

**IN THE COURT OF APPEAL OF SEYCHELLES**

---

**Reportable**

[2022] Civil Appeal SCA 11/2020  
SCCA 44 (19 August 2022)  
(Arising in CS 08/2017 [2020] SCSC  
20)

In the matter between

**DANIEL LEPERE**  
(rep. by Mr. Serge Rouillon)

**APPELLANT**

And

**PATRICK LEPERE**  
(rep. by Mr. Guy Ferley)

**RESPONDENT**

---

**Neutral Citation:** *Lepere v Lepere* (Civil Appeal SCA 11/2020 [2022] SCCA 44  
(19 August 2022) (Arising in CS 08/2017 [2020] SCSC 20)

**Before:** Robinson, Tibatemwa-Ekirikubinza, Andre JJA

**Summary:** Appeal against a decision of the Supreme Court – Co-owned land – Article 821 of the Civil Code and Section 107 (2) of the Immovable Property (Judicial Sales) Act – Power of the Court on appeal - Rule 3 (1) and 31 (5) of the Court of Appeal Rules.

**Heard:** 4 August 2022

**Delivered:** 19 August 2022

---

**ORDERS**

The Court makes the following Orders:

- (i) The appeal succeeds and readjustment of the sum to be paid by the Appellant to the Respondent is substituted from that of Seychelles Rupees Two Hundred and Sixty Two Thousand and Sixty cents (SCR 262,060.) to the sum of Seychelles Rupees Fifty Three Thousand Nine Hundred and Forty Nine (SCR 53,949/-).
- (ii) Given the circumstances, no order is made as to costs.

---

## JUDGMENT

---

**ANDRE, JA**

### INTRODUCTION

- [1] This is an appeal arising out of the notice of appeal filed on the 25 February 2020 by Daniel Lepere of Anse La Mouche Mahe (Appellant) against Patrick Lepere (Respondent), being dissatisfied with the decision of Chief Justice M. Twomey (as she then was) delivered at the Supreme Court on the 16 January 2020, in Case No. 08 of 2017 ordering the land Title C 109 at Anse La Mouche be subdivided as per the proposed plan of the survey and mapping services (Exhibit P3) attached to the Order, within six months hereof and with the parties sharing the cost of the subdivision equally. The Appellant (Petitioner in the court a quo) was further ordered to pay the Respondent the sum of Seychelles Rupees Two Hundred and Sixty-Two Thousand and Sixty cents (S.R. 262,060/-), being his share of the house within six months of the Order.
- [2] The Appellant, as per cited notice of appeal, appeals against the whole of the judgment upon the grounds of appeal set out at paragraph two of the notice of appeal and to be considered in detail below. The Appellant further seeks the relief set out at paragraph 3 of its notice of appeal namely, for an order setting aside the judgement of the Supreme Court and substituting an order for the fair and equal and proper distribution of each co-owners share of the suit property; and the whole with costs in this court and in the supreme court.
- [3] The respondent vehemently objects to the appeal and moves for its dismissal and that the finding of the learned Chief Justice (as she then was) be maintained.
- [4] All parties were duly represented in the court a quo.

### BACKGROUND

- [5] The Appellant and the Respondent are brothers and co-owners of Parcel C109, comprised 1143 square meters land with the house and water tank thereon. The Appellant, the Petitioner in the court a quo, was entitled to two-thirds of the entire property and his brother, the Respondent, to one third. According to the valuation (Exhibit P1) which was accepted by both parties, the value of the entire co-owned property was SCR2,616,180 (Land: SCR1,830,000; Building: SCR776,180; Water tank: SCR10,000).
- [6] The Petitioner petitioned for division in kind. The Supreme Court ordered for the property to be divided as per the sub-division plan attached by the Petitioner and ordered one third of the value of the house and water tank, SCR 262,060 to be paid to the Respondent. The Appellant, Petitioner in the Supreme Court, is appealing the said decision on the grounds below.

### **GROUND OF APPEAL**

- [7] The appellant raises the following grounds of appeal as per the notice of appeal, *verbatim*, as follows:
1. The learned judge has erred in law and fact by a serious miscalculation in terms of the proper sharing out of the shares of co-owners as per the legal registered rights of each owner.
  2. That the final partition ordered by the learned Chief Justice in this matter is erroneous and unequal in that
    - a. From the division of the land in the said Title C109 comprised of 1143 square meters of land and structures thereon, ordered by the learned judge;
      - i. The Appellant will receive 632 square meters rather than his legal share of 762 square meters being two thirds share of the land as per his entitlement in law; and

ii. The Respondent will receive 511 square meters a greater piece of land than he should be more than one third share in the Title C109, 381 square meters; and

b. The Appellant has to pay the Respondent a one third share in the house thereon, valued in total at R786,180/-, by paying him a one third share valued at R262,060/-; and

c. This payment to be made within 6 months of the judgement.

3. That the judgement is erroneous on the basis that the original agreed land partition was based on a share out of two thirds for the Appellant from which he was prepared to concede some extra land to make the Respondents share tally up to 511 square meters together with a compensation payment of R50,726.67/-.<sup>1</sup>

[8] The Appellant seeks that the Supreme Court Judgment be set aside and substituted by an order for the fair equal and proper distribution of each co-owners share of the suit property and costs.

## **SUBMISSIONS OF COUNSEL**

### **APPELLANT'S SUBMISSION**

[9] By way of submissions of the 6 July 2022, the Appellant in a gist submits as follows.

[10] The Appellant appeals the judgement solely on a factual basis, contrary to the statement in the notice of appeal that the learned judge also erred in law.

[11] In a gist, the Appellant claims that the Respondent has gotten more than his one third share of the property (511 square metres instead of 381 square metres) and as a result should not have been entitled to one third share of the value of the house and the water tank. The Appellant claims that due to the Respondent getting bigger share than he is entitled to, the Respondent should have been compensated by getting a smaller payment for his share in the house, only amounting to SR50,726,67.

---

<sup>1</sup> In the Notice of Appeal paragraph of this ground is '4'

[12] The Appellant states that error in calculation comes from a plan from an offer by the Appellant to the Respondent before they came to trial where he offered the Respondent a greater share of the property. It is stated in the Skeleton Heads that the terms of the agreement were not properly explained by either counsels to the trial judge, which was that for the extra portion of land to be allocated to the Respondent the payment for his share of the house would be reduced to SCR50,726.67. It is stated that page 79 of the record shows the Appellant explaining the basis of his proposition.

[13] Finally, based on the above submissions, the Appellant prays this Court for an order for the fair and equal and proper distribution of each co-owners share of the suit property; either as to their legal entitlement or as per the original suggestion of the Appellant, which was accepted by the parties, hence the whole purpose of drawing up a plan Exhibit P3; and the whole with costs in this court and in the supreme court.

#### **RESPONDENTS' SUBMISSIONS**

[14] The Respondent submits in the Skeleton Heads of Argument of the 26 July 2022 that the land was subdivided in accordance with the Appellant's pleadings at paragraph 4 of the Application for a division in kind as per attached proposed plan. The Respondent also states that the proposition was the most feasible way to partition the land, otherwise the Respondent would have gotten a piece of land not capable of development or with no economic value.

[15] It is further stated that it is also in evidence that the Appellant had enjoyed the house for a period of 10 years without any compensation to the Respondent and that the Learned Chief Justice was correct in finding that the Respondent was entitled to one third of the value of the house.

#### **THE LAW**

[16] It is trite law that "*An appellate court does not rehear the case on record. It will accept findings of fact that are supported by the evidence believed by the trial court, unless the trial judge's finding of credibility is perverse*" (*Akbar v R* (1998-1999) SCAR 175).

[17] In *Regar Publications Pty Ltd v Lousteau–Lalanne* (2006-2007) SCAR 191 it was held that, “Only in extreme cases will an appellate court question the factual conclusions reached by the trial judge”.

[18] In *Attorney–General v Ernestine* (1980) SCAR 373, the Court of Appeal provided an appeal guideline, holding that:

“[2] a). An appeal against the decision of a judge sitting alone is a rehearing.

b). When there is no question of a misdirection of himself by the judge, the appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

c). A distinction is to be made between primary facts and the inferences or deductions to be drawn from those primary facts:

(i) the appellate court should be slow to reject a finding of specific fact especially where the finding could be founded on the credibility or bearing of a witness.

(ii). on the other hand, the appellate court should feel free to form an independent opinion about the proper inference of fact, subject to the weight to be given to the opinion of the trial judge.

(d). In the drawing of inferences the trial judge has little advantage over those sitting on appeal. Even in regard to primary facts it is not possible to lay down any rule as to the circumstances in which an appellate court should or should not interfere.”

[19] *Moscow Narodny Bank v Captain et al of various fishing vessels* (1998-1999) SCAR 75 held the following regarding the role of the Court of Appeal:

“An appellate court will interfere with a lower court’s decision only if the judge of first instance –

(a) Misdirected him or herself on matters of principle; or

(b) Failed to take into account important matters, or took into account irrelevant matters; or

(c) Made a decision that was plainly wrong or wholly unreasonable.”

[20] In *Dorothy Hall v Maria Amina Morel & Ors* (Civil Appeal SCA22/2017) [2019] SCCA 24 (23 August 2019) Robinson JA further stated that *Akbar v R* (supra) authority finds

support in *Beacon Insurance Co. Ltd v Maharaj Bookstore Ltd*. [2015] 1 LRC 232 decision; citation reproduced from Robinson JA decision:

*"[12] In Watt (or Thomas) v Thomas [1947] 1 All ER 582 at 587, [1947] AC 484 at 487-488, to which the Court of Appeal referred in its judgment, Lord Thankerton stated:*

*I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witness could not be sufficient to explain or justify the trial judge's conclusion.*

*II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to a satisfactory conclusion on the printed evidence.*

*III. the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it mistakenly so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'*

*In that case, Viscount Simon and Lord du Parcq ([1947] 1 All ER 582 at 584 and 591, [1947] AC 484 at 486 and 493 respectively) both cited with approval the dictum of Lord Greene MR in Yuill v Yuill [1945] 1 All ER 183 at 188, [1945] para 15 at p. 19:*

*'It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion.'*

[...]

*[13] More recently, in In re B (a child)(care order: criterion for review)[2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911(at 53), Lord Neuberger explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated:*

*“'[T]his is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was*

one (i) which there was no evidence to support, **(ii) which was based on a misunderstanding of the evidence**, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it [...].”

[...]

[15] There are further grounds for appellate caution. In *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477 (at [4]), Lord Reed cited observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 23, (at para 14):

*'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence ... The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged [...].'*

[...]

[17] Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. In *Re B (a child) (above)* Lord Neuberger (at [60]) acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary facts and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 All ER 267 at 286, [1981] 1 WLR 246 at 269–270:

*'[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'*

See also Lord Fraser of Tullybelton ([1981] 1 All ER 267 at 281, [1981] 1 WLR 246 at 263); *Saunders v Adderley* [1998] 4 LRC 485 at 49 (Sir John Balcombe); and *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] 1 WLR 577 (at [12]–[17] per Clarke LJ). Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in



*assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."*

(emphasis added)

- [21] In criminal appeal *Graham Pothin v R (Criminal Appeal SCA 13/2017)* [2018] SCCA 17 (31 August 2018) Twomey JA in her minority judgment which dismissed the appeal also noted the following decisions supporting *Akbar v R (1998-1999)* SCAR 175:

*"[28] This approach is consistent with the roles of appellate courts in other common law jurisdictions. A helpful discussion of this tension between the trier of fact and the appellate court is found in South African jurisprudence, in the dissenting judgment of Daffue J in the case of Thobela v S (A48/2014) [2016] ZAFSHC 221 (20 October 2016),*

*Therefore if there are no misdirections on fact a court of appeal assumes that the court a quo's findings are correct and will accept these findings unless it is convinced that these are wrong. Therefore in order to interfere with the court a quo's judgment it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory or where the record shows them to such. ... it is only in exceptional cases that it would be entitled to interfere with the trial court's evaluation of oral evidence. [at [11]. References omitted].*

*[29] In Styles v Attorney General 2006 JLR 210 it was noted that "it is not part of the powers of the Court of Appeal to review the totality of the evidence, sift through points of alleged weakness and attempt to make its own evaluation of that evidence. [at 32-34]. Furthermore, any evaluation of the facts or law which have not been raised in the appeal are ultra petita, and the Court of Appeal has no role in raising these itself and determining matters which were not properly before the court."*

- [22] In *Attorney General vs Podlipny (SCA 32 of 2011)* [2014] SCCA 1 (11 April 2014) the Court noted that since the only evidence before the Supreme Court were affidavits of the parties, the Court of Appeal was *"more or less in the same position as the trial judge in terms of evaluating the evidence so far adduced"*:

*"[16] We cannot second guess what would have happened if the learned trial judge had addressed himself properly both to the law and the facts in this case. He laboured under the false apprehension that he was considering the detention*

orders. He also incorrectly granted an order for release of the funds under the wrong provision of the law. He did not consider the application for a forfeiture order as he deemed it premature. We have given the matter much thought in terms of remitting this case for rehearing of the application for a forfeiture order. We are mindful however that this matter first came before the Court in March 2009. We are here five years later and Counsel for both parties have urged us in the interests of justice to expedite this matter by resolving it on the affidavits filed before us. We are wont to weigh evidence at this remove and do so exceptionally on this occasion. We are comforted in our decision by the fact that the only evidence before the court was the affidavits of the parties. Further, in *Beeharry v R* (2012) SLR 71 we stated:

“Whilst we do not generally interfere in the perceptive function of the judge, the appellate Court is as well off as the trial judge in the exercise of its evaluative function.” (77)

*This is indeed a case where we are more or less in the same position as the trial judge in terms of evaluating the evidence so far adduced.”*

[23] The Court of Appeal has wide powers under Rules 3(1) and 31(5) of the Court of Appeal Rules:

Rule 3(1): “The procedure and practice of the Court shall be as prescribed in these Rules, but the Court may direct a departure from these Rules at any time when this is required in the interest of justice.”

Rule 31(5): “In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court may have exercised (...)”

[emphasis added]

[24] In *Allison v Financial Intelligence Unit* (SCA 39/2013), the Court of Appeal emphasised that the powers under the abovementioned Rules are broad: “We are permitted to do this given our jurisdiction to make any order in the interests of justice based on our powers under r 31(5)”. Therefore, the Court of Appeal has power to either decide on the matter themselves (as long as the amended judgment stays within the limits of the powers of the Supreme Court) or remit it back to the Supreme Court.

## **ANALYSIS**

[25] In the Application for a division in kind (C1 of the Court of Appeal Bundle) the Petitioner states that the Property is co-owned by the parties and specified the shares being 2/3 by the Petitioner and 1/3 by the Respondent. At paragraph 4 of the Application, Petitioner stated that the property can be conveniently and profitably sub-divided in kind “as per the attached proposed sub-division” and at paragraph 5 the Petitioner asked for property to be partitioned “in accordance with the parties’ entitlement in indivision and as per the attached proposed sub-division”.

[26] The enclosed plan (C5 of the Court of Appeal Bundle) shows that proposed sub-division is not according to the shares of ownership and Plot 2, which was proposed share for the Respondent, is 511 square metres, which is more than 1/3 (1/3 of 1143 square meter land being 381).

[27] The Application does not expressly state that the proposed portion is bigger than the portion that is owned by the Respondent and does not address monetary compensation. The prayer in the Application is therefore somewhat confusing as parties’ entitled shares are not the same as the proposed subdivision. During the hearing, however, the Petitioner explained the desired subdivision as follows:

*“what I have calculated is that my brother has one third of this property so I am exchanging for one portion from my plot to give to him and that this portion that I am going to give to his is equivalent to the evaluation and then I will pay the difference from which I will owe him”*

*“I am giving him a portion of land the fact that he has a share in the house, but I am exchanging this to give him a portion so that at the end of the day I will owe him the amount outstanding.”*

...

*Court to witness:*

*Q: So he is going to get a piece of land, but he will have no access to the house because the house will be on your share, correct?*

*A: Yes*

...

*Q: That is right apart from the piece of land you are giving im you are also giving him money?*

*A: "I am giving him the portion of land to the amount of value he has in the house and pay him the difference as to what I will owe him on that share that he has."*

[28] Initially, the Respondent was of the view that the land could not have been subdivided profitably for both parties. However, during the proceedings it was confirmed that the land can be subdivided as per attached plan and that the Respondent would be able to build on his plot of land.

[29] Once the proposed subdivision as per the attached plan was accepted by the parties, the Court moved on to division of the value of the house. The value of the house and water tank was valued to be SCR786,180. During the hearing the Court discussed whether the Respondent would be satisfied with SCR258,726.70 compensation for the house (see proceedings, pages 77-79). One third of the of value of the house is SCR258,726.70 (SCR776,180 divided by 3) and one third of the value of the house together with water tank is SCR262,060 (SCR786,180 divided by 3).

[30] At page 79 of the proceedings the Petitioner states that he is not offering that much, but is offering SCR50,726 to which the Court states:

*"you are not going to get far with that Mr Leperre. Okay, you are getting 2/3 of the land and he is getting 1/3. If I have the house valued he will be entitled to 1/3 value of the house. Do you understand me? So even if I adjourn today, I will call for evaluation of the house. I have to give your brother 1/3 of the value of the house."*

[31] It appears that here occurred some misunderstanding as according to the subdivision plan the Petitioner was not actually getting 2/3 of the land as his proposed share was 632 square meters and not 762. As noted above, the Petitioner indicated that he would compensate his brother for the house by giving him a larger than entitled portion of land and money compensation for the remaining.

[32] Total value of land, house and water tank is SCR2,616,180.00. Value of the land alone is SCR1,830,000.00, and the Respondent is entitled to 1/3 of it, which is SCR610,000 plus 1/3 of house and water tank. In total the Respondent is entitled to SCR872,060. Value of

land per square meter is approximately SCR1,601 (SCR1,830,000.00 divided by total number of square metres of the land, 1143). Therefore the Respondent by getting 511 square meters of land only, receives the equivalent of SCR818,111 and the Petitioner would have needed to pay him the remaining SCR53,949 (SCR872,060 minus SCR818,111) in order for the parties to have their shares of 2/3 and 1/3 of the entire property.

[33] From the Respondent's evidence during proceedings and Submissions before both the Supreme Court and the Court of Appeal it appears that the Respondent is of the view that even though he received larger portion of land than he is entitled to, he should still be entitled to 1/3 value of the house because the Appellant has had sole enjoyment of the house for the past 10 years and had the house been rented out, the Respondent would have benefited from a 1/3 share of the rent.

[34] Effectively, it appears from the proceedings that the Respondent was of the view that he is entitled to a larger portion than 1/3 of the entire property because he did not enjoy the benefits of the house for the past 10 years. The Respondent, however, did not state in his Affidavit in Reply (D1) that he should be entitled to such larger share/compensation in the property. At paragraph 4 he averred that i) property cannot be conveniently subdivided due to development covenant; ii) that proposed sub-division was not profitable for him as he will not be able to develop the portion of land; iii) that proposed division failed to take into account that he co-owns 1/3 of the house standing on his brother's proposed portion of land and consequently if property is partitioned as proposed, the Respondent would be deprived of his share in the house. At paragraph 5 he states that *"By way of further answer I pray that the property, the land and the house included, be valued and the petitioner pay to me my rightful share thereof"*. As noted above, he does not ask to be compensated for not enjoying/benefiting from the house co-ownership for the past 10 years.

[35] The Learned Trial Judge applied Article 821 of the Civil Code and section 107(2) of the Immovable Property (Judicial Sales) Act which states that any co-owner of an immovable property may petition to ask for division in kind or *"if such division is not possible, that it*

*be sold by licitation*". The Court decided that the land could be conveniently subdivided and found "no reason to disagree with the plan of the proposed subdivision as submitted by the Petitioner". At paragraph [16] of the Judgment the Learned Trial Judge concluded that the house cannot be conveniently subdivided and awarded the Respondent one third of the value of the house and water tank.

- [36] It appears that the Judgment does not take into account or at least it is not expressly stated that under the proposed subdivision plan, the Respondent receives a greater portion of land than he is entitled to. The Judgement does not state that greater portion or greater compensation was awarded to the Respondent due to him not enjoying the benefits of the potential one third of the rent for the house for the past 10 years as it was solely enjoyed by the Appellant. As noted earlier, this was not pleaded in his Affidavit in Reply but was averred later during proceedings and Written Submissions.
- [37] Therefore, it appears that there is an error in calculation of the compensation ordered to be paid by the Petitioner, now Appellant. Since the Respondent received greater portion of land than he is entitled to, the excess value should have been paid by Respondent to the Petitioner, or in present case, deducted from the compensation ordered to be paid by Appellant to Respondent for the one third share of the house.
- [38] On the one hand, the Petitioner, now Appellant actually was granted what was stated in his prayer – division of land according to the attached plan; and since the Respondent also owns one third of the house and would lose the access to it, the Trial Judge awarded compensation payment. On the other hand, as noted above, the division of entire property was effectively not done according to respective shares of the parties. I agree with the submissions of the Appellant's Counsel that it should have been better explained by the Petitioner's Counsel in the Supreme Court why offered compensation was less than one third value of the house. As noted above, it appears from the Learned Trial Judge's statement during proceedings that she could have understood that the Petitioner would be getting two thirds of the land, even though it is evidenced from the attached plan that it was not so.

[39] Effectively, the Respondent received more than one third of the value of the entire property and reasons for it are not clear from the Judgement itself. The Court did not rule on Respondent's averments regarding larger compensation for loss of enjoyment of the house; and it was not pleaded in his affidavit in Reply.

## CONCLUSION

[40] Therefore and bearing in mind the limitations of the powers of the Court of Appeal with regard to reversing factual findings of the trial judge but wide powers under the Rules of the Court of Appeal, the Court of Appeal may substitute the order of the Supreme Court if it deems that it has powers to do so and in the interest of justice. This view is supported by above cited decision in *In re B (a child)(care order: criterion for review)*[2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911(at 53) with regard to misunderstanding of the evidence by the trial judge:

*“[T]his is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) **which was based on a misunderstanding of the evidence**, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it [...].”*

(emphasis added)

[41] Noting the misunderstanding which is apparent on proceedings and the judgement as explained at paragraphs [30] and [31] above, I find it opportune that the provisions of Rule 31 (5) is exercised in the interest of justice and the sum awarded by the Court below to the Respondent be substituted/readjusted to reflect the pleadings and evidence on record and this namely as enumerated at paragraph [32] above.

[42] In arriving at the above conclusion this Court is of the firm view that the exceptional circumstances of this case renders the readjustment of the award based on the misunderstanding of evidence on record and which power could have been exercised by the trial judge in the court below hence well within the ambit of Rule 31 (5) of the Rules.

## **DECISION**

[43] Based on the above analysis and conclusion the appeal is allowed and the judgement of the Supreme Court is hereby substituted to the extent of the readjustment of the sum to be paid by the Appellant to the Respondent namely as calculated at paragraph [32] above, in the sum of Seychelles Rupees Fifty Three Thousand Nine Hundred and Forty Nine (SCR 53,949/-), hence rendering the parties share of 2/3 and 1/3 of the entire property readjusted as per pleadings filed and evidence led in the court below.

[44] Given the circumstances, no order is made as to costs.

## **ORDER**

[45] As a result, the appeal this Court orders as follows:

- (i) The appeal succeeds and readjustment of the sum to be paid by the Appellant to the Respondent is substituted from that of Seychelles Rupees Two Hundred and Sixty Two Thousand and Sixty cents (SCR 262,060) to the sum of Seychelles Rupees Fifty Three Thousand Nine Hundred and Forty Nine (SCR 53,949/-) as per calculation at paragraph [32] above.
- (ii) Given the circumstances, no order is made as to costs.

---

S. Andre, JA

I concur

---

Robinson, JA

I concur

---

Dr. Tibatemwa-Tibatema, JA



Signed, dated, and delivered at Ile du Port on 19 August 2022.