IN THE SUPREME COURT OF SEYCHE LLES

CHRISTINE MARINA ALCINDOR

PETITIONER

VS.

ANTOINE YVON ALCINDOR

RESPONDENT

Divorce Side No.117 of 2005

Mr. W. Lucas for the Petitioner

Mr. B. Hoareau for the Respondent

JUDGMENT

Gaswaga, J

The petitioner is moving the court to make orders in respect of settlement of the matrimonial property held and or acquired during the subsistence of the marriage of the parties contracted on 26th December, 1996, and subsequently dissolved with the issuance of a decree nisi of 4th January, 2006. Pursuant to an application dated 4th December, 2008 by the petitioner a decree absolute was issued by the court. The said marriage was blessed with one issue to wit R M A born on the [...]. He is currently under the legal

custody of the respondent vide a court order dated 15th May, 2007. Previously the Family Tribunal had given custody of the child to the petitioner with reasonable access to the respondent.

Since 21st March, 2004 the parties have been in separation, the respondent living with his mother at La Louise. He had walked out of the matrimonial home on his own leaving the petitioner and their son behind, allegedly to avoid an escalation of the problems he was encountering with the petitioner. The only pending issue and which forms the subject of this judgment is settlement of 'matrimonial property' comprising of a house standing on parcel H2647 located at Anse-Etoile and registered in the sole name of the respondent.

I shall first deal with a point of law that has been raised by Mr Hoareau, the respondent's counsel .Having perused counsel's submission and relevant authorities cited i find myself in agreement with him that the petitioner's pleadings indeed offend the requirements of Rule 3(1)(i) of the Matrimonial Causes Rules, in as far as the petition fails to disclose concise material facts necessary to sustain the grounds for the relief sought. Should the evidence and relief sought by the petitioner therefore not be entertained?

From the outset the following facts are important to bear in mind as one deals with the point of law. This is a family matter where the parties have been litigating before the court since 2005 first, before the then Chief Justice who later passed on the case to me. Numerous lawyers have also taken turns at the case especially appearing for and or on behalf of the respondent who, at one point in time represented himself. One fact is undoubtedly very apparent with regard to the parties. All they want is a division or adjustment of the matrimonial property (house). And this, they want to happen pretty fast .For the period they have been in court their situation continues to deteriorate. The hostilities between the parties, at times exhibited in court, would not guarantee any further delay of this case. Not even for an extra day. I also note that the respondent has had fair notice of the case and adequately responded to the petition, and sufficiently led pertinent evidence to address the sole issue before court.

Therefore, I am properly seized of all the facts as clearly put before court by the witnesses (petitioner and respondent) on oath as well as the circumstances of this case, .and i believe that a careful consideration of the same would occasion no miscarriage of justice at all to any of the parties. Excluding the petitioner's evidence as

suggested by Mr Hoareau would be doing a disservice and injustice to the parties because such is not the type of inquiry envisaged by section 20 of the Matrimonial Causes Act where the court is mandated to take into account all the circumstances of the case, including the ability and financial means of the parties to the marriage for the benefit of the other party thereof. This only comes to light by way of evidence.

However, without undermining the role or importance of the prescribed procedures - which are the handmaidens to justice, it will be stated that given the unique circumstances of this matter I would be prepared to straight away settle the real issues at hand and deliver the much needed and anxiously awaited justice to the parties. In my view, the effect of upholding the point of law would lead to further delays, frustrations and complications since the petitioner's pleadings may be rendered incompetent. I also wonder why counsel opted to bring up this point at the last minute in his submissions and not at an early stage so it could be dealt with first. It will be recalled that the petitioner alone lives in the house now. Besides, the relief or prayer (i.e. (c) Declare the parties' rights to the matrimonial property and order the settlement of same.) under attack is exactly what the respondent has also been asking for all along from the court. Further, a court administering substantive justice should have no regard to technicalities. For the reasons disclosed in the above discourse i shall disregard the point of law and subsequent orders sought, and instead, in the interest of justice proceed with the petition to adjust the matrimonial property.

Whenever called upon to inquire into a matrimonial adjustment matter the court endeavours to follow the guidelines outlined in section 25 of the Matrimonial Causes Act 1973 of the United Kingdom which is more detailed on the subject as compared to our section 20(1) of the Matrimonial Causes Act (Cap 124), 1992. The said section 20(1) of Matrimonial Causes Act in respect of financial provisions is based on section 23 of the Matrimonial Causes Act of the UK while our section 20(1) (g) in respect of property adjustments is based on section 24(a) and (b) of the UK. The court is enjoined by these provisions to take into account all the circumstances of the case, including the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; the standard of living enjoyed by the family before the breakdown of the marriage; age of each party to the marriage and duration of marriage; the

contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family. As was emphasised in **Charles vs. Charles Civil Appeal No.1 of 2003**, the principle underlying section 20(1)(g) of the Act *"is one of equity designed, as it does, to ensure that no party to a settlement of matrimonial property shall remain destitute while the other party drowns in a sea of affluence..."* In the same vein, the Court of Appeal in **Renaud vs Renaud SCA No. 48 of 1998** held:

> "The purpose of the provisions of these subsections (i.e. 20 (1)(g) of the Act) is to ensure that upon the dissolution of the marriage, a party to the marriage is not put at an unfair disadvantage in relation to the other by reason of the breakdown of the marriage and, as far as such is possible, to enable the party applying to maintain a fair and reasonable standard of living commensurate with or near the standard the parties have maintained before the dissolution"

The court will then embark on a judicious determination of each party's contributions. During the inquiry, it came to light that the parties had agreed on the value of that house as being SR 500,000 for which it was insured (See P4). It is also not in dispute that the said parcel of land was purchased on the 8th of April, 1991 for a sum of SR 25,000 and as reflected in the deed of sale/transfer (P1) same was executed in the sole name of the respondent. It is the averment of the petitioner who was at the time working with SACOS as a claims Manager that she obtained a loan of SR 25,000 from the Bank of Baroda out of which SR 10,000 was passed on to the respondent as contribution towards the purchase price of the land. That since the petitioner was leaving for a six months course in Zambia she had no time to get involved in the documentation of the transaction to which the respondent had no option but to put his sole name. And further, because their relationship was going on well without any anticipation of hitting a rock the petitioner never bothered to have her name included on the deed of sale and or claim the transfer of shares in the land on returning to Seychelles or any time thereafter. Unfortunately there is no evidence to reflect or support this contribution, not even the

loan from bank of Baroda. The court instead believes the respondent's testimony that he bought the parcel H2647 alone from his savings without any contributions by the petitioner. That the respondent had raised more money by selling his car

In addition the petitioner testified that in 1992 they agreed to take a loan of SR 115,000 (See P2) and start constructing a house on the land. The respondent was working as a draughtsman with the Ministry of Education and since he knew all about construction he physically built the house with the help of his friends and family. That after buying land the respondent cleared the site to start construction. The house was completed between January and February 1994 and by this time the respondent claims did not even know the petitioner. He however states that the petitioner who was staying with her step-mother near this property kept coming to the site and that is when they developed a relation. That when the house was completed in 1995 the respondent invited the petitioner and they started living together. The housing loan was approved in the respondent's names and monthly deductions made on his salary. As such, the petitioner avers that since they were building the house together she had to give the respondent a sum of SR 1000 to SR 1,200 every month depending on the circumstances and expenses. This is however denied by the respondent who states that it was the petitioner instead who withdrew money from his account as exhibited by the receipts (DE13). I am unable to agree with the respondent but believe the petitioner's version on this aspect because the said receipts are for the period between 2000 and 2002 and not that stated by the petitioner. There is ample evidence to prove that the parties were not only close to each other but also working together way back before starting to live in that house in December 1994. All through the hearing the respondent tried to down play this fact.

That later in 1998 when the respondent was helping his mother repair her house he asked the petitioner to take over the repayment of the loan. SR 874 was then deducted from the petitioner's salary every month by Seychelles Housing Development Corporation (SHDC) for a period of fifty one (51) months between 1998 and 2002 (See P3). This fact is not denied by the respondent who in his submissions agreed to refund this money, SR 44,574 with interest at commercial rate, being the only contribution according to him made by the petitioner and should therefore be her total entitlement herein. Following the authority of **Charles** (supra) I declined to make such order which only looks at the actual contribution of one party while at the same time crediting the other with a share for the whole of the appreciated value of the property (with the passage of time) and not just his actual contributions, as well as ignoring the surrounding circumstances.

The petitioner also stated that since both of them were in gainful employment they had each agreed to contribute towards the construction of the house in whichever way they could to add on the original loan which was not enough to complete the house. As such she regularly secured salary advances and borrowed numerous small loans and gave some of the money to the respondent to facilitate the construction exercise and further and fulfil their plan of living together in that house thereafter. In September, 1997 the petitioner borrowed SR 30,000 from the Seychelles savings bank (See P5) and in December the same year SR 36,900 (repaid with interest SR 37,732 from salary) from her employer, SACOS (See P6) to buy a car which was used by the respondent for hire as a taxi and the petitioner had to remove her name as owner thereof to enable respondent obtain a licence in his sole name from the Seychelles Licensing Authority (See P7). However, shortly thereafter the car was sold and some money added on top of the proceeds by the respondent to buy a better car S3007 which he still operates as a taxi (See P8). The petitioner claims her contribution thereof being the value of the old car. Although this is vehemently denied by the respondent who says the car S7890 was his alone while S7009 was registered in the names of both parties to enable them get a lower premium given to SACOS employees, i am inclined to believe the petitioner's version that she indeed contributed towards the car purchases as explained above.

Other loans in the sums of SR 34,000 on 28th April, 1998 (P9), SR 35,000 in 2000 (P10) SR 23,000 in 2001 (P11) and SR 26,500 in 2003 (P12) were taken from the Seychelles savings bank. A loan of SR 50,000 to renovate the house was taken in 2003 from the petitioner's employer (P13) and in addition sliding windows were purchased at a cost of SR 13,850 (See P14). At the end of each month she helped out respondent by contributing towards purchase of materials or labour costs.

On the other hand the respondent contends that the loans taken were not committed to the construction of the house. For instance it is suggested that in P5 the money was given to petitioner's sister who had guaranteed the loan. That the monies from loans P9, P10, P11 and P12 guaranteed by one Jeffrey Ernesta, the petitioner's step brother were instead used by the petitioner to travel abroad and not spent on the house as deposed by the petitioner. It was the petitioner's averment that she did not give all this money to the respondent but only contributed some of it for purposes of construction whenever the respondent requested. That she does not remember exactly how much money she contributed as she kept no record of expenses like a person anticipating a court battle. Although the respondent testified that the dates of the petitioner's travels coincided with those on which the loans were obtained and further that some of the money borrowed was deposited in petitioner's overseas bank accounts no such evidence was adduced at all to

support these assertions which remain mere allegations. It will be observed that the application of monies borrowed and taken in such a manner and circumstances by one party would be difficult to determine by the court unless followed with some sort of clear evidence or proof of expenditure (invoices/ receipts).

The petitioner admitted having destroyed the receipts which were in the names of the respondent and kept in the house but that was after she had informed him of her intention to remove and burn them as part of the exercise to clean up the house. Respondent did not object. Besides, only the respondent and his friends and not petitioner always did the purchases mostly at P&J and obtained the receipts in his names even when she provided the money to him. I find that to be a plausible explanation. There was no ill intention detected in the burning of the receipts.

The respondent was also one of the people to benefit from a Government housing scheme (own a home) whereby a reduction of SR 20,000 from the outstanding SR 52,392.90c loan was effected. The respondent has since paid off the balance of SR 31,435.91c. (See D4, D6 and D7). In the process however there was an overpayment of SR 1,748 which was refunded by the SHDC to and received by the petitioner (See D5). In my view the SR 20,000 should go to the credit of both parties in equal shares as none of them but the Government has in essence contributed it towards the house.

As for the movables in the house the petitioner's position is that since the time the respondent abandoned the house she had bought some more electronic goods which are documented and further that all the movables are insured at SR 200,000 and that she would be ready to take ½ share and give respondent the remaining ½. Since this is acceptable to the respondent i hereby order that the parties will each be entitled to ½ share of all the movables in the house.

I find it imperative at this point to quote from the judgment of **Freddy Chetty vs. Carole Emile SCA No. 11of 2008**:

> "...It is our view that acquisition and holding on to a property so acquired during marriage cannot be viewed as a property owned by two business partners which is sought to be divided on the dissolution of the partnership. To do so is to deny marriage the love, affection and the sanctity that goes with it...To look into the monetary contribution that goes into the acquisition of the matrimonial property and make an award purely on that consideration would mean to leave the other party who toiled and sweated to keep the home fires

> burning, destitute...*This makes it clear that the court's inquiry should go beyond the role of an accountant or auditor*."

Their Lordships further held that:

> "Contributions towards matrimonial property cannot be measured in pure monetary terms, in hard cash. As stated earlier the love and sweat and the long hours of vigil to bring up a family by the spouses all have a role to play in the accumulation of matrimonial property. The cooking, the sweeping, the cleaning, the sewing, the laundering, tending to the children and the many other nameless chores in a home are not things for which a value can be put on, but certainly contribute towards the build up of matrimonial property. We also find it difficult to accept that once a party makes a choice of his or her partner and decide to live together as husband and wife one party cannot be heard to say that I had the better job or I am the person who brought in more money, when the relationship goes sour .... The position certainly would be different if there is evidence to the effect that one party squandered the wealth or deliberately omitted to do what is reasonably expected of that party as a spouse.(That is not the situation in the present case)"

In **Marie Hotence Lesperance vs. Ralph Armand Lesperance SCA 3 of 2001** the parties had been married for 28 years and the matrimonial property in question i.e. parcel H720 was purchased by the Respondent's husband in his own name and his own money. From his own savings he financed the construction of the house thereon. There was no financial contribution by the appellant either to the purchase of the land or to the construction of the house. The appellant, for her part, raised the children and contributed in kind to the maintenance of the family. She also helped physically in the construction of the house whilst at the same time providing secretarial assistance to the respondent who operated a private electrical business until the latter employed a secretary. The Court of Appeal granted each party a half share in the matrimonial property.

In the present case the respondent says he personally did all the masonry, plumbing and

carpentry works on the house which took him two and a half years to build and not four to five years as stated by the petitioner. Further cross-examined on his financial contribution the respondent said he spent SR 72,000 from his monthly salary, SR 205,000 raised from his private business as a draughtsman and some other monies which he does not recall in addition to the loan of SR 115,000. If all these figures were proved and accepted they would add up to SR 392,000 minus SR 44,574 as loan repayment by the petitioner leaving a sum of SR 347,426. The respondent also testified that before he stopped his business as a draughtsman (See D 11) he was making a lot of money which was added on the loan to construct the house. Apart from stating so the respondent has nothing to show exactly how much, if at all, was committed to that project.

In fact the petitioner categorically stated that *"all the time the house was under construction I was with him, behind him, helping him in any way I can...cooking food for them...I was there even carrying crusher dust and wood on my head..."*. Indeed her answers in cross-examination further confirm that she was not only present but also contributed directly and indirectly to the construction of the house.

The petitioner is now 41 years old, while the respondent is 45 years of age. The petitioner is employed as a claims manager with an insurance company and earns a monthly salary of SR 5,125. She also has a life insurance policy and does a saving of about SR 1000 from her said salary every month after servicing outstanding loans. The respondent operates a taxi business using his own car. It cannot therefore be said that their earning capacities in the foreseeable future are bleak. The house loan is fully paid up. The petitioner lives alone in that house as her only child, R M A is currently under the custody of the respondent. In addition to the said child the respondent has another son, both staying temporarily with him at his mother's house in La Louise. He had testified that the house is too small and the two children squeeze themselves in a tiny room with their Grandmother while he sleeps elsewhere on the floor. Both the petitioner and respondent intimated that they have no alternative accommodation each urging the court to make an order for retention of the house in their favour. In the final submissions the petitioner prayed for a 50% share in the house while the respondent prayed for 100% shares in the house but with an additional order that the petitioner be paid a sum of between 20% to 25% of the total value of the house.

There is no evidence on the record suggesting that any of the parties failed in their duties as a married couple while staying together in the same house either to look after their child or to make available the necessary provisions. Instead I see evidence to the effect that each one of them contributed towards the matrimonial property and wellbeing of the family, not only financially but also in different ways. The court takes note of the fact that even when the respondent left the house on his own the petitioner continued to live with and take care of their child now aged about 12 years. She continues to maintain and look

after the house which would have depreciated in value if left unattended.

I have considered the authorities cited (and as distinguished) by both counsel in light of the facts before me. Fortified by the above authorities (especially **Lesperance** and **Confait vs. Confait Divorce Side No. 7 of 1993**) and facts i am inclined to conclude that the common intention of the parties was to treat the house and land on which it stands as their jointly-owned matrimonial property. It is also my view that there exists overwhelming evidence on the record to the effect that the respondent contributed more than the petitioner. Pursuant to Section 20(1) of the Matrimonial Causes Act and considering all the circumstances of the case, I declare that 40% share in the immovable property in question (house and land on which it stands) shall vest for the benefit of the petitioner while the remaining 60% will go to the respondent.

Accordingly, it is ordered that:

1. The parties' share in the matrimonial house shall be **40% for the petitioner** and **60% for the Respondent**.

   Upon payment by the respondent of the petitioner's share of 40% in the matrimonial house within **six (6) months** of the date hereof **the petitioner shall vacate the said house** and handover vacant possession to the respondent, **failing which this order will entitle the petitioner to pay for the respondent's share** of 60% in the matrimonial house within **six (6) months** after the date of the respondent's failure to pay, **and also have the property transferred and registered in her sole name.**

   In the event of the petitioner failing to pay for the respondent's share as in order (2) above, the said **property shall be sold by court auction** at the instigation of either party and the proceeds of the sale thereof shall be distributed in terms of the formula 40% for the petitioner and 60% for the respondent.

   Given that this is a family dispute I shall make no order as to costs.

D. GASWAGA

JUDGE

Dated this 1st day of February, 2010.