

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 24 (29 April 2022)

SCA 43/2019

(Appeal arising in DV 102/2006)

In the matter between

Franky Hoareau
(rep. by Charles Lucas)

Appellant

and

Mary Azemia
(rep. by S. Rajasundaram)

Respondent

Neutral Citation: *Hoareau v Azemia* (SCA 43/2019) [2022] SCCA 24 (29 April 2022)
(Arising in DV 102/2006)

Before: Fernando, President, Twomey and Tibatemwa-Ekirikubinza, JJA.

Summary: **Matrimonial Property-** Appeal against property adjustment order.
Where legal ownership of matrimonial assets is vested in one party, but there is evidence that the other party contributed significantly towards the property, court can order that the property be vested in both parties.

Heard: 11 and 13 April 2022

Delivered: 29 April 2022

ORDER

The appeal succeeds. Consequently, the judgment and orders of the lower court are quashed. The Respondent is to pay the Appellant 50% value of the property within 6 months. No order is made as to costs.

JUDGMENT

DR. L. TIBATEMWA-EKIRIKUBINZA, JA.

- [1] This is an appeal from a property adjustment order of the Supreme Court (F. Robinson, J.) dated 10th July 2019.
- [2] The background facts as accepted in the lower court are that the Appellant and Respondent cohabited together for 19 years. The duo got married in 2004 and had one child but in July 2006, the Respondent commenced divorce proceedings on ground that the marriage had irretrievably broken down. Subsequently, the marriage was dissolved by a court order in March 2007. Tension broke out as to what shares the applicant and Respondent were entitled to in respect of the matrimonial home.
- [3] It is an undisputed fact that the home was built on land belonging to the Respondent and she continued living in the matrimonial home after the dissolution of the marriage.
- [4] The Appellant therefore instituted a claim for a property adjustment order in the sum of SR 615,781 from the Respondent. By Notice of Motion dated 6th March 2015, the Appellant applied for leave of court to amend his pleadings dated 8th August 2007 to increase his claim from the sum of SCR 615, 781 to half the total value of the property as at the date that the court makes a final adjudication on his share in the property. The motion was granted on May 24th 2017.
- [5] At the hearing in the Supreme Court, the Appellant testified that together with the Respondent, they started building the matrimonial home in 1992. At the time, the Respondent was a clerk working at "*Maison Du Peuple*" and her salary was about SR 1500/- to SR 1700/-.
- [6] He further testified that the building contractor quoted a price of SR 400,000/- to build the matrimonial home.
- [7] That the Respondent obtained a bank loan from the Seychelles Housing Development Corporation (the "SHDC") of SR 150,000/-, which was her sole contribution to the building of the matrimonial home.
- [8] That the rest of the balance for the construction was out of his funds. The Appellant testified that out of the proceeds of sale of his land comprised in title number J435

situated at Bel Ombre which he sold to his brother, Cliff HOAREAU, he managed to contribute SR 150,000 to the construction of the matrimonial home.

- [9] He also stated that between 1984 and 2004, he received gratuity of a total sum of SR350,000/- from the Seychelles Peoples Defence Forces (SPDF) of which he contributed SR 175,000/- to the building of the matrimonial home and a retaining wall on the Respondent's property.
- [10] He further explained that he took three loans from Barclays Bank, amounting to SR96,000/-which he used as contribution to the building of the matrimonial home. He adduced the loan documents as well as invoices of building materials in the trial court.
- [11] However, the Respondent objected to the documents being admitted in evidence because they were not issued in the Appellant's names. The Appellant explained that some of the receipts and invoices were made out to individuals who bought building materials on his behalf.
- [12] The Court overruled the objection and noted that the documents, including the receipts and the invoices, related to the period of construction of the matrimonial home.
- [13] Furthermore, the Supreme Court ruled that it would decide on the weight that should be attached to the documents in the judgment.
- [14] The Appellant also stated that on 10 June 2006, before he left the matrimonial home, he conducted an inventory of the furniture and equipment he purchased and found that it was worth SR150,000/-. He stated that of the mentioned sum, he was claiming only SR 50,000/-because his son used the furniture.
- [15] The Appellant also stated that he borrowed money from the Children Welfare Fund in the sum of SR 10,000/- which was channeled to the building of the matrimonial home. In 2000, he borrowed an additional sum of SR10,000/-. He paid the loans out of his salary.
- [16] Furthermore, the Appellant claimed to have spent about SR50, 000/- on the purchase of some building materials for tiling, plumbing of the bathroom and kitchen. He added that he had spent more than the said amount, but he was only claiming SR50, 000/-.

- [17] He stated that the Respondent did not have to borrow SR150, 000/ from Nouvobanq in relation to the matrimonial home because it was in good state of repair when he left it.
- [18] On the other hand, the Respondent stated that the Appellant was not entitled to any share in the matrimonial home because he did not make any contributions towards its construction.
- [19] Although she admitted that the Appellant sold his house at Bel Ombre for SR 150,000 she denied him making any contributions out of the proceeds of the sale to the home. The Respondent stated that she is the one who single handedly built the home.
- [20] She testified that she took out a loan of SR150, 000 from the Seychelles Housing Development Corporation to pay for the houses but she neither recalled the date the loan was processed nor the monthly dues she paid towards the loan.
- [21] In regard to the retaining wall, the Respondent stated that it was built by a contractor hired by the Ministry of Local Government after the wall was damaged by the tsunamis in 2004.
- [22] SACOS paid her some money for the damaged furniture because she had insured the house with them.
- [23] She added that the furniture was bought with her own money since she was the only one working at the time she lived with the Appellant.
- [24] The Respondent further stated that in 2005 when the divorce proceedings were underway, she took out a loan of SR 260,000/- from Nouvobanq to repair damages to the house and wall caused by the floods. She stated that she was still paying off the loan.
- [25] She also paid for the carport, external shower, and extension to the kitchen, master bedroom and veranda.
- [26] Mr. Brian Kilindo a contractor hired by the Disaster Fund of the Ministry of Local Government to build the retaining wall stated that the price was about SR 80,000.

- [27] Upon evaluation of the evidence by the parties, the trial Judge was satisfied by the appellant's evidence and held that the Appellant provided his best recollection, and that it had not been coloured or diminished by the passage of time. The court based its assessment on the impression it had of the Appellant's oral evidence and the documents produced by him. However, the court observed that the evidence of the Appellant with respect to some of the items being claimed, was not clear.
- [28] For the Respondent the court observed that she had done her best to discount the monetary contribution of the Appellant in relation to the construction of the matrimonial home. The trial Judge found the Respondent to be evasive and her evidence to be scant in relation to the facts in issue. The Judge noted that the Respondent had difficulty in remembering any of the salaries she earned at the material time, and gave imprecise evidence of loans she took out except for the SHDC loan.
- [29] The court concluded that it was due to the bitterness still being felt by the Respondent towards the Appellant that resulted in her not wanting the latter to receive any share in the matrimonial home.
- [30] Arising from the evaluation of the evidence, the Judge entered judgment in favour of the Appellant and awarded him a total sum of SR 450,000 as the equivalent of his monetary contributions to the matrimonial house. The Judge also granted the Appellant interest on the said sum at a legal rate of 4% from the date of judgment until full payment of the decretal sum.
- [31] The breakdown of the said award was as follows:
- (i) Under claim for contributions out of the land sale proceeds- SR75, 000/-.
 - (ii) Claim arising out of Barclays Bank loans - SR96, 000/-.
 - (iii) under claim for contributions from gratuity- SRI 50,000/-
 - (iv) For contributions out of SPDF loans - SR25,000/-

- (v) In relation to expenses n building materials for tiling the bathroom kitchen and plumbing works-SR24, 000/-.
- (vi) For claim of money expended on building materials- SR60,000/-
- (vii) For a third share in household movables- SR 20,000.

[32] Dissatisfied with the judgment, the Appellant appealed to this Court on the following grounds:

- 1. The learned Judge failed to properly evaluate and consider the evidence relating to the contributions made by the Appellant as she erroneously refused to admit pleaded documentary evidence to that effect.**
- 2. The trial Judge erred in her analysis on the value of the structures on the premises despite the fact that there were three altogether. (sic)**
- 3. The learned Judge erred in awarding the Appellant a sum tantamount to a refund of his contributions he made over 20 years ago instead of applying the principles under Section 20 (1) (g) of the Matrimonial Causes Act. In so doing, the trial judge failed to show how she reached the decision on the quantum of award in paragraph 73 of the judgment.**
- 4. The trial Judge failed to appreciate the reliability and truthful accounts given by the Appellant relating to the relationship, disparity in contributions, the standard of proof to be of the documents attached to the affidavits and the discredit of the Respondent's testimony by cross examination. Her award of less 25% of the value to the Appellant in that respect is unjustified and unfounded.**
- 5. The trial judge failed to discount the extra benefit the Respondent enjoyed from the Appellant's share of the matrimonial home which includes his share in the movables, rentals collected from the annex apartment, sole occupation of the premises while the Appellant made out of pock expenses for alternative accommodation since 2005.**

6. The trial Judge failed to adjudicate on the Appellant's Motion which amended his original demand for SR 615,718 and was wrong at paragraph 72 of the judgment to adjudicate on a demand that had been substituted by an amended demand for 50% since June 2017.

Prayers

[33] The Appellant prayed that this Court reverses the orders in paragraph 73 of the judgment and awards him at least 50% of the value of the structures on the Respondent's land.

Court's analysis

[34] The central issue for determination in this appeal is whether the Learned Trial Judge followed the correct principles in granting an award for contributions made towards a matrimonial home and whether proper evaluation of the documentary evidence was carried out.

[35] I will resolve the grounds in the following order: Ground 6, Ground 1 and 4, Ground 3 and 5 together and end with Ground 2.

[36] **Ground 6:** This ground in essence faults the Trial Judge for proceeding to determine the award to him on the basis of pleadings which were originally filed in court but later amended.

[37] It is on record that the Appellant, with leave of the court, amended his claim on the disputed property by increasing it from the sum of SCR 615, 781.00 to half the total value of the property "as at the date that the court would make a final adjudication on his share in the property registered in the Respondent's name."

[38] However, the Trial Judge preceded her costing of the award by stating that the applicant: "is asking this court for the sum of SCR 615, 781.00."

[39] In this, the Trial Judge erred. The court's point of departure should have been the amended pleadings. Consequently, **ground 6 succeeds**.

[40] Nevertheless, the amount originally claimed and that which the court awarded will be useful in answering the question: did the Appellant make substantial contribution to the building of the matrimonial property in dispute?

[41] Grounds 1 and 4

Ground 1 faults the trial judge for not properly evaluating the documentary evidence adduced in court. Ground 4 faults the Judge for failing to appreciate the reliability and truthful accounts given by the Appellant relating to disparity in contributions. Both groundd1 and 4 deal with evaluation of evidence.

[42] A look at the proceedings in the court below show that the Appellant's case was based on affidavit evidence, oral evidence resulting from examination in chief as well as in cross examination.

[43] Documents indicating the loans the Appellant accessed, the gratuity paid to him by his employer, funds received from the sale of his land etc. during the relevant period, as well as documents indicating purchases of building materials were adduced in evidence.

[44] Regarding documentary evidence Counsel for the Respondent objected to the admission of particular documents for various reasons. However, a reading of the court proceedings reveals various pieces of evidence which were admitted in evidence but with a rider that the Learned Judge would decide what weight/evidential value she would attach to the evidence in question. And in the judgement of the court below, the Trial Judge said:

The Applicant ushered in evidence miscellaneous including invoices and receipts which according to his evidence showed that he bought building materials from ...building material retail outlets between 1993 and 1994 and in 1996 for the construction of the matrimonial home. ... According to the affidavit evidence of the Applicant, he spent about SR 79,013.88/-

on building materials. Objections were taken to most of these documents being ushered into evidence on the ground that they are not made out in the name of the Applicant. The Applicant explained that some of the receipts and invoices are made out to individuals who bought the building materials on his behalf. This court noted that the documents, including the receipts and the invoices, related to the period of construction of the matrimonial home. ... This court admitted those disputed documents and, further, ruled that it will decide on the weight that should be attached to them at time of judgment

[45] And indeed although the Appellant claimed a total of 129,013 as money spent on miscellaneous building materials, only 84,000 was awarded.

[46] Specific mention should also be made of a document emanating from an electrician indicating that he did electrical installation works at the matrimonial home. Its admission was objected to by the Respondent because it was a letter and not an invoice or receipt. The letter stated that the works amounted to SR 18,768. Although the Appellant's Counsel informed court that the author would be called to testify, this did not happen. This amount was not awarded. In regard to this, the reason is clear.

[47] The Appellant also testified that he had obtained loans from Barclays Bank (SCR 96,000) as well as SCR 37,000 from his place of work (SPDF). He produced the loan offer from the Bank and the documents indicate the purpose for the loan to be: RENOVATION OF HOUSE. The Trial Judge credited the full Barclays Loan to the Appellant by awarding him the 96,000 claim.

[48] Regarding the SPDF loans, the Appellant adduced in evidence documents showing that a total of 37,000 was extended to him as a loan in instalments.

[49] The documents indicated what the purpose of the loan was: "to extend one bedroom", another was to "build stone wall" etc. The loan request indicated the specific purchases to be made using the loan and a look at the details will indicate different building materials

and labour. Comments from the officers in charge indicated that site visits were conducted.

[50] However, the Trial Judge gave only 25,000 to the Appellant and she indicates that the award is for “SPDF loans and labour for workers”. I note that the Appellant adduced in evidence had testified that he had paid SR 10,000 as labour for erection of walls. This amount was pleaded separately from the loan of 37,000. No explanation is given for declining to accept the full claim.

[51] The Appellant further testifies that he spent SCR 175,000, which was part of his gratuity, on the development of the property. Documents to support his having received gratuity after very two years as an employee of the Forces were adduced in evidence. The Learned Judge gave an award of 150,000. No explanation for not giving the whole pleaded sum was given.

Pleaded amount by the Plaintiff- Appellant

[52]

| Heading | Pleaded amount in SCR | Awarded amount SCR | Exhibit number |
|--|-----------------------|--------------------|----------------|
| 1. From proceeds of sale of J 435 | 100,000 | 75,000 | 1 |
| 2. Barclays Loans | 96,000 | 96,000 | 2 |
| 3. SPDF Gratuity | 175,000 | 150,000 | |
| 4. SPDF loans and labour for workers | 47,000 | 25,000 | 3 |
| 5. Electrical Installation and materials | 18,768 | - | 4 |
| 6. Building materials | 50,000 | 24,000 | |
| 7. Building Materials | 79,013 | 60,000 | 5 |
| 8. 1/3 share in household movables | 50,000 | 20,000 | 6 |
| | 615,781 | 450,000 | |

her
credible
witness.
In her
words:

This court is satisfied that the Applicant provided his best recollection,

and that his recollection had not been coloured or diminished by the passage of time. This court has based its assessment on the impression made by the oral evidence of the Applicant against the conclusions to be drawn from the miscellaneous documents produced by Him. However, this court observes that the evidence of the Applicant with respect to some of the items being claimed is not clear.

[53] It may be safe to conclude that the Learned Trial Judge cannot be faulted for attaching little or no evidential value to documents such as receipts written in the names of individuals other than the Appellant.

[54] There is no doubt that a judge who is presented with documentary evidence has the authority and opportunity to determine the weight to be attached to the evidence.

[55] However, after expressing satisfaction with the credibility of the Appellant as a witness, the Learned Trial Judge ought to have given explanations regarding the weight attached to documents whose authenticity was not questionable and the justification for treating the loan from the Barclays Bank differently from the loan from the employer. Justice would have been served better if the Learned Judge had given explanations as to why evidence which on the face of it was similar was nevertheless treated/assessed differently and thus leading to partial awards in one instance and full awards in another.

[56] In comparison to the Appellant, the Learned Trial Judge made a finding which for all intents and purposes discredited the Respondent as an unreliable witness. In her words:

... the Respondent did her utmost to discount the monetary contribution of the Applicant in relation to the construction of the matrimonial home. This court found the Respondent to be evasive and her evidence to be scant in relation to the facts in issue. The Respondent had difficulty in remembering any of the salaries she earned at the material time, and gave imprecise evidence of loans she took, except for the SHDC loan.

- [57] What can be deduced from the Judge’s observation above is that the only amount which could with certainty be accepted as the Respondent’s contribution to the development of the property is the SCR 150,000/ she obtained as a loan.
- [58] Nevertheless, a look at the proceedings at the lower court show that the Respondent purchased various types of construction materials which she claimed to have used to make improvements to the property in 2005. Counsel for the Appellant did not object to adducing receipts and invoices written in the name of the Respondent. The Judge however did not make any findings on the relevance of the purchases to the dispute in issue.
- [59] I scrutinised the purchases and calculated the total spent on expenses which add value to the structure as indicated in the table below. I left out purchases for items such as furniture and other movable property.

| Exhibit Number (R) | Description | Value | Date |
|---------------------------|----------------------------|--------------|-------------|
| 7 | Cash Sale UCPS | 264.96 | 12.08.05 |
| 8 | Cash Sale UCPS | 106 | 12.08.05 |
| 9 | SMB Reinforcing Bar | 185 | 12.08.05 |
| 10 | SMB Tiles | 750 | 23.09.05 |
| 11 | SMB Timber | 7438 | 01.09.05 |
| 12 | SMB Timber | 612 | 03.10.05 |
| 13 | Civil Construction Ltd | 470 | 03.10.05 |
| 14 | SMB Timber | 306 | 17.10.05 |
| 15 | Cash Sale UCPS | 535 | 04.08.05 |
| 16 | Cash Sale UCPS | 326 | 08.07.05 |
| 17 | Cash Sale UCPS | 549.4 | 08.07.05 |
| 18 | Cash Sale UCPS | 795 | 04.07.05 |
| 19 | Cash Sale UCPS | 640 | 04.07.05 |
| 20 | Cash Sale UCPS | 326.4 | 04.07.05 |
| 21 | Cash Sale UCPS | 459 | 04.07.05 |
| 22 | Bodco Conduit | 885 | 13.08.05 |
| 23 | SMB welded mesh and MS bar | 1670 | 05.07.05 |
| 25 | Plywood | 842 | 08.07.05 |

| | | | |
|----|-------------------------|-----------------|----------|
| 28 | Rapid Roofing | 35895 | 19.05.05 |
| 29 | UCPS | 263 | 28.09.05 |
| 30 | Bodco | 108 | 15.10.05 |
| 31 | Bodco | 1385.4 | 18.10.05 |
| 32 | Bodco | 346.8 | 18.10.05 |
| 33 | Home accessories -Tiles | 7500 | 18.10.05 |
| 51 | Air Conditioning | 7425 | 25.01.05 |
| | TOTAL | 70082.96 | |

[60] The total value came to SCR 70,082.96. The dates on the receipts range between 04.07.2005 to 18.10.2005. This would bring the Respondents contribution to 150,000 + 70,082.96 = 220,082.96. If we are to accept that the cost was SCR 45,000, the Respondent's contribution would be 48.89% of the cost of the development.

[61] There is no set mathematical formula by which matrimonial property should be divided and each case is considered on its merits.

[62] However, **Section 20 (1) (g) of the Matrimonial Causes Act** gives guidance on how courts should determine division of matrimonial property. The Section provides that:

(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.

[Court's emphasis]

[63] In **Esparon vs. Esparon**¹ this Court interpreted the meaning of the above provision as follows:

¹ [1998-1999] SCAR 191.

“all the circumstances of the case, [and] may have regard, without being exhaustive, to such matters as the standard of living enjoyed by each of the parties before the breakdown of the marriage, the age of the parties and duration of the marriage, any physical or mental disability of any party, the contributions made by each to the welfare of the family, including looking after the home or caring for the family or the value to either party of any benefit (like a pension) which a party will lose as a result of the divorce....”

[64] Furthermore, courts in exercising their discretion in division of matrimonial property are to be guided by the goal of ensuring that one party is not to be put at an unfair advantage in relation to the other. In my view, this is the principle of fairness and equity. In **Hoareau vs. Hoareau**², this Court emphasized the principle as follows:

“It is important not to forget to ensure that a party is not put at an unfair advantage. In the process, the court should try, as far as possible, to come up with an award that will enable the other party to maintain a fair reasonable living which is “commensurate or near the standard” the parties were maintaining before the dissolution of the marriage. We know and appreciate that this is not an easy task but courts should keep on trying so that the wider goal of ensuring that one party is not put at an unfair advantage in relation to the other is achieved.”

[65] In determining the equitable balance in matrimonial property, the starting point is looking at the legal ownership and then subsequently adjust the shares of each party based on the level of contributions made by each party.³

[66] In *Lepathy v Lepathy* [2020] SCSC 142 this Court dealt with a case in which matrimonial property was in the name of one spouse only. The Court answered the question: what contribution and factors are to be taken into account in dividing such property?

[67] Court noted that case law has established that the point of departure in the division of

² SCA 30/1996.

³ *Esparon v Esparon* (footnote 1)

matrimonial property where only one party has title to the property is to consider the assets held in the name of one spouse as that spouses' property unless it is established that that was not the intention of the parties (see *Etienne v Constance* (1977) SLR 233 and *Maurel v Maurel* (1998-1999) SCAR 57.

[68] It was however also held that it is also firmly established in Seychellois jurisprudence that where the legal ownership of a matrimonial asset is vested solely in one party but there is overwhelming and convincing evidence that the other party made significant contributions towards the matrimonial asset in issue, the matrimonial property should be vested in both parties given the express terms of section 20 (1) of the Matrimonial Causes Act giving a large discretion to the court with regard to all the circumstances of the case (*Esparon v Esparon* (1998-1999) SCAR 191).

[69] In other words, court starts with acknowledging the legal ownership of the property on the one hand and then acknowledges the contributions made towards the property by each of the parties, on the other hand.

[70] In line with the two principles enunciated above, courts answer the question: did the party with no legal ownership adduce evidence to prove their contribution towards the property in issue? And what value should be put to the contribution?

[71] In the matter before us, even if we are to give the modest figure of 45000 as contribution by the Appellant, juxtaposed with the contribution of the Respondent, I come to the finding that the Appellant made significant contributions to the matrimonial property in issue. It is however on record that the Appellant is willing to be awarded 50% of the value of the property.

Ground 3

[72] The essence of this ground is that whatever amount of money is accepted by the court as the Appellant's contribution to the building of the matrimonial property, to order that it

be refunded to him would lead to an injustice against him. The essence of the argument is that he should receive the value of his “investment” at the time of division of the property.

[73] It is on record that in 2008, the lower court ordered for a Quantity Surveyor to value the property in dispute. But the case only eventually took off in 2017. The court then appointed another Quantity Surveyor – Nigel Roucou.

[74] At the hearing of the appeal, Counsel for both parties were informed that due to the fact that this matter had been in the courts as far back as 2006, the Court would use the 2017 Quantity Surveyor’s Report, the latest report, rather than send the case back to the Supreme Court with orders that the court appoints a Quantity Surveyor. In valuing the property, the 2017 report excluded the value of the land. This is because it was an uncontested fact that the Respondent had sole legal ownership of the land.

[75] The property was valued at SR 2,975,000.00. The value (296,500) attached to the reinforced concrete retaining wall has been excluded from the figure above because evidence adduced proves that the cost was done by neither of the parties.

[76] What remains is SCR 2,678,500 to be shared between the parties in equal shares.

ORDER

[77] The Respondent is in occupation of the matrimonial home. In the circumstances, I make the following orders:

1. The Respondent is to pay the Appellant the sum of 1,339,250 within 6 months of this Judgment.
2. In the event that the Respondent fails to make payment within 6 months of this Judgment, the property will be sold and the proceedings shared between the two parties in the ratio specified in this Order.

Dr. L. Tibatemwa-Ekirikubinza, JA

I concur: _____
Fernando, President

I concur: _____
M. Twomey, JA

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