IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2024] SCA MA 10/2024 (8 October 2024.)

In the matter Between

The Estate of the late Julien Kevin Parcou

(represented by its Executrix Rose Tarroza Parcou)

Rosita Tarozza Parcou **Applicants**

(rep. by Mr. Frank Elizabeth)

And

Jill Debra Cecile Laporte **Respondent**

(rep. by Mr. Bernard Georges)

Neutral Citation: *The Estate of Late Julien K Parcou v Laporte* (SCA MA 10/2024) [2024] (8 October 2024)

Before: **Andre JA**

Summary: **Extension of time – Rule 26 of the Court of Appeal of Seychelles Rules 2023**

Heard: 24 September (Last Sitting date for closure of pleadings).

Delivered: 8 October 2024

ORDERS

The Court makes the following Orders:

(i) The application for special leave to appeal is dismissed.

(ii) No orders made as to costs.

RULING

ANDRE, JA

INTRODUCTION

[1] The Ruling arises out of a notice of motion filed on 24 July 2024 seeking an order granting leave for the 1st and 2nd Applicants, the estate of the late Julien Kaven Parcou and Rosita Tarroza Parcou respectively, to file an appeal against the judgment in CS No. 35 of 2023. The Applicants have also assisted the Court with their intended grounds of appeal.

[2] The Motion is supported by an affidavit by Rosita Tarroza Parcou who is the executrix of the 1st Applicant. It is averred that her counsel, Mr Frank Elizabeth, made several attempts to get a copy of the judgment in order to consider whether the deponent should appeal. Copy of emails to this effect marked RP4 were attached to the affidavit. It is further averred that her counsel managed to get a copy of the judgment on 24 June 2024 and the copy marked RP5 is attached to the affidavit and that this copy is signed by the Court staff who gave a copy of the judgment.

[3] It is additionally averred that the executrix was out of the jurisdiction and her return scheduled for 13 July 2024 was delayed due to bad weather and instead, she only arrived back to Seychelles on 21 July 2024. A copy of the plane ticket marked RP6 is attached to the affidavit.

[4] It is averred further, that the judgment is prejudicial, manifestly unfair and fundamentally erroneous and contrary to law and this Court should exercise its jurisdiction to grant leave to appeal out of time. That not granting leave to appeal is likely to offend the principle of fair hearing enshrined in the Constitution.

[5] It is further averred that the appeal is not frivolous or vexatious and that there is an overwhelming chance of success and the appeal involves issues of law only. The 1st Applicant avers that it is in the interest of justice for this Court to grant leave to appeal out of time and that the Respondent would not be prejudiced if the application is granted.

[6] The Respondent, Jill Debra Cecile Laporte, resists the application through an affidavit in reply dated 6 September 2024. She avers that the grounds advanced for seeking leave to appeal out of time are exceedingly weak. That in an age where communication is easy by telephone, a messaging service or email, instructions to appeal could have been sought or given while the Applicant was traveling.

[7] It is further averred that having looked at the two grounds of appeal, these could have been easily formulated and filed within time as they are simple grounds requiring no research of the law. It is averred that a court would be inclined to grant leave to appeal out of time where the grounds advanced reveal an overwhelming chance of the appeal succeeding. Conversely, grounds which ex-facie do not have a meritorious appeal will generally militate against leave being granted.

[8] It is averred further, that the proposed grounds of appeal of the Applicants do not show an arguable case for two reasons. The first proposed grounds are founded on a wrong reading of the law which clearly states that the reserved portion of a succession is two-thirds where there are two children. The second proposed ground advances a completely erroneous legal position, namely that a Will has to be invalidated before a court can read down the dispositions therein while established jurisprudence says the exact opposite namely – dispositions can only be read down if the Will is valid.

SUBMISSIONS OF THE PARTIES

[9] The Applicants submit that the present application has its legal basis in Rule 26 (1) of the Court of Appeal Rules and the applicant must show good cause for the delay and absence of prejudice to the Respondent. It is submitted that the delay in filing an appeal is attributable to a series of unforeseen events. Firstly, the Applicants were faced with difficulties in obtaining the judgment promptly despite efforts being made by their attorney and this delayed any action to file an appeal. The Applicants refer this Court to paragraphs 8 and 9 of the affidavit in support of the application. Further to this, the Applicants submit that the inability to immediately instruct counsel after leaving Seychelles due to inclement weather conditions and travel delays all contributed to the late filling of the appeal.

[10] In terms of the appeal being meritorious, it is submitted that the intended appeal raises issues of law and is not frivolous and vexatious. It is submitted that the Supreme Court's judgment contains legal errors which would render it prejudicial and unjust if left unchallenged and therefore the intervention of this Court is warranted. It is submitted that the Applicants have a strong chance of success as the appeal pertains to critical points of law.

[11] In respect of prejudice to the Respondent, it is submitted that there would be no prejudice suffered if the application is granted. It is further submitted that the Applicants have acted with diligence and the delay is minor and excusable, particularly with the surrounding circumstances. It is also submitted by the Applicants that no substantial rights of the Respondent will be impacted.

[12] The Applicants further raise constitutional considerations by stating that refusal to grant leave to appeal would contravene the Applicants' constitutional right to a fair hearing. It is submitted that the principle of fairness enshrined in the Constitution mandates that the Applicants be allowed to challenge a judgment they believe is fundamentally unjust.

[13] Another submission by the Applicants is that it is in the interest of justice that leave be granted to appeal out of time. It is submitted that the Applicants' conduct does not demonstrate any intent to delay proceedings or to disrespect court deadlines, but the application is made in good faith and justice will be served by allowing the appeal to proceed. It is submitted that in the case of ***Lesperance v Bastienne & Anor*** **(MA 324/2021)** the Constitutional Court of Seychelles considered an application for leave to file a petition out of time and that the key factors that guide granting such an application include: length of delay, reasons for the delay, prejudice to the respondent and whether there is an arguable case. It is submitted that the Applicants have provided valid reasons for the delay such as difficulty in obtaining the judgment and unavoidable travel disruptions. It is further submitted that the proposed appeal raises serious legal issues making it comparable to the principles highlighted in *Lesperance case*.

[14] The Respondent for her part concedes that the authorities on the subject agreed that in exercising its discretion to grant leave to appeal out of time, a court will have regard to

four things: length of delay; the reasons for the delay; degree or prejudice to the Respondent; and, whether the appeal discloses an arguable case.

[15] It is submitted that in this case the length of time that elapsed after the appeal should have been lodged is not significant. It is also submitted that the prejudice suffered by the Respondent, who has been denied her share of succession of her father, or indeed a simple inventory of the assets of the estate by the intransigence of the Applicant who has spent the intervening period opposing every plaint, application and petition brought, will not be greatly increased as she has received nothing so far through the actions of the Applicant.

[16] It is submitted, however, that the two other factors militate against granting of leave.

[17] In respect of reasons for delay, it is submitted that the reasons given are poor and there is no reason given why the Applicant could not have communicated with her attorney by telephone or email. It is submitted that the Applicant was after all in the Philippines and not the Amazon jungle or on Mars. It is also submitted that the proposed grounds of appeal did not require any input from the Applicant as they are legal grounds that did not require consultation with a lay Applicant.

[18] The Respondent maintains that the grounds of appeal raised have no prospects of success. It is submitted that the first ground misreads Article 913 of the Civil Code which reads in the relevant part, '*Gifts inter vivos or by will shall not exceed…one third (of the property of the donor) if he leaves two children…*' It is submitted that since it is not disputed that the deceased left two children, he could only have disposed one-third of his estate by Will and this is what the trial judge found in paragraphs 50 and 51 of the judgment.

[19] The Respondent submits that the second ground is based on the startling argument that the Will has to be invalidated in order for a reading down of the dispositions therein to be possible. It is submitted that this too is a misreading of the law. If the Will is invalidated, there can be no writing down of its contents because the Will ceases to exist as a whole. It is submitted that the reduction of dispositions can only occur when the Will is valid as

to form but not as to dispositions. It is further submitted that the validity of a Will is preserved but the contents are modified to render them consonant with the law.

ANALYSIS AND DETERMINATION

[20] Rule 26 of the Court of Appeal Rules empowers the Court to extend the time fixed by the same Rules, upon good cause being shown. This Court in ***Cornelis L Hoevers v Rachel F Hoevers*** **(nee Alphonse) SCA MA 07/2024** considered Rule 26 of the Court of Appeal Rules, albeit in a different context of condoning the late filing of skeleton heads or argument. The Court held that when determining 'good cause' a court must be guided by five factors: (i) degree of delay, (ii) the explanation advanced for such lateness, (iii) the prospects of success, (iv) the importance of the case from a jurisprudential point of view, and (v) prejudice suffered by the Respondent (at paragraph [24]).

[21] In determining that the applicant's late filing of heads of arguments could be condoned, the Court in *Hoevers case* at paragraph [31] held that while the delay was significant and the reasons advanced were unsatisfactory, this was outweighed by the jurisprudential value the case had prima facie the pleadings. What the Court did was to recognise that some factors have the effect of outweighing others. The conclusion by the Court in *Hoevers case* on condoning the late filing of heads of arguments was reached against the backdrop of recognising three interrelated things. Finality of litigation is important (at para [8], however procedural justice cannot override substantive justice (at para [14], hence a balance of these two aspects must be struck in the furtherance of administration of justice (at para [11]). The Court also highlighted that as an apex court of the jurisdiction, it is duty-bound to avoid a mechanical and arbitrary application of its Rules, the effect of which may appear as though the Court is abdicating its role to hear the appeal of parties.

[22] Although the Court in *Hoevers case* was condoning late filing of the head of arguments, the principles set therein are important as one considers an application made in terms of Rule 26 of the Court of Appeal Rules. Therefore, I am guided and assisted by the five factors of good cause, bearing in mind how other factors can be outweighed against each other.

[23] The degree of delay is not an issue of contention by the parties particularly by the Respondent who would be the most prejudiced. Therefore, the Court need not emphasize this. Another aspect that is not an issue of contention is the prejudice suffered by the Respondent given that it is conceded by the same party that there is no prejudice suffered. As the Respondent submitted, the present application rests on whether there are sufficient reasons for delay and the prospects of success. These are considered in detail in the paragraphs to follow.

[24] The explanation or reasons advanced for such lateness as this Court held in *Hoevers case*, must be both reasonable and intelligible. The Applicants submitted that the delay in filing the appeal is attributed to: (i) the Registrar not availing the judgment when requested; and (ii) the 2nd Applicant was in the Philippines. The Respondent has submitted particularly on the latter reason stating that this does not offer much assistance to the case of the Applicants because there is no reason the 2nd Applicant could not have communicated with her attorney from the Philippines. Further to this, the Respondent maintains that since the proposed grounds of appeal are legal grounds, there was no need to consult with 'a lay Applicant'.

[25] On the latter point made by the Respondent, I would respectfully disagree that since the grounds are legal grounds, the input of the Applicant was not needed. Counsel for the Applicants could not have acted without the express instructions from his client. Any such instructions to appeal could have only been given by the Applicant following legal advice from Counsel Elizabeth. This brings me to the argument advanced that the 2nd Applicant was in the Philippines and this contributed to a delay in filing of the appeal.

[26] Suffice it to say that I am not convinced that the absence of the 2nd Applicant from the jurisdiction delayed conveying instructions to appeal. In an age of a plethora of modes of instant communication such as text messages, email, and phone calls through the use of Wi-Fi, the excuse that the 2nd Applicant was out of the jurisdiction and there were 'inclement weather conditions and travel delays' is frivolous.

[27] Another reason for the delay was that the judgment was not made available. Reliance was placed on a thread of emails marked as RP4 where Mr Elizabeth wrote to the Registrar of

the Supreme Court requesting the judgment and according to the Applicant, a response was belatedly given. On a closer reading of the email thread, I cannot see how the issuing of the judgment can be said to be belatedly given. The email dates show that an email was sent to the Registrar on 20 June 2024, which was a Thursday, and the Registrar actioned through a court staff on 24 June 2024, which was a Monday. According to the calendar, the Registrar actioned within two business days. However, it is to be noted that the judgment was shared or made available to the Applicants' attorney approximately 19 days after the judgment was handed down. I say 19 days because as section 57 (1) (a) of the Interpretation and General Provisions Act provides, the day on which a thing has occurred is excluded when computing the time period reckoned by days. This meant that as of 24 June 2024, the Applicants had another 11 days to lodge an appeal within time.

[28] On one end, it can be argued that an experienced attorney at the Bar such as counsel for the Applicants could have read and formed a legal opinion for his clients' consideration within a day, and instructions to appeal based on such legal opinion could have been given by the client. On the other hand, it is also maintainable that a litigant has the administrative right to receive a judgment on the day it had been delivered and have the full benefit of a 30 days time limit to lodge an appeal, irrespective of how experienced their attorney is at the Bar.

[29] The fact that after delivery of the judgment, access to the same was made 10 days before the 30-day time limit to appeal does not seem administratively fair to the litigant. In the circumstances, I accept that the delay in accessing the judgment was a factor that caused a delay for the Applicants to file an appeal. Further considerations however are whether there are prospects of success and the jurisprudential value the appeal may provide. These are considered below.

[30] In respect of prospects of success, the Applicants argue that these are present as the judgment has errors of law that require this Court to intervene and correct. Beyond this submission, the Applicants have not further explained their position or demonstrated the actual error they contend. The Respondent on the other hand had submitted that the proposed grounds are based on a misread of the law.

[31] The first proposed ground of appeal reads:

> The learned trial Judge erred in law when she reduced the dispositions of the Last Will and Testament of the late Julien Kaven Parcou made in favour of the 2nd Appellant to the allowable portion stipulated under article 913 of Cap 33, namely to one-third after deduction of all debts of the estate at the opening of the succession as the Respondent was entitled to only the reserve portion in law which us one-quarter of the estate of the deceased after payment of all debts.

[32] The essence of this proposed ground is that the learned trial judge erred in determining that the Respondent is entitled to one-third of the deceased's estate as a reserve portion. Article 913 of the Civil Code 1976 provides that:

> Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915 - 1.

[33] If the deceased has left one child, the reserve portion is half of the property. If the deceased left two children, the disposition cannot exceed one-third of the property. This means the two children are entitled to the two-thirds of the property. If the deceased has left three or more children, then dispositions cannot exceed one-fourth of the property and those children are entitled to three-quarters of the property.

[34] In the present case, the late Julien Kaven Parcou had an adopted child and the Respondent who was declared the same by the Court as observed by the trial judge at paragraphs [33] and [36]. Therefore, the estate of the late Julien Kaven Parcou left two children and they are entitled to two-thirds of the property as any disposition by the deceased cannot exceed one-third. Clearly, there are no prospects of success on the first proposal because the law is clear that when the deceased leaves two children, one-third of the estate is the reserve portion.

[35] The second proposed ground of appeal reads:

> The learned trial Judge erred in law when she failed to declare that the Will and Testament of the deceased is invalid in law before declaring that the Respondent is entitled to inherit one-third of the deceased's estate since in the absence of a declaratory order that the Last Will and Testament of the deceased was invalid in

> law, in light of the judgement of the Supreme Court, acknowledging the Respondent as the daughter of the deceased, the Court is legally obligated to give effect to the Will and the dispositions contained therein in favour of the 2nd Appellant.

[36] The essence of this ground is that the Will must have been declared invalid before declaring what the Respondent is entitled to. The Respondent for her part maintains that this is a misreading of the law and what the Applicants suggest is to invalidate the Will and this would mean it will cease to exist as a whole. I am inclined to agree with the Respondent in this regard.

[37] Prima facie the proposed ground of appeal, what the Applicants suggest is not plausible and creates an absurdity. This is because invalidating a Will means the same ceases to exist. In the area of reserve portion, where a Will is contrary to article 913 of the Civil Code, a court is not duty-bound to invalidate the will. Instead, what a court is duty-bound to or what a court is limited to is a declaration of how and why a Will is contrary to article 913 of the Civil Code and that this error must be corrected to take into account the reserve portion (see generally ***Racombo v Sinon*** **(CS 124/2018) [2020] SCSC 456 (25 February 2020**)). I therefore respectfully disagree with the Applicants that the proposed ground 2 has any prospects of success.

[38] Notwithstanding the above, another consideration for good cause is the importance of the case from a jurisprudential point of view and in particular, the case having the possibility of having some or significant jurisprudential value once determined as this Court held in *Hoevers case* at para [29]. In that case, the Court also held that while the jurisprudential value may be associated with prospects of success, it goes further in that sometimes a court may be invited to see prima facie the pleadings, the necessity to correct or clarify the position of the law.

[39] The Applicants have advanced that it would be in the interest of justice to order leave to appeal because the conduct of the Applicants does not demonstrate any intent to delay proceedings or disrespect court deadlines. In my view, the interest of justice can be associated with both prospects of success and jurisprudential value. However, the Appellants have not assisted this Court with any substantive submissions on this point.

[40] On a perusal of the proposed grounds of appeal and submissions of the Appellant, I cannot see how there is any exceptional jurisprudential value that can be brought about if the appeal is determined, whether to clarify the law or in the interest of justice.

[41] The Applicants raised constitutional issues in so far as they contend that refusal to grant leave to appeal contravenes the Applicants' right to a fair hearing. In terms of Article 46 (7) of the Constitution, this Court has the jurisdiction to determine constitutional issues that arise in the course of its proceedings. Therefore, I would venture into whether failure to grant leave to appeal violates the Applicants' right to a fair trial in terms of Article 19 of the Constitution.

[42] The right to a fair hearing has been a subject of determination by this Court in **(*Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited* (MA 35 of 2022**). The majority of the Court held that

> 53. The right to a **fair hearing is a fundamental constitutional principle** which permeates, guards, and protects, virtually every other fundamental right in the Constitution. **A fair hearing is denied where there is a refusal to listen to what a party has to say regarding his case before the court.** Where there is, serious and credible evidence of a substantial contravention of the constitutional right to a fair hearing, such that a party was not heard, the Court may, if it considers the breach to be consequential, review and nullify its previous decision tainted by the lack of fair hearing.
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> 54. **The contravention of the right to a fair hearing may be because a party was not heard at all in the sense that the party was not allowed to put his case to the Court.** This happened in *Attorney-General v Marzorcch*i Civ App 8/1996 (delivered on the 9 April 1998). But the same thing may also happen where a party is ostensibly able to make submissions before the Court but the Court, or at least one of its members, has made clear beforehand that he or they will not consider the submissions in arriving at his or their decision in the case. In these latter circumstances, the party cannot properly be said to have had a fair hearing.

[43] It is not lost to this Court that the Applicants at all material times of their case being live, enjoy the right to a fair hearing. This includes being heard on appeal as the Applicants seek to do presently. However, as this Court in *Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited* held, a fair hearing occurs when a party has not

been given the opportunity to present his or her case, or when a party presented his case but the presiding officer has made it clear that the submissions are not going to be taken into account. In the present case, none of these things have occurred. The Applicants failed to appeal within the prescribed time and have applied to this Court for leave to appeal out of time. The Applicants have been heard by this Court on the application for leave to appeal out of time and were given ample opportunity to submit their case without any hindrance. Certainly, it cannot be said that their right to a fair hearing has been contravened.

[44] This Court in ***Ge-Geology Limited v The Government of Seychelles*** **(SCA MA 31 of 2022) [2023] SCCA 4 (24 February 2023)** has previously stated that: '…*The fact that a judge has not ruled in a manner that a party had anticipated does not automatically mean there is a breach of fair hearing.*' I find it pertinent to reiterate this point in the present case. This is because the Applicants submit that a refusal to grant leave to appeal out of time has the effect of contravening the right to fair hearing. I respectfully disagree with this position. Refusal to grant leave of appeal is guided by Rule 26 of the Court of Appeal Rules which this Court will apply and exercise its discretion judiciously and have done so in the paragraphs above.

DECISION

[45] In the circumstances, it cannot be said that the Applicants' right to a fair hearing has been contravened. The opportunity to be heard has been provided in so far as they have applied for leave to appeal out of time in terms of Rule 26 of the Court of Appeal Rules, have submitted and argued their case and this Court has considered fully all the submissions.

[46] Further to the above, there has been no good cause shown by the Applicants to grant leave to appeal. This is because while there has been no significant delay, no prejudice suffered and there was a good reason for delay to access to the judgment, this is outweighed by other factors. In particular and as earlier held, there are no prospects of success on the part of the Applicant. Similarly, and on prima facie the proposed grounds of appeal, the appeal is one which will offer no jurisprudential value because of the reasons earlier set out in paragraph [39].

[47] Consequently, the application is dismissed.

[48] No orders made as to costs.

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Andre, JA

Signed, dated, and delivered at Ile du Port on 8 October 2024