

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] (18 December 2023)

SCA 13/2023

Arising in MA 240/22

Out of CS 113/2019

LUCIE POOL

(rep. by Basil Hoareau)

Appellant

And

CYRIL MALVINA

(rep. by Serge Rouillon)

Respondent

Neutral Citation: *Pool v Malvina* (SCA 13/2023) [2023] (Arising in MA 240/2022 Out of CS 113/2019) (18 December 2023)

Before: Fernando, President, Twomey-Woods, Tibatemwa-Ekirkubinza JJA

Summary: Meaning of interlocutory judgment- death of defendant- abatement of suit- sections 176 – 179 SCCP.

Heard: 4 December 2023

Delivered: 18 December 2023

ORDER

(1) The appeal is allowed. The matter is remitted to the court below for appropriate orders to be made in light of this Court's decision, inter alia the substitution of a representative of Mr. Marie's Estate in his stead.

(2) Each party shall bear its own costs in this appeal.

JUDGMENT

TWOMEY-WOODS JA

(Fernando, President and Dr. L. Tibatemwa-Ekirkubinza JJA concurring)

Background

1. The matter at hand pertains to the sale of jointly owned land in Anse Aux Pins, specifically referred to as Parcel S12948. In a Complaint initiated by Cyril Malvina (referred to as Mr. Malvina), it is alleged that he bought the land from Charles Marie (the 1st Defendant in the lower court, now deceased, henceforth referred to as Mr. Marie). After Mr. Malvina paid the sale proceeds and signed the transfer of title document, he discovered that the land was not solely owned by Mr. Marie, but rather had multiple co-owners. Consequently, Mr. Malvina filed a lawsuit against Mr. Marie and the Attorney and Notary Public, Ms. Lucie Pool (hereafter referred to as Ms. Pool), who had prepared and executed the transfer deed.
2. Both Mr. Marie and Ms. Pool in their respective defences, averred that Parcel S12948 was a subdivision of a larger parcel of land, namely Parcel S2120, which had erroneously been registered by the Land Registration Division into the names of Mr. Marie and other co-owners when in fact it should have been registered solely into Mr. Marie's name. They further averred that they had undertaken to rectify the error by petitioning to partition the land in the Supreme Court and that this explanation had been accepted by Mr. Malvina.
3. Before the Complaint could be heard, Ms. Pool filed a motion in the court *a quo* in which she submitted that Mr. Marie had passed away and that the matter could not proceed until an executor was appointed to represent the estate of Mr. Marie. She asked for abatement of the case. The motion was opposed by Mr. Malvina on the grounds that there had been no error in the registration of the subdivision, that Mr. Marie had not exclusively owned the land in issue and that Ms. Pool had been complicit in fraudulent transactions in relation to the land and that the trial should proceed as scheduled.
4. In a ruling delivered on 3 April 2023, the learned Chief Justice rejected the motion for abatement of the case and ordered that the case proceed against Ms. Pool only. He reasoned that as the case was purely based on a breach of a sale agreement which had been allegedly committed through the professional negligence of Ms. Pool and as a

result of which compensation was claimed both severally and jointly, the cause of action survived.

5. Dissatisfied with this ruling, Ms. Pool has now appealed to this court.
6. Before I can address the grounds of appeal, I must deal with a motion filed by opposing Counsel on 21 November 2023.

The application to strike out the appeal

7. Mr. Malvina has filed an application supported by an affidavit for an order that the appeal be struck out for:

- (1) failing to file the heads of appeal within the allotted time as per the provision of the Seychelles Court of Appeal Rules.*
- (2) failing to apply for leave to appeal from an interlocutory order of the Supreme Court.*
- (3) abuse of process.*

(1) Delay in filing heads

8. With regard to the first limb of the application, Ms Pool has filed an affidavit in which she has explained that she informed the Assistant Registrar of the Court of Appeal of the fact that her lawyer had been taken ill and that subsequently had had his licence revoked. She had offered to sign and file the heads of argument but was subsequently advised at a preparatory hearing held on 14 November 2023 that it was best that she sought the assistance of Counsel.
9. Indeed, the court seems to have acknowledged the predicament Ms Pool found herself in and seemingly gave her leave to pursue the appeal. The following exchange took place and bears witness to this fact:

“Court: You will be appearing, Ms. Pool?”

Ms. Pool: No, Mr. Renaud is my lawyer, but I understand he is sick, he has been in hospital twice over the last few months, and I called him during the week, but he is still on sick leave at home and he is not able to attend today, but I do not know if he will be able to do the appeal, or I would have to –

Court: I am sure Mr. Hoareau (present in Court) will help you. There you are, he is nodding his head to me, so I take it –

Mr. Hoareau: I had already spoken to my learned friend about this.

Court: Because, you know, Ms. Pool, I am a person, I do not like adjournments, and also you would realise, I think Mr. John Renaud has already filed his Written Submissions, Skeleton Heads.

Ms. Pool: Yes.

Court: You are aware of it?

Ms. Pool: Yes.

Court: So, it is a question of just showing it to him, maybe he may want to add on, but if you want to add on you will have to do it fairly fast, and then ensure that.

10. I note further that the brief was served on Ms. Pool on 13 September 2023 and the skeleton heads dated 31 October 2023 were filed by Mr. Renaud on 7 November 23. I take note that Ms. Pool filed an affidavit explaining the circumstances leading to the delay.

11. I also note that the Registrar issued a notice to the Court on 13 September 2023 that Mr. Renaud was indisposed until 31 September and that his licence was subsequently revoked.

12. In these special and extraordinary circumstances, I am minded to apply the proviso in Rule 24 (k) of the Seychelles Court of Appeal Rules, which allows the court to use its discretion to hear an appeal, notwithstanding that heads of argument have not been filed on time. I am of the view that reasons have been given for this Court to condone the delay.

(2) leave to appeal from an interlocutory order

13. With regard to the second limb of the application, Mr. Rouillon, learned Counsel for Mr. Malvina has submitted that the case has been set for continuation in the court below and that this is an appeal from an interlocutory order of the same court, which can only be allowed if leave is sought from either court. He relied on the case of *EODC Operations Limited v Lincoln* (SCA 42 of 2020) [2023] SCCA 3 (24 February 2023). As no leave has been sought in the present case, he submits that the appeal should be struck out.
14. Mr. Hoareau, learned Counsel for Ms. Pool, has submitted that the present appeal is not from an interlocutory order but rather from a final order. The court below had ruled that “the cause of action survives... against the 2nd defendant” only and by inference the matter between Mr. Malvina and Mr. Marie had ended. Indeed, a continuation date was set for the trial between Mr. Malvina and Ms. Pool. In the circumstances, as this was an appeal from a final order, no leave of the court was necessary.
15. I agree with Mr. Hoareau on this issue. Indeed, the case cited by Mr. Rouillon is authority for the principle that an interlocutory order is one which does not lead to the final determination of the matter between the parties. It is clear that the ruling of the court below disposed of the matter between Mr Malvian and Mr Marie in finality. In the circumstances, this application cannot stand.

(3) Abuse of process

16. I have had difficulty following Mr. Rouillon’s submissions on this issue. He seems to be stating that because a date has been set for the continuation of the suit between the parties in the court below, together with the alleged averment that the present appeal is a further attempt to cover up fraudulent acts by Ms. Pool, the present appeal is an abuse of process.
17. This court cannot examine the merits of the case still to be heard in the court below nor can it anticipate the outcome of the hearing. Further, it cannot find that a party agitating a point of law on appeal can be accused of fraud or abuse of process. In the circumstances, the submission by Mr. Rouillon is dismissed.

18. I now address the appeal before this court.

The appeal before this court

19. The appeal grounds as submitted are as follows:

- (1) The learned Chief Justice did not consider the whole of the evidence placed before him to arrive at a fair and just conclusion.*
- (2) The Plaintiff was filed by the Respondent/Plaintiff against 2 defendants; since the 1st defendant passed away in the course of the hearing, the learned Chief Justice should have ordered the respondent/Plaintiff to take steps to appoint an executor in view that the land belongs to heirs Charles Marie, and they need to be represented by an executor.*
- (3) The learned Chief Justice did not appreciate that there was a judgment by consent and once an executor is appointed a mediation could be carried out to execute the judgment by consent.*
- (4) The learned Chief Justice erred in holding that because there were allegations of breach and negligence, necessarily the case should proceed against the Appellant/2nd Defendant. They were only allegations by the Plaintiff/Respondent's Attorney and not facts as averred to in the defence.*
- (5) The learned Chief Justice did not consider that if the case were to continue in its present form the appellant/2nd Defendant will not have a fair hearing. (Sic).*

The issue before this court

20. The grounds reproduced above all relate to an important issue that falls for our determination: should abatement of the suit have been ordered in the circumstances of the present case?

21. It is trite that an application for abatement is one calling for a suit to be abated until a defect is cured. In other words, a successful application in abatement does not prevent the Plaintiff from continuing once the defect is corrected. As such, this procedural tool is meant to suspend and delay an action rather than terminating it altogether.

Submissions of parties

Submissions of Ms. Pool

22. Ms. Pool has submitted that the registration of the transfer of Parcel S12948, was done simultaneously with the registration of the other subdivisions of the parent parcel. An error had occurred in the name of the Respondent.
23. With regard to the allegation of fraud relating to two heirs being omitted from the Affidavit on Transmission by death, she submits that they had passed away a long time ago and their birth and death certificates could not be located and attaching their certificates to the affidavit was not a requirement under the Land Registration Act until its amendment in 2022.
24. In terms of the application for abatement, she submits that it was the duty of the trial judge to halt the hearing when it became known that a party to the suit had passed away and to make an order for his substitution by an executor of his estate. This is especially relevant given that Mr. Marie had indicated in his statement of Defence that Mr. Malvina was aware of the mistake by the Land Registry in registering the correct owners of the four subdivisions and, consequently, of the land transfer document. In addition, the heirs were willing to have matters rectified amicably, which they had attested to in a signed judgment by consent to this effect on 6 July 2020.
25. Ms Pool has further submitted that Mr. Malvina's attitude is baffling given that he wants the land transfer registered yet opposes the process of the rectification of the registration of the sub-divisions and has not complied with the terms of the judgment of consent, which he signed.
26. In what I believe is her strongest submission on the issue of abatement, Ms. Pool states that she will not have a fair hearing by the fact that the suit has abated automatically against Mr. Marie with his death. She submits that only the executor of his estate can execute the terms of the judgment by consent which he signed.

27. She has relied on sections 176, 177, 178 and 179 of the Seychelles Code of Civil Procedure, which enable the court to order the addition of a necessary party to the suit when a party passes away. She has also relied on the courts' decision in *Khudabin v Porice & Anor* (SCA 68 of 2018) [2021] SCCA 34 (13 August 2021) and *Multichoice Africa Ltd v Intelvision Network Limited and Intelvision Limited* (MA 194/2019) [2020] SCSC 518 (12 June 2020).

28. Mr. Rouillon has filed no written submissions which is regrettable as this Court has had no assistance from him on this important matter. He seems to have been preoccupied with motions to strike out. In court, he submitted that Mr. Malvina is simply opting to proceed against the second defendant (Ms. Pool) now that the first defendant (Mr. Marie) has passed away. His claim is for damages against the second defendant only.

Determination

29. I have examined the Complaint filed by Mr. Malvina and note that the Complaint, as it stands, avers a breach of an agreement by Mr. Marie and a breach of legal duties by Ms. Pool for which they are liable jointly and severally. The prayers are for damages against both defendants jointly and severally. Attached to the Complaint is an unregistered land transfer document, which in law is still enforceable *in personam* against the deceased's estate. His interests or that of his estate are, since his demise, undefended and unrepresented. The surviving heirs must establish any claim or debt of the deceased. No amendment has been made to the Complaint despite the demise of Mr. Marie. These facts and the purport of section 176 may have been overlooked by the learned trial judge.

30. Whilst I cannot at this juncture pass judgment on the pleadings as they stand and examine whether the right cause of action has been brought, I must still bring to bear the law relating to pleadings insofar as it concerns the order by the learned trial judge to discontinue the suit against Ms. Pool.

31. Section 176 of the Seychelles Code of Civil Procedure establishes that:

“A cause or matter shall not become abated by reason of the death, bankruptcy or insolvency, or change of status or of capacity, of any of the parties, if the cause of action survives; and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the hearing and the judgment (emphasis added).

32. Consistent case law in this jurisdiction has established that pursuant to section 176 of the Seychelles Code of Civil Procedure in the event of the death of a party occurring between the hearing and the judgment, the cause, in relation to that party does not abate (see for example *Labiche and Others v Laporte* (22 2000) [2005] SCSC 32 (4 May 2005)), *Khudabin* (supra), *Multichoice Africa Ltd*, (supra), *Nimmo v Marie* (MA 188 of 2019) [2022] SCSC 157 (25 February 2022)).

33. Sections 177 - 179 of the SCCP further provide:

“177. In case of the death, bankruptcy or insolvency, or change of status or of capacity, of a party to a cause or matter, the court may order that any necessary party be added or that any person entitled to represent the party who has died or become bankrupt or insolvent or being the successor in interest of any such party, be substituted for such party.

178. Any person claiming to be the representative of a deceased plaintiff or for a deceased defendant may apply to the court to substitute his name on the record for that of the deceased plaintiff or the deceased defendant, as the case may be. The application shall be by petition served on the defendant or the plaintiff, as the case may be.

179. Any plaintiff or defendant may apply to the court to substitute any person alleged to be the representative of a deceased defendant or of a deceased plaintiff for the deceased defendant or the deceased plaintiff, as the case may be. Such application shall be by petition served on the person whom it is desired to substitute” (emphasis added).

34. In fact, in *Multichoice* (supra), Govinden J, as he then was, stated:

“(22) The purpose behind sections 178 and 179 is to allow for the non-abatement of the suit in the event of the unfortunate demise of a party and the survival of the cause of action...

(23) This said, the next question is who makes the application: is it the Plaintiff on record or the intended Plaintiff who seeks to be substituted in lieu of the former? A deceased person cannot be a party to legal proceedings and the effect of the death is to suspend the action as to the descendent or succession until his or her legal representative is substituted as a party...”

35. The case law on the issue of litigants who pass away before the resolution of their litigation is summarised in the White Book as follows:

“If a sole defendant dies and the cause of action is one that survives, the plaintiff may obtain an order to continue proceedings as against the executor or administrator of the deceased defendant, or such executor or administrator may himself apply to be substituted or added as a defendant (Duke v Davies [1893] 2. Q. B. 260); but unless and until such executor is added, the action cannot be continued.

In the case of the death of one of one several defendants, where the cause of action survives, if the defendants are jointly and severally liable the liability continues in the survivors (Ashby v. Day, 45 L. T. 408, a joint guarantee). If all die, the proceedings should be continued against the representative of the last surviving defendant.

If the defendants are jointly and severally liable the action may, on death of a defendant, be continued against the survivors, or against the representative of the deceased and the survivors, or against the representative of the deceased and the survivors, Hibernian, etc., Co. v Fottrell, 13 L. R. Ir. 335, Ellis v Wadeson, [1899] 1. Q. B. 714.”

36. These authorities are relevant to the present matter. Obviously, the course of action is determined by the particulars of each case.
37. The averments in the Complaint, as it stands, make allegations concerning Mr. Marie. It is clear that his interests or now that of his Estate must be represented.
38. This should also not prejudice Mr Malvina's rights, who may still choose other alternatives to the present suit.


39. The appeal is therefore, allowed, and the learned trial judge's decision is quashed.

Order

40. In the circumstances, I order as follows:

(1) The appeal is allowed. The matter is remitted to the court below for appropriate orders to be made in light of this Court's decision, inter alia the substitution of a representative of Mr. Marie's Estate in his stead.

(2) Each party shall bear its own costs in this appeal.



Dr. M. Twomey-Woods, JA.

I concur



A. Fernando, President

I concur



Dr. L. Tibatemwa-Ekirikubinza, JA

Signed, dated and delivered at Ile du Port on 18 December 2023.