

IN THE COURT OF APPEAL OF SEYCHELLES

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**Reportable**

[2022] Civil Appeal SCA 73/2019  
SCCA 76 (16 December 2022)  
(Appeal from CS 26/2017) SCSC  
1052

In the matter between:

**EMMANUEL BIBI**

**First Appellant**

**LINDY BIBI**

**Second Appellant**

**HELENE MARIE-THERESE ESPARON  
nee BIBI**

**Third Appellant**

**MARIE MADELEINE DOROTHY BIBI**

**Fourth Appellant**

**PAUL JEFFREY BIBI**

**Fifth Appellant**

**MARCEL GEORGES BIBI**

**Sixth Appellant**

*(all rep. by Mr. F. Elizabeth)*

and

**THE ESTATE OF THE LATE**

**Respondent**

**JOSEPH SAMUEL BIBI**

**Rep by the joint executors Marcus Labrosse**

**And Raneel Achanne Bibi**

*(rep. by Mr. W. Lucas)*

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**Neutral Citation:** *Bibi & Others v The Estate of late Joseph S. Bibi* (Civil Appeal SCA 73/2019) [2022] SCCA 76 (16<sup>th</sup> December 2022) (Appeal from CS 26/2017 SCSC 1052)

**Before:** Andre, Robinson, Dr. L. Tibatemwa-Ekirikubinza JJA

**Summary:** Appeal against a decision of the Supreme Court – Disguised donation – reserved heirs, reductions to gifts *inter-vivos* under the Civil Code of Seychelles Act (Cap 33)

**Heard:** 2 December 2022

**Delivered:** 16 December 2022

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## **ORDERS**

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The Court makes the following Orders:

- (i) The appeal is dismissed and the judgment of the lower court is thus upheld in its entirety; and
  - (ii) Costs are awarded to the Respondent.
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## **JUDGMENT**

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**ANDRE, JA**

### **INTRODUCTION**

- [1] This is an appeal arising out of the notice of appeal filed on 26 December 2019 by Emmanuel Bibi, Lindy Bibi, Helene Marie-Therese Bibi, Marie Madeleine Dorothy Bibi, Paul Jeffrey Bibi, and Marcel Georges Bibi (Appellants) against The Estate of late Joseph Samuel Bibi (duly represented by the joint executors Marcus Labrosse and Raneel Achanne Bibi (Respondent), being dissatisfied with the decision of Her ladyship Laura Pillay J given at the Supreme Court on the 27 November 2019 in Civil Side No. 26 of 2017 (impugned judgment).
- [2] The Appellants as per cited notice of appeal, appeal against the whole of the decision upon the grounds of appeal set out in paragraph 2 of the notice of appeal and to be considered in detail below. The Appellants further seek the relief set out in paragraph 3 of its notice of appeal namely, the setting aside of the impugned judgment; ordering the land Registrar to rectify the land register and to cancel the registration of register title numbers J1567 subdivided into J3138 and J3139 and title number J1568 subdivided into J3140 and J3141; to register title numbers J1567 subdivided into J3138 and J3139 and title number J1568 subdivided into J3140 and J3141 in the name of the estate of the late Marie Jeanette Valerieenne Bibi to be redistributed amongst all the heirs of the estate in accordance with their respective shares provided by law.

## BACKGROUND

[3] The Appellants are children of the deceased Mrs. Bibi. The Respondent is the estate of the late Mr. Bibi, who was also the child of the deceased Mrs. Bibi. The Supreme Court case (CS 26/2017) concerned two plots of land, the transfer of which the Appellants, then Plaintiffs, sought to declare as a disguised donation. The Plaintiffs sought the following orders in the Supreme Court:

- (1) to declare that the transfer of titles J1567 and J1568 by the deceased to the first Defendant was a disguised donation or an alienation, subject to return;*
- (2) to order the reduction of the disguised donation by ordering the first Defendant to:
  - i) Return titles J1567 and J1568 or the excess share to the succession of the deceased; or*
  - ii) Return or transfer the Plaintiffs' share in titles J1567 and J1568 to the Plaintiffs.**
- (3) That the first Defendant be directed to account for the fruits of titles J1567 and J1568 and to pay them or the share in excess of his title to the succession of the deceased.*
- (4) To make any order that the Court deems fit in the circumstances.*

[4] Supreme Court delivered the Judgment on the 27<sup>th</sup> of November 2019 dismissing the Plaintiff and the appellants have filed the Appeal against the said Judgment.

## GROUND OF APPEAL

[5] The Appellants set out three grounds of appeal which *in the verbatim* state as follows:

**Ground 1** – The learned trial Judge erred when she dismissed the Appellants' case on the basis that the lack of evidence as to the total value of the estate and the properties in question is fatal to the Appellants' case.

**Ground 2** – The learned Judge erred when she failed to follow and apply the ratio decidendi in the case of *Hall v Parcou & Anor CS No. 353/2009 (2017)* to the present case.

**Ground 3** – The learned Judge erred when she made a finding at paragraph 32 “. . . that the late Joseph Bibi approached his mother requesting the transfer of the land parcels onto his name in order to secure a loan for his business and the mother accepted with the intention of doing just that and not transferring the property to him outright as the Defence suggests.” Having made this finding the learned Judge erred when she dismissed the Appellants’ case.

[6] The Appellants seek three reliefs as cited in paragraph [2] above. Costs are also prayed for by the Appellants.

## **SUBMISSIONS OF PARTIES**

### **Appellants’ Submissions**

[7] The submissions of the Appellants filed on 17 November 2022 in relation to the three Grounds of Appeal are interlinked. In relation to Ground 1, the Counsel also submits regarding finding in paragraph [32] (relevant to Ground 3) and regarding ratio decidendi in *Hall v Parcou* (relevant to Ground 2).

[8] With regard to Ground 1, the Appellant submits that in paragraph 37 of the judgment the trial judge found that “*the lack of evidence as to the total value of the estate and the properties in question is fatal to the case*” and that “*this Court is unable to make a declaration as to whether or not the said transfers were over and above his lawful share in the succession without the total value of the estate inclusive of the land, house, and shop*”.

[9] The Appellant further submits that due to the finding in paragraph [32] the court ought to have come to a different conclusion. The Appellant submits that the intention of the mother was not to transfer the property outright to deprive the remaining heirs but to assist the Respondent in raising loans for his business. It is submitted that “*It is clear from the Court's findings that the transfer of the properties from the mother to the son, was indeed a disguised donation intended to assist the son but the intention was not to permanently deprived the heirs of their rightful inheritance*”.

- [10] Thereafter, the Appellants submit that *“the fact that there was no valuation of the property was not fatal to the case as the appellants in their pleadings had sought an order from the Honourable Court “to make any order it thinks fit”.* It is submitted that due to that prayer, the trial Judge should have ordered the valuation and such an approach would have been consistent with the decision in *Hall v Parcou* referred to by the trial judge in paragraph [35] of the judgment.
- [11] With regard to Ground 2, the Appellant submits that having cited *Hall v Parcou* case where, as submitted, the Court disregarded the fact that no evidence had been provided regarding the value of the property and *“ordered the return of the alienated property back to the estate”* the trial Judge in the present case failed to give reasons for departing from the ratio decidendi in that case.
- [12] With regard to Ground 3, the Appellants reiterate what was stated in relation to Ground 1 by submitting that the trial judge erred in not addressing the intention of the mother, being only to help the son, and not permanently deprive the remaining heirs of the inheritance.
- [13] It is further submitted that the trial judge erred in not considering that the mother, before her death, sued the Respondent *“seeking the return of her property”* and concluding with the question of *“why would the mother of Joseph Samuel Bibi filed a case against her son if her intention was to make an outright sale of the properties to her son?”*.
- [14] The Appellants conclude that *“the learned trial Judge erred when she dismissed the case of the appellants in the face of overwhelming evidence showing that the transfer of the properties to Joseph Samuel Bibi was indeed a donation deguisee and that it was never the intention of the mother to transfer the properties to Joseph Bibi, as a gift to him”*.
- [15] It is further concluded that there was no proof before the Court that consideration was paid for the land, which points to the evidence that the mother *“did not intend to sell her properties to her son, Joseph Bibi, depriving the rest of her children of their rightful inheritance”*.

[16] Finally, based on the above submissions, the Appellants pray to this Court that this appeal should be allowed as prayed for with costs.

### **Respondent's Submissions**

[17] By way of filed submissions of 22 November 2022, the Respondent in a gist submits as follows.

[18] In reply to Ground 1 of the Appeal, the Respondent relies on Article 918 of the Civil Code; decisions *Clothilde v/s Clothilde* 1976 SLT 245; *Pragassen v/s Vidot* 2010 SLR 163; and *Reddy and Anor Versus Ramkalawan*. It is submitted that there is an irrebuttable presumption that a sale to an heir *avec reserve d'usufruit* is a donation, which is not void but reducible to the *quotite disponible* and that there must be a "*rapport a la masse*" of the value of the land in excess of the "*quotite disponible*". It is further submitted that a party who relies on Article 913 must prove the value of the gift and the estate. Respondent further submits relying on *Pragassen v/s Vidot* that bad faith and fraudulent pretence of the deceased must be proved.

[19] In reply to the Appellant's argument regarding prayer for any order the Court thinks fit, the Respondent submits that, "*It is strict rules of pleading that the court cannot grant a relief not prayed for in particular the pleading of valuation is the most essential element of the claim before the court, therefore, failure to place before the court such evidence as to the value of the property is fatal for the Appellants case which warranted to a dismissal*". The Respondent, therefore, concludes that with regard to the Ground 1 the trial Judge was right to dismiss the Plaint "*on the ground that one of the essential element for the calculation of the excess or reserved portion of the donated property is the value of the said property which the Appellants has failed to place as evidence before the court*"

[20] In reply to Ground 2 of the Appeal the Respondent submits that the trial Judge has distinguished the case of Hall versus Parcou citing paragraph 35 of the Judgement where the Trial Judge states that in Hall v Parcou there was no other property to distribute, whereas in current case there is also a shop and a house in addition to the alienated

property. The Respondent, therefore, submits that the Trial Judge was correct to find that the *ratio decidendi* in *Hall v Parcou* was not applicable in the present case.

[21] In reply to Ground 3 of the Appeal, the Respondent submits that “*This ground of Appeal does not raise new or different issues as in the first two grounds hence, In response to this ground of appeal, the Respondent relies on its submission under ground 1*”.

[22] The Respondent moves for the dismissal of the appeal with costs.

### **ANALYSIS OF THE GROUNDS OF APPEAL**

[23] Since the Grounds of Appeal and submissions in support are interlinked, the following issues can be identified for consideration in this appeal:

- i. Value of the property – relevance and whether lack thereof is fatal to the case
- ii. *Hall v Parcou* *decidendi*
- iii. The intention of the mother

#### **Ground 1 and 2 - Value of the property - relevance and whether lack thereof is fatal to the case**

[24] Section II - The Reduction of Gifts and Legacies of the Civil Code (before the amendments) relates to the reduction of gifts *inter vivos*. Article 920 provides that a gift that exceeds the disposable portion “*shall be liable to be reduced to the size of that portion at the opening of the succession*”; and under Article 921 such reduction can be only demanded by “*by those in whose favour the law has provided the reserve, by their heirs or assigns*;” Articles 918, 922 and 923 of the Civil Code make it clear that the value of the entire estate and the property gifted is paramount:

“*Article 918*

***The value of full ownership of the property alienated, whether subject to a life annuity or absolutely or subject to a usufruct in favour of one of the persons entitled to take under the succession in the direct line, shall be set against the disposable portion; the excess, if any, shall be returned to the estate. This calculation and return shall not be demanded by other persons entitled to take***

*under the succession in the direct line who have agreed to the alienation, and in no circumstances by those entitled in the collateral line.*

Article 922

***The reduction shall be made by taking into account the total asset value of all the property existing at the death of the donor or the testator.***

***After a deduction of the debts, the assets given by way of a gift inter vivos according to their condition when the gift was made and their value at the opening of the succession are added together. If the property has been alienated, its value at the time of the alienation and, if there is subrogation, the value of the converted property is taken into account when the succession opens.***

***The disposable portion of which the deceased was entitled to dispose shall be calculated on the basis of all these assets having regard to the class of heirs whom the deceased has left.***

Article 923

***Gifts inter vivos shall only be affected by a reduction if the value of all the property included in the testamentary dispositions is insufficient; if the gifts inter vivos must be reduced, the process of reduction shall start from the last gift following a backward order to the earliest gift.***

(emphasis added)

[25] It was established in *Pragassen v Vidot* (2010) SLR 163 that, “An inter vivos gift (made by a deceased who is survived by 9 heirs), which is in excess of one-fourth of the value of the estate, is contrary to art 913 of the Civil Code. The party who is relying on art 913 of the Civil Code **must prove the value of the gift and the estate** in order to successfully rely on art 913” (emphasis added).

[26] The Court further held:

***“There is neither any pleading nor any evidence before this Court adduced during the hearing of this suit as to the value of the whole property of the deceased. Neither do we have the value of the gifted property. Hence this Court cannot determine the value of the gifted property in relation to the value of the whole property of the deceased in order to ascertain whether this falls foul of article 918 of the Civil Code of Seychelles. As it is the plaintiff who asserts, the onus is on him to prove that element. I find that the plaintiff has failed to do so.***

..... *In the circumstances, I find and conclude that it is not possible for this Court to adjudicate whether the value of the disposition by way of that gift inter vivos exceeds the value of the disposable portion in terms of article 920 of the Civil Code of Seychelles for such to be reduced to the size of the appropriate portion at the opening of the succession”*

(Emphasis added)

[27] In *Reddy & Anor. v Ramkalawan* (CS 97/2013) [2016] SCSC 31 (26 January 2016) it was emphasised that Article 918 creates irrebutable presumption in favour of disinherited heirs and that it was not possible at the time of the decision to disinherit one’s child under Seychelles law. The Court further emphasised that “*it is the value of the donation that matters in actions such as the present one*” and that it is the value in excess that must be returned, not the immovable property. The Court also referred to Article 922 and further held that “*Article 922 provides that it is the total asset value of all the property existing at the death of the donor or the testator that is taken into account for the reduction. **Debts must also be deducted.***” (Emphasis added). In *Reddy & Anor v Ramkalawan*, though, there was a valuation of the property provided in the evidence.

[28] In *Adonis v Cedras* (CS 44/2020) [2021] SCSC 613 (22 September 2021) the plaintiff has not provided evidence of the value of the whole estate and, among other prayers, actually prayed for the valuation of the property. It was admitted by the defendant that the plaintiff also approached the defendant in order to jointly commission a valuer’s report. The Court stated the following with regard to establishing the value of the estate:

“[12] *Indeed as submitted by counsel for the Defendant in order to establish that there has been a donation deguisee the Plaintiff has to show that that there has been a gift to the Defendant over and above the disposable portion. **This of course means that the Plaintiff has to establish the value of the estate in order to calculate the reserved and disposable portion in relation to the number of reserved heirs.***” (Emphasis added)

[29] It was held that it was not proved and the case was dismissed. Although, in addition, to value not being proved the defendant was not the reserved heir and the court held that, “*the right to claim back the value in excess of the disposable portion exists for one reserved heir as against another reserved heir. There is no evidence on record that the*

*Defendant is a child of the deceased which would bring her within the ambit of articles 913 and 918”.*

- [30] Therefore, in *Adonis v Cedras* again the importance of valuation was emphasised and even though the plaintiff asked the court to order valuation, the court dismissed the case.
- [31] Nevertheless, in the present case, the valuation was not even pleaded. The Appellants stated now in their submissions before the Court of Appeal that because the Plaintiff included prayer "*to make any order it thinks fit*", the trial Judge should have ordered valuation and it would have been consistent with the decision in *Hall v Parcou & Anor* (CS 353/2009) [2017] SCSC 92 (06 February 2017). Firstly, prayer for any order court thinks fit is quite wide and is often included in the complaints. However, in my opinion, while it may be taken to give the court wider discretion in respect to pleadings, it must not be taken to mean that the court needs to make the case for the Counsel and/or correct pleadings' shortcomings. Furthermore, the court needs to be mindful of the established *ultra petita* principle and if "*to make any order it thinks fit*" would be taken to mean anything that the court thinks is more suitable than what the party asked for, it can consequently give other grounds of appeal based on *ultra petita*.
- [32] Secondly, the Appellants neither pleaded valuation nor relied on *Hall v Parcou* findings. Therefore, the argument that the trial Judge should have ordered valuation as in *Hall v Parcou* seems like an afterthought. The distinguishing features of this case from *Hall v Parcou* are discussed below in this judgment.
- [33] I also agree with the submissions of the Respondent that "*the court cannot grant a relief not prayed for in particular the pleading of valuation is the most essential element of the claim before the court . . .*". Situation could have been different for example if the valuation of the alienated property was not possible and the Appellants asked the court to order such valuation. Furthermore in the present case specifically, considering there are other properties within the estate – the Appellants should have at least provided a valuation of the estate.

[34] In *Chetty v Chetty* (CS 253/2018 ) [2020] SCSC 366 (02 July 2020) Dodin J considered the issue of “*whether the failure on the part of the Plaintiff to lead evidence as to the value of the estate is fatal to the claim*” as an academic point. Dodin J referred to Article 922 and Article 926 (testamentary disposition) and stated that the disposable portion needs to be calculated having regard to all the assets of the deceased and that it “*is clear that what matters when determining the quotite disponible is the total asset value of all the property as per article 922*”. Dodin J further stated that in order for the Court to make any reduction/adjustment orders it would be necessary to ascertain the value of the deceased’s estate.

[35] Dodin J further considered *Hall v Parcou* (CS 353/2009) [2017] SCSC 92 (07 February 2017); *Pragassen v Vidot* (CS 360/2005) [2009] SCSC 124 (02 July 2010) and judgment presently being appealed – *Bibi & Ors v Estate of Joseph Samuel Bibi* (CS 26/2017) [2019] SCSC 1052 (27 November 2019). Dodin J stated:

“*Hall v Parcou* (CS 353/2009) [2017] SCSC 92 (07 February 2017) highlights that there may be situations where the Court is nevertheless able to make orders for reduction but that appears limited to instances **where it is clear what the estate comprises of without further adjudication of its value**”

(Emphasis added)

[36] With regard to the *Bibi* decision, Dodin J stated that he considered the decision in *Hall v Parcou* but the determination of the court was that it was not possible in this case to make such orders.

[37] In *Hall v Parcou* the deceased transferred all the property owned. The Court held the following:

“[31] *The transfers of property to the Defendant should therefore not have exceeded one quarter of the Deceased's estate. The evidence before the court is that outside of the three properties transferred to the Defendant there is no other property left to distribute among the heirs. Hence, the entire estate has been transferred unlawfully to the Defendant. The three quarters share of the estate transferred in excess has to be brought back into the hotchpot for redistribution into four equal shares. It must be emphasised that Article 918 refers to the value of the property and not the property itself being returned to the hotchpot.*”

[38] Pillay J in the present case distinguished circumstances in *Hall v Parcou* with present case quite clearly:

“[35] In the case of *Hall v Parcou & Ano.* (CS 353/2009) [2017] SCSC 92 (07 February 2017) in spite of no evidence being led as to the value of the property, the Court ordered that the value of the alienated property had to be return to the estate on the basis of the evidence that there was no other property to distribute amongst the other heirs outside of the three properties alienated.

**[36] In the current case, however, it is in evidence that there is a shop on the property, which is being rented, behind which stands the house of the late Jeannette Bibi.**

[37] With all that said the lack of evidence as to the total value of the estate and the properties in question is fatal to the case. As much as the evidence shows that about 2500 square metres of land was transferred to the late Joseph Bibi from the late Jeanette Bibi to the exclusion of his siblings this Court **is unable to make a declaration as to whether or not the said transfers were over and above his lawful share in the succession without the total value of the estate inclusive of the land, house and shop.**”

[39] It is clear that in the present case the property transferred to the Respondent is not the only property forming part of the entire estate of the deceased mother. Moreover, with regard to the shop, when Ms. Madeleine Bibi was asked about the management of the shop and proceeds from renting it out, she stated that rent money was received by “us” when asked who is us, she replied: “*I was the one that was receiving the money*” (see pages 101-102 of the Court of Appeal Bundle). Without going into a detailed analysis of whether the shop was an incorporated business or not, if it belonged to the deceased mother or if she benefitted from the proceeds of the business, arguably the profits and liabilities, subject to the nature of ownership, should also form part of her estate’s assets and liabilities which needs to be taken into account when ascertaining the full value of the estate in accordance with Article 922. Furthermore, the valuation of a business may potentially be more complex than the valuation of an immovable property and moreover include tax considerations also. Therefore, this could also be a further distinguishing factor in the present case. In my view, the circumstance of *Hall v Parcou*, namely, that all the property was transferred and all were immovable property is distinguishable from the present case, where there was property left in the estate and one of the assets is a shop

potentially generating income, not just immovable property. Therefore, the trial Judge had and indicated sufficient reasons not to apply *Hall v Parcou* in terms of ordering the valuation of the estate.

[40] In *Racombo v Sinon* (CS 124/2018) [2020] SCSC 155 (26 February 2020) the plaintiff also had not provided the valuation of the estate but the Court ordered dispositions under the Will to be reduced so that the reserved heirs receive their portion of the inheritance. In that case, two minor children of the deceased were left out of the Will. It was held:

*“[24] The Plaintiff has however not provided a valuation of the whole estate to assist the Court to come to a conclusion with regards to whether or not the dispositions fall within the reserved or disposable portions. The rule as per *Pragassen v Vidot* (2010) SLR 163 is that a party who is relying on Article 913 of the Civil Code must prove the value of the gift and the estate in order to successfully rely on Article 913. However in this matter the fact that the deceased’s two minor children Shannon and Aisha Racombo have not been bequeathed anything in the Will in itself renders the Will dated 19th February 2018 contrary to Article 913, in accordance with the finding in *Calixte v Nibourette* (2002) SLR 35 that children unaccounted for in wills succeed to all but the disposable portion of the estate. It is worth noting at this juncture that there is no claim that the two minor children have been given any gifts during the deceased’s lifetime which could have been taken into account for the purposes of this case.*

...

[26] With that said it is the finding of this Court that the deceased could only dispose of  $\frac{1}{4}$  of his estate to the Defendant with the remaining  $\frac{3}{4}$  reserved for distribution amongst his four children.

[27] In the circumstances I declare that the dispositions in the Will dated 19th February 2018 is contrary to law and should be reduced as per paragraph [26] above in order to ensure that all the reserved heirs of Finley Jacques Racombo receive their reserved portion of his estate in Seychelles.”

(emphasis added)

[41] Circumstances in *Racombo v Sinon* are also different from the present case. Firstly, with regard to findings in relation to the Will. Secondly, there was no evidence that the minor children have received any inheritance from the deceased, either under the Will or otherwise.

[42] The Appellants in the present case did not argue that they presented enough/or any evidence with regard to the value of the estate, instead, it was submitted that in view of *Hall v Parcou*, absence of evidence of the value of the estate is not fatal to the case. As illustrated above, there is a requirement under the Civil Code that the whole value of the estate needs to be established. Plaintiff not establishing the value is not necessarily fatal to the case as shown in *Hall v Parcou* and *Racombo v Sinon*, but other cases in their own circumstances dismissed the case when no evidence was provided.

[43] Therefore, the conclusion that can be made is that not providing evidence of the value of estate and gift is not always fatal to the case; what is fatal is failure to establish that the value of the alienated property exceeds the disposable portion. In cases where the plaintiff proved this element, even though valuation was not provided, the court ordered the excess to be returned to the estate. In other cases, this element was clear as there was nothing else left for the reserved heirs, unlike the present case. Therefore, it was crucial for the Appellants to show that the properties transferred to the Respondent exceeded the disposable value of the estate as it came to light during evidence that the estate had other properties. Since they have not done so, it was fatal to their case in circumstances where estate comprises not just the alienated property.

[44] Based on the above analysis, Grounds 1 and 2 fail.

### **Ground 3 – the intention of the mother**

[45] The Appellants argue that the mother did not intend to transfer the land outright but only “to help him [Joseph Bibi] obtained a loan to invest in his business **but not to permanently deprived her other nine children of their rightful inheritance**” (emphasis added).

[46] It is submitted that the trial judge was therefore wrong to dismiss the case. Further, at paragraph 4 of the submissions (in relation to Ground 1 but relevant to Ground 3) the Appellants conclude: “It is clear from the Court's findings that the transfer of the properties from the mother to the son, **was indeed a disguised donation intended to**

***assist the son but the intention was not to permanently deprived the heirs of their rightful inheritance***” (emphasis added).

[47] Firstly, the Appellants' submissions regarding intention are somewhat contradictory because if the mother did not intend to transfer the property outright, there should have been no disguised donation as a disguised donation is a gift presented as a sale, in simple terms. It was held in *Botel v Monnaie Ruddenklau* (CS 55/1999) [2001] SCSC 20 (28 September 2001) that, “*Where it is established that there was a temporary transfer of property subject to the conditions of retransfer, the transaction is not a gift*”. The Court addressed the intention of the donor with regard to gifts. The case concerned a plaint alleging that the transfer of property was a gift *inter vivos* and was opposed on the grounds of prescription and res judicata. The case has been previously brought before the Supreme Court and the Court of Appeal involving two alternative claims that were pleaded: "disguised sale" and alternatively, "disguised gift *inter vivos*". Without going too much into details of this case, the following remark of this Court regarding intention when making gifts is of value. It was stated:

*“In the end result, the trial Court found in favour of the above facts as pleaded, namely that there was an agreement by the Defendant to temporarily hold the property for and on behalf of the Plaintiff and that in spite of the deed of sale, the Plaintiff had retained the "beneficial interest" of the land. Accordingly, the trial Court held that the ostensible sale was rescinded by the operation of a back letter. At that stage, the trial Court could not proceed further, and determine, in the alternative, that the same transaction equally amounted to a gift (whether disguised as a sale or not) since a gift as defined under Article 894 of the Civil Code would constitute "an act whereby the donor irrevocably divests himself of the ownership of the thing in favour of the person who accepts it." The alternative claim that the transaction amounted to a gift, albeit 'disguised', became redundant.*

[48] Therefore, if the deceased mother in the present case did not intend to give the land outright, it can be argued that she did not intend to irrevocably divest herself of the ownership in favour of Joseph Bibi. She, therefore, did not intend to absolutely transfer the land and the disguised donation should not even be relevant and a different issue may arise.

[49] Respectfully, it is not entirely clear which particular finding in relation to actual pleadings the trial judge was making in paragraph 32 of the Judgment:

“[32] *It is the considered view of this Court that the truth is that the late Joseph Bibi approached his mother requesting the transfer of the land parcels onto his name in order to secure a loan for his businesses and the mother accepted with the intention of doing just that and not transferring the property to him outright as the Defence suggests.*”

[50] Basically, it is not clear with certainty whether this paragraph means that the deceased mother expected the property to be transferred back to her at some point once the loan business is concluded; or whether it may mean that there was no actual money transfer or consideration paid was less than the actual value. If the paragraph means the latter, then it can indicate that the finding is that transfer was indeed a disguised donation. If the finding means that the deceased mother expected a transfer back, according to *Botel v Monnaie Ruddenklau* transfer could not have been a gift.

[51] The Appellants in the Plaintiff alleged that the transfer was a disguised donation and asked for either return of the property to the estate or the value thereof. Finding that the transfer is a disguised donation alone does not mean that value of the property shall be returned as was pleaded by the Appellants. Basically, even if the sale was indeed a disguised donation, it does not mean that it is automatically void and value must be returned to the estate. The value shall be returned if it exceeds the disposable portion, not just because it is a disguised donation.

[52] In *Pragassen v Vidot* it was held that the intention of the donor is material to establish a disguised donation. In *Reddy & Anor v Ramkalawan* however, the court held that *Pragassen v Vidot* was wrong just in that regard:

“[23] *In the circumstances, the submission made by Counsel for the Defendant in respect of proof that must be met to rebut the presumption of validity of a deed in respect of a donation has no application to this case. The fact that a donation is made to an heir in excess of the disposable portion does not amount to fraud, it only amounts to a disinheritance disguised as a donation. That is the meaning of donation déguisée in this case. Hence, the question of fraudulent donation or its proof where it concerns disinherited heirs does not arise and is completely immaterial. To that extent the case of Pragassen v Vidot (2010) SLR 163 was*

*wrongly decided. This is rightly so since it is not the deed itself that is being attacked but the alienated inheritance.”*

- [53] It should be borne in mind that disguised donations may be alleged not only in cases of inheritance. Under UK law **by way of mere example** (emphasis is mine), equivalent to disguised donations can be used to avoid tax in relation to gifts or evade liabilities to creditors. In these kinds of cases, the intention of the donor would of course be important and the courts would look at various factors to ascertain intention such as, among others, consideration paid, time of the sale, etc. In the UK, however, there is no forced heirship. In terms of inheritance and countries with forced heirship, disguised donations or gifts *inter vivos* can be potentially used as methods to attempt to disinherit the reserved heirs and avoid forced heirship. However, as was stated in *Reddy & Anor v Ramkalawan*:

*“[21] An owner of property is not precluded by law from selling his land or giving it away. A disguised sale is also valid if the sale respects the conditions of form, the rules of contract and public policy (see Article 931, Civil Code of Seychelles). Similarly the de cuius can sell or make a gift to an heir - as long as that sale or the gift does not so diminish the estate that the reserved rights of the heirs are not satisfied.*

...

*[22] Article 918 creates an irrebuttable presumption in favour of disinherited heirs – a donation to one entitled to succeed to the exclusion of others who are also entitled to succeed shall be reduced if it exceeds the disposable portion (quotité disponible). Nothing more, nothing less. It is nigh impossible to disinherit one’s child under Seychellois law.”*

- [54] Therefore, in Seychelles under the Civil Code prior to the amendment, in cases of inheritance, the intention of the deceased with regard to gifts *inter vivos* or disguised donations is indeed immaterial. **Whether or not a person actually intended to disinherit the legal heirs, if a person disposed of more than the disposable portion of the estate as per Article 913, a person disinherited reserved heirs and the excess shall be returned.** Excess should be valued as the actual value of the alienated property according to the provisions of the Civil Code and not as what the deed of transfer states. Here is where the disguised donation can be most relevant as even if the deed of transfer states one consideration if it is a disguised donation, the real value will need to be ascertained to determine the excess.

[55] Therefore, the Appellants' argument regarding Ground 3 fails as the trial Judge cannot be held to err in finding/observation that the mother did not intend to transfer the property outright and dismiss the case which pleaded disguised donation. The intention of disguised donation is immaterial in inheritance matters. The argument that "*It is clear from the Court's findings that the transfer of the properties from the mother to the son, was indeed a disguised donation intended to assist the son but the intention was not to permanently deprive the heirs of their rightful inheritance*" is somewhat confusing. Transfer with an intention not to permanently transfer the land is not a disguised donation. The disguised donation, in simple terms, is a gift presented as a sale. Transfer with an intention to receive the property back at some point or reserve interest in the property is something else, which was not pleaded in the Plaintiff, but it is not a disguised donation.

[56] Therefore, if the Appellant argues that the deceased mother never intended to transfer the property permanently and absolutely, the case should have been based on some other arguments, not disguised donation, and if that was so, Ground 3 of the Appeal should have been made clear. Instead, it puts two together – absolute transfer was not intended but it was done as a disguised donation. In my mind, these arguments contradict each other as if the absolute transfer was not intended it cannot be a gift, but it is argued that it was a gift presented as a sale. In my view, Ground 3 of the Appeal should fail mainly on the basis that intention is immaterial in relation to disguised donations in inheritance matters and the case was dismissed due to a lack of evidence on the value of the estate and alienated property. Further, it is not clear what the Appellants are arguing.

## CONCLUSION

[57] As illustrated above, the major factor that needs to be established in cases where a reserved heir asks for the return of the value of the alienated property back is that the transfer exceeded the disposable portion of the assets. It is not always fatal to the case where Plaintiff does not establish the value of the estate and alienated property. The court has ordered valuation or ordered reductions to be made in cases where it was clear that the entire estate was alienated and where the entitled heirs received nothing. As it became

apparent during the court proceedings, this was not the situation in the present case as apart from alienated property the estate still comprised the shop and the house. Neither did the Appellants disclose that in the Plaintiff and presented valuation of that property, nor did they ask the Court to order valuation of the alienated property.

[58] The intention of the donor with regard to disguised donations in inheritance cases is immaterial. The most important factor is that a donation exceeds a disposable portion. Whatever the court's observations with regard to the intention of transfer were, in my view they were not the deciding factors. The deciding factor was that the court was unable to determine whether the transfer of land to Joseph Bibi was in excess of the disposable portion out of the whole estate, considering the estate also comprised the shop and the house. Therefore, the trial Judge's observation/finding in relation to the intention of the mother was immaterial for dismissal of the case as was pleaded; it was dismissed based on lack of evidence regarding the value of the estate and transferred property.

## **DECISION**

[59] Having found no merit to each of the grounds of appeal as raised by the Appellants, the appeal is dismissed and the reliefs sought cannot be granted. The judgment of the lower court is thus upheld in its entirety.

## **ORDER**

[60] As a result, this Court orders as follows:

- (i) The appeal is dismissed and the judgment of the lower court is thus upheld in its entirety; and
- (ii) Costs are awarded to the Respondent.

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S. Andre, JA

I concur

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Dr. L. Tibatemwa-Ekirikubinza, JA

**ROBINSON JA**

[61] I agree with the conclusion arrived at by Andre JA in her judgment that the appeal should be dismissed.

\_\_\_\_\_  
F. Robinson, JA

Signed, dated, and delivered at Ile du Port on 16 December 2022.