

ESPARON v ESPARON

(2012) SLR 39

B Georges for the applicant
F Ally for the respondent

Judgment delivered on 2 February 2012 by

RENAUD J:

The parties in this matter are divorced and are now in the process of settling matrimonial assets. The substance of the matrimonial assets in issue is the house occupied by the parties. It is situated at Anse Aux Pins, Mahe, Seychelles on land parcel S2776 which is registered in the sole name of the respondent. The applicant is praying this Court to order that the said property be transferred into her sole name for reasons set out in an affidavit. The parties also adduced further *vice voce* testimonies.

The applicant is a German National who married the respondent, a Seychellois National on 30 May 1992 and divorced on 24 July 2009. There are two children born of this marriage and they are now in the care and custody of the applicant in Germany.

The applicant claims that she wholly financed the purchase of the property in issue and as she was a non-Seychellois she caused the property to be registered in the sole name of the respondent. She also claimed to have financed the construction of the matrimonial home on that property from her personal funds and moneys received from her family in Germany in the total sum of R 970,000. She produced documentary evidence showing that she indeed transferred the total amount of Deutschmark 325,497.91 from Germany to Seychelles. She claims that she also furnished the house with her own funds in addition to her own furniture which she brought from Germany.

The applicant averred that at the material time the respondent had no money or ability to purchase the land and build and furnish the matrimonial home and that he made no financial contribution whatsoever to the purchase of the land and the building of the matrimonial home.

The applicant also claimed that during the subsistence of the marriage she contributed towards the household expenses and the maintenance and upkeep of the family including the payment of the school fees of the children. That happened, according to her, because the respondent earned a very meagre salary or at times no salary as he was unemployed for a few months, and that the respondent was greatly dependent on her in respect of the family charges.

The parties separated on 26 March 2001 and the applicant went back to Germany with the two children, taking only clothes and the children, and leaving all the

movables in the home. Since then she had been the one who maintained the children without any contribution from the respondent. Since the applicant left in March 2001 the respondent has had the sole use, occupation and enjoyment of the matrimonial home.

The applicant averred that the respondent has no will, interest, ability and financial means to maintain the matrimonial home in that he had abandoned the matrimonial home, which is currently unoccupied and is in a state of disrepair and its value rapidly diminishing.

The applicant on the other hand claims that she has the will, interest, ability and financial means to maintain and preserve the matrimonial home and that unless it is settled on her its value will rapidly and substantially diminish.

It is for the reasons averred by the applicant that she claims to be entitled to land title S2776 with the matrimonial home thereon which should, therefore, be settled in her sole name. She added that should this Court find that the respondent has any share in the property she is prepared to pay him for his share.

In his affidavit in reply the respondent asserted that he had been married to the applicant for 16 years prior to her deserting him and the matrimonial home, leaving Seychelles with their two children in March 2001. Since then he has had sole occupation of the home and now claims that he should be allowed to retain it.

He denied abandoning the house however; because he is working on Praslin he had to live there. He stated that he made arrangements for a caretaker to look after the house in his absence and visits the property whenever he comes to Mahe. He averred that he has the will, interest, ability and financial means to retain the property.

The respondent, although admitted that the land title S2776 was indeed purchased from funds received from the applicant, denied that the matrimonial property should be settled in her sole name. He averred that as per an agreement between the applicant and him, he was to contribute towards the maintenance of the house during the course of the marriage in Seychelles. The respondent admitted that the construction of the matrimonial home and furnishings thereof were greatly done from funds received from applicant's parents from Germany and from gifts received from her parents.

The respondent also averred that during the marriage, he was gainfully employed as an entertainment manager in Seychelles earning between R 5,000 to R 6,000 monthly. He claimed to have contributed substantially towards household expenses and for the upkeep of the children. He added that at the material time there was question of payment of school fees as both of them contributed towards payment of day care for the child Jessica as the other child Janick had just been born and both of them contributed towards the payment of the babysitter for him. He denied that it was only the petitioner who maintained the children during their marriage.

The respondent averred that he could not pay for the children's maintenance after they had left for Germany as no system existed then for the transfer of funds to Germany as remittance in view of the restrictions existing then in Seychelles. He averred that he did make arrangement with the German Welfare Agency for Children, whereupon the children have been maintained in Germany ever since, by the said system.

The respondent contended that the applicant having deserted the matrimonial home and the matrimonial property having been registered in his sole name, this Court ought to order that he retains the matrimonial property solely. The respondent added that the applicant is already in possession of a flat in Freudenstadt, Germany and will accordingly not be prejudiced in him solely retaining the matrimonial property in Seychelles.

I had the benefit of hearing the parties viva voce. The parties actually lived and co-habited in the matrimonial home for 6 years or so. They were married in 1992 and lived in Germany before coming to Seychelles in 1996. They later moved into the matrimonial home after its completion.

As is the case in all such matters before the Court, each party goes at great length in trying to convince the Court through the production of all possible documentary evidence as well as adducing oral evidence that he/she should be vested with the matrimonial property, solely or in a greater share.

In our jurisdiction there are many such cases which have been decided by this Court as well as in the Seychelles Court of Appeal and therefore guidance abounds. However, there is no set mathematical formula by which such cases are decided and each case is considered on its own merits. The cardinal principle is that there must be a level of equity in that the respective party is not deprived of their fair share of contributions in the matrimonial asset despite such asset being registered in the sole name of one party, as is the case here. In determining that equitable balance the Court normally starts by looking at the legal ownership and then adjusts the shares of each party based on the level of contributions made by each party, be such contributions in cash, in kind or otherwise.

The legal ownership of the matrimonial asset, Title S2776 and the house thereon as well as its contents, belongs to the respondent as the property is registered in his sole name. It follows that the house thereon belongs to him in the absence of any legal document to the contrary, and obviously likewise the contents of that house.

Is there evidence that the petitioner made significant contributions, both in cash or in kind towards the acquisition of such matrimonial assets?

I have carefully listened to the testimonies of the parties and have verified the documentary evidence before the Court and I find and conclude that there is overwhelming and convincing evidence that the petitioner did indeed make significant contributions towards the matrimonial assets in issue.

Having made the above finding of facts I believe that I should proceed to equitably adjust the assets in order to reflect the situation of the parties. To start with I will declare that although the matrimonial property is registered in the sole name of the respondent it in fact belongs to both parties to the marriage. At the time the property was purchased the petitioner was not a Seychellois and the property could not be registered in her name personally or jointly with respondent. They were married and as a unit the property was registered in the sole name of the respondent although belonging to both of them. It follows that the house built on that property as well as its contents likewise belong to both parties jointly, hence for avoidance of doubt I find that all the matrimonial assets in issue belong to both the petitioner and the respondent jointly.

Having concluded that the matrimonial assets belong to the parties jointly I must now determine in what proportion does each party hold in these assets.

On the basis of the evidence I find that the petitioner made a greater cash contribution than the respondent. This fact is admitted by the respondent. The parties lived in the matrimonial home for 6 years and the petitioner left with the two children for Germany leaving the property in the sole care and custody of the respondent for a considerable period of time. Property needs to be administered and maintained and that was done by the respondent solely. Whether he maintained it to the level that it would have been had the parties continued to live together does not carry much weight against the respondent. On the other hand the petitioner maintained the two children of the marriage during that period. Despite the property not being kept in an utmost standard of repair I take judicial notice that the value of property in Seychelles has been on the considerable increase over the years. Bearing in mind the foregoing findings, I assess the shares of the parties in the matrimonial assets at 60% for the petitioner and 40% for the respondent.

The pleadings show that both parties do not wish to hold their shares in indivision but would prefer a clean break. I believe that this is fair and reasonable in the circumstances. As the respondent is the one who had been occupying the matrimonial home since the petitioner left Seychelles up to now, I will give the respondent the first option to purchase the shares of the petitioner and this he must do within 6 (six) months from the date of this judgment, failing which the option shall revert back to the petitioner to purchase the shares of the respondent within six months thereafter or 12 months (twelve) from the date of this judgment. Failing the parties purchasing the shares of the other party as stated, the property shall be sold on the market and each party will receive their share in the proceeds.

If and when either of the respective party purchased the shares of the other party the sole ownership of the property title S2776 and the house thereon as well as its contents

shall be registered in the sole name of the party who had purchased the shares of the other party. This judgment and proof of payment shall be sufficient for the Land Registrar to give effect to the transfer as afore-stated.

I order accordingly.