IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 20 (29 April 2022)

SCA CL03/2021

(Appeal from CP 01/2021)

In the matter between

Nasim Onezime — **Appellant**
(rep. by Mr. Basil Hoareau)

and

The Attorney General — **1st Respondent**
(rep. by Ms Aaishah Molle)

Government of Seychelles — **2nd Respondent**
(rep. by Mr Stefan Knights)

Neutral Citation:	*Onezime v The Attorney General and Government of Seychelles* (SCA CL 03/2021) [2022] SCCA 20 (Arising in CP 01/2021) (29 April 2022)
Before:	Fernando President, Twomey-Woods JA, Robinson JA
Summary:	Invalidity of an affidavit filed in support of a constitutional petition
Heard:	11 April 2022
Delivered:	29 April 2022

ORDER

Appeal dismissed.

JUDGMENT

FERNANDO, PRESIDENT

1. The Appellant has appealed against the decision of the Constitutional Court dismissing her constitutional petition on the ground that her affidavit, in support of her constitutional petition, was defective and inadmissible.

2. The Appellant in her petition before the Constitutional Court had complained that her right to dignity under article 16, her right to liberty under article 18(1), her right to privacy under article 20, her right to freedom of movement under article 25(1), and her right to own and peaceful enjoyment of her property under article 26 of the Constitution, have been contravened by the Government through its agents, representatives, servants and or employees and had brought the action against the Government.

3. It is a mandatory requirement in view of the provisions of the **Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, namely rule 3(1)** that **"***an application to the Constitutional Court in respect of matters relating to the… contravention… of the Constitution shall be made by petition accompanied by an affidavit of facts in support thereof***"**. (emphasis added) It has always been the practice by the Constitutional Court in petitions before it and the Supreme Court in judicial review matters to place reliance on affidavit evidence instead of oral testimony, save in an exceptional case. The affidavit is equated to evidence given on oath or an affirmation and is relied upon by the court as proof of the facts stated therein. It stands in the place of oral testimony. The affidavit verifies the legitimacy of a claim and once signed by the deponent before a legally authorized person, is legally binding and the person signing is subject to being charged with perjury if the affidavit contains false information. It is for this reason that the court needs to be satisfied that the affidavit filed before it, is true and valid, both from the point of view of the contents therein and also has been properly sworn or affirmed before a person who is legally entitled to take the oath or affirmation of the deponent and therefore can be relied upon in

arriving at a decision in the case. An affidavit sworn before a person outside Seychelles in order to be admissible before the courts of Seychelles has to fulfil certain conditions.

4. The following grounds of appeal have been filed:

i. **"**The learned Judges erred in law in holding that an affidavit sworn out of Seychelles can only be judicially recognized in Seychelles if authenticated in accordance with section 28 of the Evidence Act.

ii. The learned Judges erred in law in holding that Order 41/12 of the Supreme Court Practice, of England, was inapplicable to Seychelles in respect of an affidavit, sworn outside Seychelles, before a notary public in the Commonwealth.

iii. The learned Judges erred on facts and on the law in dismissing the Constitutional Petition on the ground that the Appellant's affidavit, in support of the Appellant's Constitutional Petition, was defective and inadmissible, instead of granting the Appellant the opportunity to file a fresh affidavit.**"** (verbatim)

By way of relief the Appellant has asked this Court **"**to allow the appeal by quashing the judgment of the Constitutional Court and to consequently remit the Constitutional Petition before the Constitutional Court.**"** (verbatim)

5. The Petitioner's affidavit had been signed on the 7th of April 2021 by the Petitioner in Mombasa, Kenya and purportedly notarized before one Mr. Were G. T. Sirioyi with a short or initial signature where the letters are hardly legible, even on the jurat. On the affidavit is a red seal sticker and blue stamp with words **"**Were G. T. Sirioyi, Commissioner for Oaths/ Notary Public, P.O. Box 90385, Mombasa**"**

inscribed on it. There is nothing to authenticate the notarization of the affidavit. It is this affidavit in support of the petition, that had been declared inadmissible in the Courts in Seychelles on a preliminary objection raised by the 2nd Respondent.

6. At the very outset I wish to state that the Appellant had shot herself in the foot in ground 3 of appeal, referred to at paragraph 4 above, by stating that the Constitutional Court, instead of dismissing her petition on the ground that her affidavit was defective and inadmissible, should have granted the Appellant the opportunity to file a fresh affidavit. In the Written Submissions of the Appellant filed before this Court leave had been sought to **"**file a fresh and proper affidavit or produce the document, verifying the authority of the notary to administer the oath in Kenya, such as a document from the High Court of Kenya, in the event that the appeal is allowed on the basis of the third ground of appeal**"** (verbatim) This in my view amounts to an admission that the affidavit was defective and inadmissible.

7. Grounds (i) and (ii) of appeal, referred to at paragraph 4 above, have made the task of this Court easy. The crux of this appeal is whether an affidavit sworn outside Seychelles should be authenticated in accordance with section 28 of the Evidence Act, in order to be judicially recognized in Seychelles or whether Order 41/12 of the Supreme Court Practice of England is applicable to Seychelles if the affidavit had been sworn before a notary public in the Commonwealth and therefore no authentication is necessary? **'**Authentication**'** means the verification of the signature and seal of the person who attested the affidavit.

8. In raising the preliminary objection before the Constitutional Court, that the affidavit is defective and should be struck out, because it was not certified in accordance with the laws of Seychelles, the 2nd Respondent had submitted:

a) that the affidavit was not signed in Seychelles,

b) that the affidavit was not accompanied by an apostille,

c) that the affidavit is not certified by the Seychellois Consul in Seychelles,

d) that the affidavit is not certified by the Kenyan Ministry of Foreign Affairs and the Seychellois Department of Foreign Affairs.

9. Based on the objections the following questions arise in relation to what is stated at paragraph 5 above: Who is **'**Were G. T. Sirioyi**'**; did he in fact on the 7th of April 2021, have the official character he claimed to have, namely was he a validly registered Commissioner for Oaths and Notary Public in Kenya; are the red seal sticker and blue stamp with words **"**Were G. T. Sirioyi, Commissioner for Oaths/ Notary Public, P.O. Box 90385, Mombasa**"** inscribed on the affidavit, the genuine seal of Were G. T. Sirioyi, and are the inscribed letter/s in the affidavit, the genuine short or initial signature of Were G. T. Sirioyi? There is no evidence before the Court that any of these matters have been verified. The learned Chief Justice in his intervention at page 19 of the proceedings of the 8th of June 2021 have correctly in my view raised this same issue when he said: **"**We do not know Mr. (not typed but should be a reference to Mr. Were G. T. Sirioyi), for he is foreign. We know all Attorneys -at-law of Seychelles Court, we know all the notaries public of Seychelles Court, we can take judicial notice of what these persons have attested in a local affidavit, but how would we here sitting before this Court take judicial notice of a foreign document, without it being attested?**"** (verbatim from the record of proceedings)

10. It is clear that the affidavit was not signed in Seychelles.

11. According to **section 171 of the Seychelles Code of Civil Procedure** affidavits may be sworn in Seychelles –

> **"***(a) before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar; and*

(b) in any cause or matter, in addition to those mentioned in paragraph (a) before any person specially appointed for the purpose by the court.**"**

All these are persons whose existence and title to administer an oath, namely to take the oath or affirmation in an affidavit, can be easily verified by a court in Seychelles as deemed necessary in paragraph 3 above. This shows the emphasis placed in our law to ensure that the affidavit has been properly sworn or affirmed before a person who is legally entitled to take the oath or affirmation of the deponent. It is only affidavits sworn before the above mentioned persons that will be accepted and relied upon for any legal purpose in the Seychelles. Our law cannot be less stringent for affidavits sworn in foreign countries.

12. There is a similar provision in the Oaths and Statutory Declarations Act of Kenya which states at section 4: **"***(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit <u>for the purpose of any court or matter in Kenya</u>…***"** (emphasis added). A Notary Public in Kenya can attest affidavits for use outside Kenya. However, documents for international use, in addition to the attestation by the Notary Public, must be registered with the High Court of Kenya. An affidavit sworn before a Notary Public in Sri Lanka, to be used abroad, has to be authenticated by the Registrar of the Supreme Court of Sri Lanka and certified by the Ministry of Foreign Affairs of Sri Lanka. This is because a foreign court needs to be satisfied that the affidavit filed before it has been properly sworn or affirmed before a person who is legally entitled to take the oath or affirmation of the deponent and therefore can be relied upon in arriving at a decision in the case. Thus every country has its own laws and rules to accept affidavits sworn abroad.

13. The law in relation to judicial recognition of documents, like affidavits in this case, administered in foreign countries and admissible in the courts of Seychelles is laid down in **section 28 (1) of the Evidence Act**. In accordance with this section, **"***<u>when a document (an affidavit) executed</u> <u>in any foreign country</u> or place***"**; other than in a

state which is a signatory to the Hague Convention of 5th October 1961 on Abolishing the Requirements of Legislation for Foreign Public Documents (known as the Apostille Convention); **"***is produced before any court in Seychelles purporting to have affixed thereon the seal and signature of***"** the officers specifically named therein, **"***such affidavit shall be admitted in evidence without proof of the seal or signature being the seal or signature of any such officer and without proof of the official character of any such officer, and the court shall presume that such seal or signature is genuine and the officer signing the affidavit held at the time when he signed it the official character which he claims and the affidavit shall be admissible for the same purpose for which it would be admissible in the United Kingdom of Great Britain and Northern Ireland in accordance with the English law of evidence for the time being*.**"** The officers named in section 28(1) are: **"***British Ambassador, Envoy Minister, Chargé d'Affaires, Secretary of Embassy or Legation, British Consul General, Consul, or Vice Consul, Acting Consul, Pro Consul, Consular agent, Acting Consul General, Acting Vice Consul, or Acting Consular agent, duly authorised by section 6, subsection (1) of the Commissioners for Oaths Act, 1891, of the Imperial Parliament as amended by section 2 of the Commissioners for Oaths Act, 1891, of the Imperial Parliament*.**"**

14. Section 28 of the Evidence Act in my view is a mandatory provision to be complied with, in relation to recognition and admissibility of all documents, executed abroad both in Convention states and those that are not Convention states, before our courts, in view of its wording **"***when any document executed in any foreign country or place is produced before any court in Seychelles***"** and the wording **"***shall be admitted in evidence***"**. The corollary being shall not be admitted if there has been non-compliance with the provisions of section 28 of the Evidence Act. The only other exemption being in relation to documents executed before the passing of section 28 of the Evidence Act. Since the affidavit sought to be produced had been executed on the 7th of April 2021, long after the amendment that was made to the

Evidence Act incorporating section 28, that question does not arise for determination in this case.

15. An Apostille certifies the origin of the public document to which it relates, it certifies the authenticity of the signature or seal of the person or authority that signed or sealed the public document and the capacity in which this was done. It therefore helps the foreign country to assess the authenticity of an official signature on a document; the capacity in which the person signing the document acted; and the identity of any stamp or seal affixed to the document. It is an official government Certificate printed or stamped onto the reverse side of a single page document or attached to multiple paged documents. It does not however authenticate or confirm the contents of a document. The difference between a document containing an **'**apostille**'** and a notarized document is, a notarized document is used only within the country, the document had been notarized. When it is necessary to use a notarized document in a foreign country an apostille must be placed on it. There is no apostille printed or stamped on the affidavit filed in support of the petition in this case. An Apostille is placed in documents that are to be used in foreign countries by parties to The Hague Convention of 5th October 1961. Where a country is not a party to the Hague Convention other methods are used to authenticate the signature and seal of the person who attested the document.

16. Both the Appellant and the Respondents have admitted, and it is a fact, that Kenya is not a party to the Apostille Convention. It is also undisputed that a Commissioner for Oaths and/or a Notary Public in Kenya or for that matter in any other country, do not fall into the category of any of the officers specifically named in section 28(1) referred to at paragraph 13 above and whose documents or affidavits which purport to have their seal and signature are admitted in evidence before the courts of Seychelles, without proof of the seal or signature being the seal or signature of any such officer and without proof of the official character of any such officer. I therefore agree with the finding of the Constitutional Court: **"**It is our considered

view that a notary from a Commonwealth country, does not fall under section 6 of the UK Commissioner for Oaths Act, 1889, and a notary from Kenya is not a person authorized to authenticate an affidavit for the purposes of any court or matter in Seychelles in terms of section 28(1) of the Evidence Act.**"**

17. The affidavit is not certified by the Seychellois Consul in Kenya nor is it certified by the Kenyan Ministry of Foreign Affairs and the Seychellois Department of Foreign Affairs, so that the courts in the Seychelles could satisfy itself that **'**Were G. T. Sirioyi**'** did in fact on the 7th of April 2021, have the official character he claimed to have, namely was a validly registered Commissioner for Oaths and Notary Public in Kenya; that the red seal sticker and blue stamp with words **'**Were G. T. Sirioyi, Commissioner for Oaths/ Notary Public, P.O. Box 90385, Mombasa**'** inscribed on the affidavit is the genuine seal of Were G. T. Sirioyi; and that the inscribed letter/s in the affidavit, the genuine short or initial signature of Were G. T. Sirioyi. In the absence of an apostille, this would have been the best way that the affidavit could have been made admissible in the courts of Seychelles.

18. The Appellant at ground two of his appeal has sought to place reliance on Order 41/12 of the Supreme Court Practice of England for the admissibility of the affidavit sworn outside Seychelles, before a notary public in a Commonwealth country on the basis of section 12 of the Evidence Act. He could have maintained this argument if section 12 of the Evidence Act was applicable**. Section 12 of the Evidence Act** states:

> **"***Except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail*.**"** (emphasis added)

The Appellant's argument fails in view of the wording "*Except where it is otherwise provided in this Act*"; as there is clear provision in section 28 of the Evidence Act in

regard to admissibility of documents (affidavits) executed in foreign countries. I am of the view that the Constitutional Court was correct when it stated: **"**Section 28 of the Evidence Act clearly sets out the procedure to be adopted in the judicial recognition of foreign documents in the Seychelles and there is no necessity to have recourse to English law on this issue. Section 12 which recognizes the applicability of English law of evidence in Seychelles, would only have been applicable if there was no existing provision in the Evidence Act.**"** Section 28 would be rendered meaningless if the Appellant's argument is right.

19. An objection similar to the one raised by the 2nd Respondent in this case was raised in the case of **Kanga v Ministry of Employment, Immigration and Civil Status & Anor (MC 29/2019) [2020] SCSC 657 (14 September 2020).** That was in an application for judicial review under the **Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules. Rule 2(1)** of the said rules requires that an application to the Supreme Court for the exercise of its supervisory jurisdiction shall be made by petition accompanied by an affidavit in support of the averments in the petition. In that case also the affidavit of the Petitioner was sworn before an overseas Notary in Kenya. The Supreme Court stated in that case: **"***A State that has not signed the Convention must specify how foreign legal documents can be certified for its use. Two countries may have a special convention on the recognition of each other's public documents, but in practice, this is infrequent and authentication would be the norm. The document must be certified by the foreign ministry of the State in which the document originates and then by the foreign ministry of the government of the State in which the document will be used; one of the certifications will often be performed at an embassy or consulate. In practice this means that the document must be certified twice before it can have legal effect in the receiving country*.**"**

20. In the case of **Robert Poole V Government of Seychelles (Constitutional case no 3 of 1996)** the Constitutional Court in relation to an affidavit sworn in Kenya, had

said that the signature of the Notary Public must be duly authenticated by the Registrar of the High Court of Kenya and stamped by the seal of that Court in order to conform with the spirit of the provisions in section 28 of the Evidence Act.

21. It is on the basis of these decisions that the 2nd Respondent had submitted before the Constitutional Court that the affidavit is not certified by the Seychellois Consul in Seychelles nor has it been certified by the Kenyan Ministry of Foreign Affairs and the Seychellois Department of Foreign Affairs. Had the Appellant complied with the judgment in Kanga v Ministry of Employment, Immigration and Civil Status & Anor referred to at paragraph 18 above or that of Robert Poole V Government of Seychelles (Constitutional case no 3 of 1996) referred to at paragraph 19 above, the Constitutional Court would have had some proof as to the authenticity of the affidavit, although section 28 of the Evidence Act does not provide for it.

22. I therefore have no hesitation in dismissing grounds (i) and (ii) of appeal.

23. At ground (iii) the Appellant had stated that the Constitutional Court erred on facts and on the law in dismissing the Constitutional Petition on the ground that the Appellant's affidavit, was defective and inadmissible, instead of granting the Appellant the opportunity to file a fresh affidavit. According to **Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, namely rule 4(1)** where the petition alleges a contravention or a likely contravention of a constitutional provision, the petition accompanied by an affidavit of the facts in support of the petition, shall be made in the Registry of the Supreme Court within 3 months of the contravention. Thus, a petition necessarily includes the accompanying affidavit of facts in support thereof. A petition without a proper affidavit is no petition. **Rule 4(3)** however states a petition may be filed out of time with leave of the Constitutional Court. **Rule 4(4)** states that the Constitutional Court may for sufficient reason, extend the time for filing a petition. These rules make it clear that such filing can only be with leave and for

the Court to grant leave, the petitioner needs to make an application and leave is not granted by the Constitutional Court ex mero motu. It is for the petitioner to enlighten the Court as to the reasons for not complying with the mandatory prescribed time period set out in rule 4(1) in filing the petition. For the Constitutional Court to grant an extension of time for filing a petition ex mero motu without an application, would amount to disregarding its own rule under rule 4(1). Further it is entirely at the discretion of the Court to extend the time for filing a petition and that only for sufficient reason. In this case the Counsel for the Appellant had not only failed to seek leave from the Constitutional Court to file out of time a fresh affidavit but stubbornly defended his position that the affidavit filed was not defective and therefore admissible, despite the many interventions by the Constitutional Court to state that the affidavit was defective. In a situation like that the question of **"**sufficient reason**"** and wrongful exercise of discretion by the Constitutional Court does not arise for consideration.

24. In the case of **Darrel Green v Seychelles Licensing Authority and Government of Seychelles CA 43/1997, Ayoola J** stated that a person who alleges a contravention of a provision of the Constitution is permitted to file a petition outside the prescribed time period set out in rule 4(1) only if he obtains leave of the Constitutional Court. He had gone on to say: "*The Constitutional Court may grant such leave not as of course but only if the applicant shows sufficient reasons to justify an extension of time. Nothing in these provisions empowers the Constitutional Court to act suo motu and grant leave where none has been sought and where facts have not been deponed to before its showing "sufficient reasons" to extend time .... Throughout the proceedings the jurisdiction of the Constitutional Court to grant leave had not been invoked by any application duly made*." (emphasis added)

25. In the case of **Assemblies of God V The Attorney General and Others (2020) SCCC 976** the Constitutional Court stated: "*Should a Petitioner miss the three-month period, and file a petition outside the three-month period, they have to seek the court's permission to do so. In other words, they have to obtain leave of the Constitutional Court. The Constitutional Court may grant such leave if the applicant shows sufficient reasons to justify an extension of time: the court must be satisfied that there is good and sufficient cause for the delay. The longer the delay the more onerous is the burden on an applicant. The court is not empowered to act on its own and grant leave where none has been sought and where facts have not been deponed to before it showing sufficient reasons to extend time*." (emphasis added)

26. I am therefore of the view that the Constitutional Court did not err in dismissing the petition without granting the Appellant the opportunity to file a fresh affidavit and I therefore dismiss ground (iii) of appeal.

27. Since the Constitutional Court did not err on any one of the three grounds raised by way of appeal there is no basis to quash the judgment of the Constitutional Court as sought by the Appellant. The Appellant had in the Written Submissions filed before this Court sought leave to file a fresh affidavit "in the event that the appeal is allowed on the basis of the third ground of appeal". Since ground (iii) of appeal stand dismissed, that matter does not arise for consideration.

28. For the reasons enumerated above I dismiss the appeal but make no order as to costs.

Fernando President

I concur: _____

Dr. Twomey-Woods JA

I concur: _____

Robinson JA

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