

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 17 (29 April 2022)

SCA 51/2019

(Appeal from CS 59/2019)

In the matter between

Sheryl Nicette

(rep by Mr. France Bonte)

Appellant

and

Derreck Marimba

(rep by Mrs. Alexia Amesbury)

Respondent

Neutral Citation: *Nicette v Marimba* (SCA 51/2019) [2022] SCCA 17
(Arising in CS 59/2019) (29 April 2022)

Before: Fernando President, Robinson, Tibatemwa-Ekirikubinza, JJA.

Summary: Paternity- Appeal against the decision of Supreme Court declaring the respondent the father of Grace Heidi Trisha Nicette and grant of an order that the Civil Status Officer rectifies the Act of Birth to reflect the declaration.

Heard: 12 April 2022.

Delivered: 29 April 2022

ORDER

The appeal is dismissed. The orders of the Supreme Court are upheld.

JUDGMENT

DR. L. TIBATEMWA-EKIRIKUBINZA, JA.

[1] This is an action against the lower court's declaration of the respondent as the biological father of Grace Heidi Tricia Nicette.

[2] The facts as accepted by the Supreme Court are that the appellant and the respondent were in an intimate relationship in 2016. The respondent did not deny her relationship

with the appellant and their *concubinage notoire*. In July 2017 the child in issue was born and the appellant named her Grace Heidi Trisha Nicette.

- [3] The respondent testified that he learnt from the appellant's family that the appellant was expecting his child. He then approached the appellant who did not deny the fact that the respondent had made her pregnant but accused him of doing so deliberately and messing up her plans. She told him that she would do her best to keep the child away from him.
- [4] That acting on her word, the appellant denied the respondent access to the child.
- [5] Consequently, the respondent filed a case for access before the Family Tribunal which ordered that a DNA test be carried out to establish the child's paternity.
- [6] The appellant successfully appealed to the Supreme Court to have the Tribunal's order set aside. The Supreme Court *inter alia* held that the Tribunal's order could only have effect if the parties were willing to voluntarily take the test. That since the appellant was unwilling to subject her child to a DNA test, the order could not be enforced.
- [7] It was subsequent to this that the respondent filed a paternity suit in the Supreme Court seeking to be declared the father of the child.
- [8] During the hearing of the suit, the respondent testified that he formally acknowledged the said child by notarial deed in January 2018 and made a similar declaration to the Civil Status Office which amended the child's Birth Certificate to include his name as the child's father. The respondent also testified that there were several writings in the form of text messages emanating from him to the appellant in which he admitted that he was the father of the child. The text messages to this effect were adduced in court as evidence and not objected to by the appellant.
- [9] In defence, the appellant stated that she was not sure that the respondent was her child's father because she was involved in several intimate relationships at the time she became pregnant with the child in issue. However, when asked to mention the persons she was intimately involved with, she did not name them. She also stated that she was unwilling to have the child undergo a DNA test but that if the child became of age, she could make

her independent decision to take the test. She further stated that she did not want to have anything to do with the respondent.

[10] The respondent's counsel argued that since the appellant in her defence did not challenge the respondent's notarial deed in which he acknowledged being the child's father, it was taken to be an admission that he was indeed the father and this was sufficient evidence to establish paternity.

[11] Counsel for the appellant on the other hand argued that the evidence produced by the respondent to prove that he is the father of the child was not sufficient to pass the evidential threshold since no independent corroborative evidence was adduced.

[12] In determining the issue as to whether the respondent was the child's father, the learned Trial Judge, Twomey, CJ, held that the respondent's evidence was overwhelmingly compelling that he was the father. The Judge on the other hand found the appellant to be untruthful.

[13] Dissatisfied with the decision, the appellant sought to have the decision of the lower court quashed.

[14] **Ground of Appeal:** The Judgment is against the weight of evidence.

[15] **Relief Sought from the Court of Appeal:** The decision of the Supreme Court be quashed.

Court's analysis

[16] Counsel for the appellant filed a Notice of Appeal in which there was but one Ground of Appeal: The Judgment is against the weight of evidence.

[17] However, in the written submissions, Counsel raises issues in regard to how the Trial Judge dealt with the plea in *limine litis* he raised at the lower court to wit that the Respondent had no *locus standi* to proceed under Article 340 (3) (a) of the Civil Code. He also faults the Trial Judge's interpretation of the effect of Article 35 of the Civil

Status Act and further questions whether the Supreme Court has the authority/jurisdiction to declare guardianship over a child. It is my view that such are exclusively legal and/or procedural issues. It cannot be said that they question adequacy or sufficiency of evidence adduced at trial to prove paternity.

[18] Under Rule 54 (3) of the Court of Appeal Rules, it is provided that: Every notice of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of the appeal, specifying the points of law or fact which are alleged to have been wrongly decided. Rule 18(8) provides that an appellant shall not without leave of the Court be permitted, on the hearing of that appeal, to rely on any grounds of appeal other than those set forth in the notice of appeal.

[19] In line with the above rules, case law has firmly established that a party is bound by its pleadings.¹ An appellant cannot go outside the scope of the pleadings they filed in court. A party cannot seek relief outside his grounds of appeal.

[20] The appellant did not seek the leave of this Court to challenge the Trial Court's findings and decision on the *plea limine litis* raised at trial but made submissions faulting the Judge's decision that the respondent had locus to proceed under Article 340 (3) (a) for a judicial declaration that he was the father of the child. By rule 18(8) of the Court of Appeal Rules the Court cannot entertain such ground without leave of the Court, which has in the present matter neither been sought nor granted.

[21] Consequently, the submissions made regarding *locus standi* were ill founded.

[22] This Court will therefore address its mind solely on the aspect of sufficiency of evidence adduced to prove paternity.

[23] Was the Judgment against the weight of evidence adduced?

¹ E.g. *Confait & Anor v Port-Louis & Anor* (SCA 66/2018) [2021] SCCA 39; *Re Ailee Development Corporation and the Companies Act 1972* (SCA 13/2008) [2010] SCCA 1

[24] Issues of paternity are established by a preponderance of evidence - which shows that a man is more likely than not to be the father of the child. In determining whether a claim for paternity has been proved, the court will rely on the credibility of the witnesses, their testimonies and circumstantial evidence.²

[25] The law governing proof paternity is set out in the Civil Code as follows: **Article 321 (1) of the Civil Code Act** provides that:

Possession of status may be established when there is sufficient coincidence of fact indicating the relationship of descent and parenthood between a person and the family to which he claims to belong ...
(Emphasis of Court)

[26] **Article 340** of the **Civil Code Act** provides that:

1. It shall not be allowed to prove paternal descent, except:
 - (a)
 - (b)
 - (c)
 - (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)
- (2). The right to prove paternal descent under this Article is for the benefit of the child alone, even if born of an incestuous or adulterous relationship.
3.

² Jean-Baptiste vs. Dogley SSC 383/2006, 18 February 2011.

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. (My emphasis)

[27] In the present matter, the appellant faulted the trial Judge for according weight to the evidence adduced by the respondent to come to the conclusion and declaration that the respondent is the natural father of Grace Heidi Trisha Nicette. It was submitted by counsel for the appellant that the trial judge failed to appreciate the evidence of the appellant *in toto* and simply inferred fatherhood from the fact that the appellant and respondent were girl and boy friend and “slept together.” It was also submitted by counsel that the appellant’s refusal to name the other men she was intimate with had been used by the judge against the appellant. That in the absence of a DNA test there was insufficient evidence to satisfy the burden of proof required to prove paternity. Counsel also argued that the comments of the Judge on the state of the law regarding DNA evidence shows prejudice and bias hence causing injustice to the appellant.

[28] In dealing with the matter, the trial Judge held as follows:

“The appellant has never denied her relationship with the respondent and their concubinage notoire. That concubinage notoire does not have to amount to the parties cohabiting – it suffices that they conducted themselves as if they were living together ... In respect of the provisions of Articles 321 and 340 of the Civil Code, I find that the status of the child is established ... since the child’s Birth Certificate contains her father’s name and her father’s recognition of her in the deed of acknowledgment.”

In my view what the Trial Judge stated above brings the case within the ambit of **sufficient coincidence of fact** articulated in **Article 321 (1) of the Civil Code**

The Trial Judge held further that:

Similarly, the provisions of Article 340 are satisfied by the writings emanating from the respondent containing an unequivocal admission of paternity and the concubinage notoire of the parties.

[29] I find no fault with the trial Judge’s findings above. The trial Judge considered the evidence of the notorious cohabitation, the Respondent’s acknowledgement through a notarial deed that the child was his, the text messages exchanged between the parties and more specifically writings emanating from the respondent containing an unequivocal admission of paternity. There was also the child's birth certificate containing the respondent’s name as the father of the child. It is on these various pieces of evidence that the judge based her declaration that paternity had been established and proved.

[30] I note that the respondent’s notarial deed which he signed on 15th February 2018 was never disputed by the appellant. Whereas the respondent adduced evidence of a deed to prove he was the child’s father, the appellant did not adduce evidence to rebut the claim. It is a principle of evidence that every claim or allegation which is not expressly denied is taken as an admission. Evidence of words or conduct on the part of the defendant which amounts to an admission is sufficient to corroborate a fact.³ It is my finding that the evidence adduced by the respondent in the trial court was sufficient to support his claim of paternity. It can therefore be seen that the submission by counsel that the judge simply inferred fatherhood from the fact that the appellant and respondent were girl and boy friend and “slept together” is not supported by the record. And it cannot be said that the judge reached her decision without further evidence from which it could be inferred that the respondent was the father of the child.

[31] It must also be noted that whereas the Respondent was willing to subject himself to a DNA test, the appellant was categorical that she was not willing to subject the child to the test. It must be further noted that indeed as was stated by the Trial Judge, at the time when the case was heard by the Supreme Court, the law did not allow the court to order DNA evidence as it does now under Article 375 (2) of the Civil Code. The judge in fact “bemoaned” the state of the law thus:

despite scientific advances of nearly twenty years, the Legislature has not ...
permit(ted) the use of DNA tests to prove or disprove the paternity of a child.
That would have been conclusive evidence in this case to settle the matter.

³ Moncherry v Rassool (1976) SLR 168; Crea v Agathine (N0.2) (1977) slr 153 and Marie v Julienne (1978) SLR 135.

Instead the court has only arcane and outdated tool at its disposal to help it in its enquiry, namely the provisions of Article 321.

Thus, the court was left to determine paternity by evaluating other adduced evidence.

[32] Counsel also argued that the comments of the Judge on the state of the law regarding DNA evidence shows prejudice and bias hence causing injustice to the appellant.

[33] I am astonished that Counsel could interpret the Learned Judge's statement as evidence of bias and prejudice towards the appellant. But I will leave it at that.

[34] It is also clear from the judgment that the appellant has misinterpreted the basis of the decision of the judge. Whereas indeed the trial judge made a finding that the testimony of the appellant that at the time of conception of the child she did not have an exclusive relationship with the respondent but was "sleeping around" was a lie, the trial judge explained why she disbelieved the testimony of the appellant. The court's explanation was hinged on the issue of the appellant's credibility as a witness - or more precisely her lack of it.

[35] The judge *inter alia* stated that whereas the plaintiff's evidence was overwhelmingly compelling, the evidence of the defendant was incredible and the witness was unimpressive and untruthful.

[36] As I stated in **Carolus and Others v Scully and Others**⁴ it is a generally accepted principle in court hearings that the demeanour of a witness is of value in shedding light on the credibility of a witness. Demeanor evidence refers to the non-verbal cues given by a witness while testifying, including voice tone, facial expressions, body language, and other cues such as the manner of testifying, and the attitude of a witness while testifying. The opportunity to observe the demeanor of a witness while testifying is often exclusive to the trial court, the court where evidence and testimony are first introduced, received, and considered.

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[37] It is trite that an appellate court *should not lightly disturb* a finding of fact arrived at by the trial judge who had the opportunity of observing the demeanour of witnesses and hearing them. I have found no reason to depart from the findings of the trial court.

[38] From the above analysis, I come to the conclusion that the trial Judge was right in declaring the respondent as the natural father of Grace Heidi Trisha Nicette and for ordering rectification of the birth register for the child to bear her father's name.

Orders.

[39] The appeal fails.

The judgment and the orders of the Supreme Court are upheld.

I make no order as to costs as the appellant appears *in forma pauperis*.

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Dr. Lillian Tibatemwa-Ekirikubinza, JA.

I concur

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Fernando, President

Signed, dated and delivered at Ile du Port on 29 April 2022.

ROBINSON JA

[1] The appellant has appealed a decision of the Supreme Court dated 10 September 2019 in which the Court held that the respondent's evidence was overwhelmingly compelling that he was the father.

[2] The appellant has appealed the judgment on the ground that the judgment is against the weight of evidence.

[3] Clearly, the ground of appeal raised by the appellant is tantamount to there being no ground: see the cases of *Petit v Bonte* [2000] SCCA 1 (SCA 45/1999) [2000]SCCA 13 (14 April 2000) and *Chetty v Esther* (SCCA 44/2020 (Appeal from MA No. 156/2020 and MC No. 69/2020)) [2021] SCCA 12 (13 May 2021). It is observed that the ground of appeal runs afoul of rule 18(3) of the Seychelles Court of Appeal Rules 2005, as amended. Rule 18 (3) of the Seychelles Court of Appeal Rules provides —

"[...] grounds of appeal shall set forth in separate numbered paragraphs the findings of fact and conclusions of law to which the appellant is objecting and shall also state the particular respect in which the variation of judgment or order is sought."

[4] Given the mandatory wording of the provisions of rule 18(7) of the Seychelles Court of Appeal Rules 2005 as amended, I have no option but to strike out the notice of appeal.

[5] The appeal is dismissed and the orders of the Supreme Court are upheld.

[6] I make no order as to costs.

F. Robinson, JA

Signed, dated, and delivered at Ile du Port on 29 April 2022.