in question was within the scope of the MCA and it did not matter whether the property was bought by the respondent before marriage.

[34] It was also held in *Desaubin v Perriol* (1996) SLR 90 that under the Matrimonial Causes Act 1992, the court has the power to vary and divide a property registered in the name of

one party to a marriage if circumstances warrant such a division. The Court stated that the question is "what are the respective contributions of the parties".

[35] The case of *Pillay v Pillay and Pillay v Pillay* (MA 322/2016 and MA 43/2016 (consolidated) (arising in CS78/2015)) [2017] SCSC 545 (27 June 2017) involved several properties in dispute, one of which was bought by the petitioner before the marriage (Parcel J1606). With regards to distinguishing between previously held property and matrimonial property, the Court cited Lord Nicholls' comments in *White v White* [2001] 1 AC 596 (at paragraph [47]):

> "*42. This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.*
>
> *43. Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property."*

[36] It is now established law that in assessing the parties' share in the property the Court needs to consider not just the monetary contribution (see also *Lesperance v Lesperance* SCA 3 of 2001). In *Samori v Charles (2012) SLR 371* the Court of Appeal stated:

> "*We have no reason to interfere with any of the above findings of fact made by the learned Trial Judge as regards the financial contributions made by the two parties to the marriage. But a marriage is not only about financial contributions, it is also about love, of friendship, of security, of commitment, of moral and emotional support; which combine together to make a success of the lives of the two people to the marriage. These are matters that cannot easily be measured in monetary terms and also cannot be ignored when a court is called upon to make a determination on matrimonial property."*

[37] It follows from the above that although community of property was abolished, the property solely owned by one of the spouse can be taken into account by the Court in property adjustment orders under section 20 where it is just and necessary to ensure a party to a marriage is not put at an unfair advantage in relation to the other party. The Court therefore can order that some share in the property solely owned by one party be granted to the other spouse. The Court needs to consider various circumstance of the parties and in order to assess the share of each party, the Court needs to take into account the contributions of the parties, including monetary and non-monetary contributions.

Analysis – C3992

[38] Since there is no community of property in Seychelles, arguably, the C3992 bought solely by the Appellant prior to marriage, should solely belong to the Appellant and not be included in the matrimonial property pot for division between the parties. On the other hand, given wide powers of the Court to make property adjustment order under section 20 and the decisions of the Court of Appeal in *Boniface v Malvina* (supra) and *Arissol v Pillay* (supra), the property which was bought prior to marriage and is solely owned may be subject to the order since the order can be made in respect of <u>any property of a party to a marriage</u> or any interest or right of a party in any property for the benefit of the other party. The above cited decisions also support the findings that share in a property bought solely by one party even prior to the marriage can be awarded to the other spouse.

[39] In many cases such property in dispute may also have a matrimonial home built upon it, which is not the case in the present suit. The matrimonial home of the parties in this case is built on the jointly owned land and since divorce has been occupied and solely enjoyed by the Appellant. There is no house built on C3992.

[40] In our opinion, if the Appellant has indeed discharged the loan taken to purchase the land within 5 years from the sale date, therefore, before the marriage to the Respondent, the land should not be included in the matrimonial pot for division as the Respondent has not contributed to the purchase of the land; the parties have not built anything on it together; and there are other two plots of land jointly owned by the parties.

[41] We are satisfied that granting half share in jointly owned property is sufficient to ensure fairness upon divorce, there should be no need to include C3992 for division.

Issue 2: What are the shares of the parties in the jointly owned properties, namely C3963 and C7772, and whether the Appellant's share should be larger

[42] As noted earlier both parties agree that C3963 and C7772 are jointly owned (subject to formal transfer of C7772). The parties did not provide a Title Deed, however, provided Transfer of Land document which states that land is transferred to *"Bennet Duncun Accouche and Audrey Eline Accouche"*. The document does not specify the nature of title that the parties hold.

[43] With regards to joint ownership of matrimonial property, it was held in *Charles v Charles* (2004-2005) SCAR 231 that where the parties own a house jointly, they are presumed to have intended to own the house in equal shares. The Court, however has a discretion to make orders to settle matrimonial property and such discretion is a judicial discretion that must be made in consideration of all relevant factors. It was further held that the starting-point is one of equal shares (also see *Serret v Serret* (2012) SLR 112).

Analysis – C3963 and C7772

[44] As indicated by above case law, where matrimonial property is jointly owned the starting point is equal shares, however the court may vary the shares taking into account, among other factors, contribution by the parties, which includes non-monetary contribution.

[45] In the present case, the Appellant avers that he is entitled to larger share in the joint property than the Respondent as he has been the sole person paying the outstanding loan in relation to the properties and therefore had made greater contributions in acquisition of the matrimonial property.

[46] Both parties provided bank account statements which show some contributions into paying off the loan. The statements, however, are only for certain years during their marriage without exact indication for which exact loan payments were made. Testimony

of the bank employee were also not helpful in determining which one of the parties paid exactly which sum towards the discharge of multiple loans.

[47] Furthermore, it was not denied by the Respondent that she contributed to the loan repayments only during certain years. She further stated that the spouses were in agreement to divide their expenses at certain points during their marriage, in that the Appellant would be making payments toward the loan and the Respondent would be paying for children's school fees and household expenses. While the Respondent did not provide the invoices for the large sums of school fees, the Appellant also did not deny that the Respondent was paying the school fees. The Appellant has also provided certain receipts of payments for school and nursery fees.

[48] Taking documentary and oral evidence of financial contributions as a whole, in our opinion the Trial Judge did not err in finding that parties were entitled to equal shares of the matrimonial property, namely C3963 and C7772. This finding is further supported by the abovementioned case law which emphasises that it is not only monetary contributions that are taken into consideration by the Court in the matrimonial property adjustment orders. We are not of the opinion that the Appellant has shown that he is entitled to larger share in the jointly owned matrimonial property.

CONCLUSION

[49] In all the circumstances of this case, it is our opinion that the Respondent should be entitled to 50% of the jointly owned C3963 and C7772.

[50] In the result the appeal succeeds. The order of the court below granting the Respondent ownership of C3992 is hereby quashed and set aside.

[51] We enter judgment in favour of the Appellant, namely that he is granted sole ownership of parcel C3992.

[52] We further affirm that the respondent is entitled to 50 % of the jointly owned C 3963 and C7772, and we so order. There is no order as to costs.

Dr. O. Dingake, JA

I concur

Dr. Lillian Tibatemwa-Ekirikubinza JA

F. ROBINSON, JA

[1] The Respondent instituted these proceedings under the Matrimonial Causes Act. The Appellant resisted the Application and set up a Cross-Application.

[2] The learned Judge delivered a judgment on the 29 May 2019, which does not contain any assessment of the evidence and consideration of the Cross-Application. It is unclear on what basis the learned Judge had come to any finding in this case. It is to be observed that the learned Judge, in his judgment, sloppily ordered that a valuation be carried out.

[3] At the appeal hearing, both Counsel expressed their concerns regarding the approach of the learned Judge.

[4] After anxiously considering the proceedings in this case, including the judgment, I conclude that this is not a fit case for me to exercise powers under rule 31 of the Seychelles Court of Appeal Rules, 2005, as amended.

[5] For the reasons stated above, I set aside the orders of the learned Judge and remit the case for a fresh hearing in the Supreme Court.

F. ROBINSON, JA

Signed, dated and delivered at Ile du Port on 17 December 2021.