

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: DC 136/2014

[2016] SCSC 169

VICTOR JESUS DITURO

Petitioner versus

TAMARA GISELLE DITURO BORN VENTURA

Respondent

Heard: 19th January, 2016

Counsel: Mr. Anthony Derjacques for petitioner

Absent/ Unrepresented for respondent

Delivered: 3rd March, 2016

JUDGMENT

Carolus Master

PLEADINGS

[1] The Petitioner filed a Divorce Petition dated 7th October, 2016, supported by Affidavit sworn by the Petitioner, on the ground that his marriage to the Respondent has irretrievably broken down because the parties have lived apart for a continuous period of one year immediately preceding the presentation of the Petition and the Respondent

consents to the grant of the divorce. An Affidavit of consent to the grant of the divorce sworn by the Respondent was filed together with the Petition

- [2] The Court, upon the application of the Petitioner, on the 11th February, 2015, ordered summons to be served on the Respondent outside Seychelles in Argentina. The Respondent by email dated 18th May, 2015, addressed to the Assistant Registrar Mrs. J. Lepathy acknowledged receipt of the Petition and stated that she agreed with the request for divorce but that she lives in Argentina and was unable to travel to Seychelles.
- [3] An amended Divorce Petition dated 27th July, 2015, supported by an Affidavit sworn by the Petitioner was subsequently filed on the same grounds, the only difference between the original Petition and the amended one being the addition of an averment in the amended Petition that “The Petitioner as an airline cabin crew member with the Emirates Airline, resides both in the United Arab Emirates, namely Dubai, and at Belombre, Mahe, at the Emirates Crew facilities and house units.”
- [4] The Court proceeded to hear the cause ex-parte.

JURISDICTION

- [5] In terms of section 3(1) of the Matrimonial Causes Act, the Supreme Court has jurisdiction in relation to matrimonial causes (which includes divorce petitions) on an application of a party to a marriage who “at the date when proceedings are begun –
- (a) is domiciled in Seychelles; or
- (b) has been habitually resident in Seychelles throughout the period of one year ending with the date when proceedings are begun.”
- [6] In order for the Court to entertain the present Petition therefore, the Petitioner must satisfy the Court that he is either domiciled in Seychelles or has been habitually resident in Seychelles throughout the year preceding the filing of the Petition. In that respect, it is averred in the relevant part of paragraph 2 of the amended Petition that:

“2. ...The Petitioner was and is presently an Emirates Cabin Crew ... including at the time of the marriage. The Petitioner as an airline cabin crew member with the Emirates Airline, resides both in the United Arab Emirates, namely Dubai and at Belombre, Mahe, at the Emirates Crew facilities and house units.”

[7] The Petitioner testified that the parties, both Argentine nationals, were married on 26th September, 2013, in Seychelles.

[8] The Petitioner testified that he works as cabin crew with Emirates Airline in Dubai in the United Arab Emirates. He explained that when he got the job in Dubai he would usually travel to Seychelles every two weeks so that he would spend one week in Seychelles and one week in Dubai each time. He further stated that he and the Respondent decided to get married in Seychelles because they were not living in Argentina, because Dubai is an Islamic country and also because he liked Seychelles, it being a romantic destination.

[9] He stated as follows: “The Company usually give (sic) us a choice of countries that we have to fly and I chose Seychelles and US and Rome in Europe so the base is in Dubai. Emirates crew members work in Dubai and we have a base there and they gave me one more base here at Fishermen’s Cove Estate in Seychelles so I have one week in Dubai and one week here. Sometimes I get one week in Rome as well but more often to Seychelles and Dubai.”

[10] The Petitioner testified that when he is in Seychelles he lives in Emirates accommodation, that Emirates provides him with accommodation at the Fisherman’s Cove Estate which is paid for by Emirates.. He stated that the accommodation provided for him in Seychelles by Emirates is set aside specifically for him. He stated that in the week that he is not in Seychelles, he does not know whether it is used by anyone else but that “according to Emirates it is my home place to live here.” He explained that the accommodation “is a kind of villa where I have my kitchen, living room, bedroom and a balcony. It is just to rest because as a cabin crew we fly around the world.” The Petitioner further stated that he comes to Seychelles twice a month and that he normally stays for one week each time.

[11] The Petitioner testified that he left Argentina six years ago and that he has only been back on holiday to visit his parents. He specified that he does not live in Argentina and that he owns no properties in Argentina.

[12] The Petitioner further testified that he cannot get a divorce in Dubai where it is particularly difficult for foreigners to obtain a divorce. He also cannot get divorced in Argentina because the parties were married in Seychelles. Consequently if this Court does not grant the divorce he will never be able to get divorced. He further stated that both he and the Respondent want to carry on with their lives.

[13] Counsel for the Petitioner made written submissions on the issue of the jurisdiction of this Court. He has referred to Article 102 of the Civil Code of Seychelles Act which deals with the issue of “Residence” as well as the cases of Wilmore v/s Wilmore (1996) SLR 229, Busch v/s Busch (1971) SLR 350 and Coppolino v/s Coppolino SSC112/2001. He submitted that the Petitioner meets both tests as per section 3 of the Matrimonial Causes Act in that he is both domiciled in Seychelles or has been habitually resident in Seychelles throughout the period of one year ending with the date when proceedings began since he has established the following:

1. He is in a special category of persons habitually flying throughout several jurisdictions, as a cabin crew member.
2. His employer as part of the conditions of work has allocated to him a permanent flat, for his continued use and residence, throughout his employment these past years and continuing, which he utilises and lives in for a week, every two weeks, in Seychelles.
3. He does not reside in Argentina, nor in the USA.
4. Dubai (UAE) is merely the headquarters of the airline and not his residence.
5. His use and living in flat at Fisherman’s Cove Estate, Belombre, is settled, permanent, habitual, durable and professional.

- [14] I shall first deal with the issue of whether the Petitioner is habitually resident in Seychelles.
- [15] According to the testimony of the Petitioner he is an Argentine National. He left Argentina six years ago and since then he has only been back to Argentina on holiday to visit his parents. He works with Emirates Airlines which is based in Dubai in United Arab Emirates, as cabin crew. The Petitioner is given a choice as to the destinations to which he can fly from Dubai and he chose Seychelles, US and Rome, Italy. He therefore flies from Dubai to Seychelles, USA or Rome and spends time at whichever destination he happens to be flying to before flying back to Dubai. However he travels more to Seychelles than to any other destination and usually travels twice a month to Seychelles and stays in Seychelles for one week each time (so that he usually stays two weeks in Seychelles each month). When he flies to Seychelles he stays one week here and returns to Dubai where he spends another week there. The company provides him with paid accommodation in Seychelles in the form of a villa at Fisherman's Cove Estate. The Petitioner is not aware whether the villa is used by anyone else when he is not in Seychelles.
- [16] I find implausible the testimony of the Petitioner, that he usually flies two times in a month to Seychelles and that each time he stays for a week in Seychelles after which he flies back to Dubai and stays a week there before either coming back to Seychelles or flying to another destination. If I am to believe this, it means that the Petitioner flies only four times in a month (from Dubai to Seychelles where he spends one week, from Seychelles to Dubai where he spends another week, from Dubai to Seychelles again where he spends another week and from Seychelles to Dubai where he spends yet another week) and that he spends two weeks in Dubai and two weeks in Seychelles while awaiting his next flight. Furthermore other than his testimony (which the Court disbelieves) the Petitioner has not brought any evidence of his stays in Seychelles for the stated periods.
- [17] Article 102 of the Civil Code of Seychelles Act provides as follows in respect of the term "Residence":

“1. The residence of a person shall be the place in which he resides in fact and shall not depend upon his legal right to reside in a country.

2. In determining whether a person is habitually resident in a place account shall be taken of the duration and continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence.

3. Residence or habitual residence shall only be an element to be taken into account by a Court in deciding whether a person has established a claim of domicil.” Emphasis is mine.

[18] Member of the cabin crew of an aircraft travelling to Seychelles are legally entitled to stay in Seychelles. The Immigration Decree (Cap 93) makes provision for the issuing of permits to persons entering Seychelles (which may be a Dependant’s permit, a residence permit, a visitor’s permit or a gainful occupation permit) but certain categories of persons including “members of the crew of aircraft engaged in their duties as such” are exempted from holding such permits. The question arises however as to whether the Petitioner’s stays in Seychelles may be qualified as *residing* in Seychelles. In my view since the Petitioner’s stays in Seychelles as a cabin crew member are as it were “between flights” for the purpose of resting and to await the next flight and not for any other reason, it is doubtful whether such stays may be qualified as residence.

[19] The Court, in the case of Coppolino v/s Coppolino SSC112/2001, (referred to by Counsel for the Petitioner in his submissions) stated that “In terms [of] Article 102(3) of the Civil Code, habitual residence requires continuity of residence and durable ties between the person and his residence.” In that case however, the Court did not address the issue of habitual residence in depth. It found that “the Petitioner was (sic) not admittedly been habitually resident in Seychelles throughout the period of one year ending with the date when the proceedings began ...” but that he had satisfied the domicile requirement in Section 3(1)(a) of the Matrimonial Causes Act.

- [20] In terms of Article 102(2) cited at paragraph 17 above three matters have to be taken into account in determining habitual residence, namely: (1) **duration** of the residence, (2) **continuity** of the residence and (3) other facts of a personal or professional nature which point to **durable ties** between a person and his residence.
- [21] With respect to duration and continuity of residence, the Petitioner deponed that he has been staying in Seychelles for at least two weeks in each month since he started working with Emirates. Although he stated that he left Argentina six years ago, he did not specify and there is no evidence to show that this is when he started working with Emirates. However he did state that he was working with Emirates when he got married on 26th September, 2013. Therefore at the time of filing the Petition on 8th October, 2014, if the testimony of the Petitioner is to be believed, he had been staying in Seychelles for at least two weeks of each month of the year immediately preceding institution of the proceedings. However as stated above I do not believe that the Petitioner did spend that amount of time in Seychelles and I find it more likely that he spent much less than two weeks of each month in Seychelles. This Court not having any credible evidence as to the length of stay of the Petitioner in Seychelles finds itself unable to make a finding as to whether the amount of time that the Petitioner spent in Seychelles was of sufficient duration to constitute habitual residence. In addition, I find that the Petitioner's stays in Seychelles being constantly interrupted by having to travel as part of his work affected the continuous character of his residence necessary to constitute habitual residence.
- [22] In order to establish habitual residence, Article 102(2) also requires "facts of a personal or professional nature which point to durable ties between a person and his residence. There is no evidence before the Court to show any facts of a personal nature which point to any ties (durable or not) between the Petitioner and his residence in Seychelles. I am also of the view that although the Petitioner's residence in Seychelles is due to his employment with Emirates it cannot be said that any ties he may have with his residence in Seychelles are of a professional nature for the following reasons: Emirates Airlines is based in Dubai in the United Arab Emirates and Seychelles is one among several destinations to which this airline flies. The Petitioner deponed that he flies from Dubai to Seychelles as well as other destinations and stays at those destinations to, in his words

“rest because as cabin crew we fly around the world” before returning to Dubai. The Petitioner is not gainfully employed in Seychelles and does not work when in Seychelles but is simply there to recuperate and await the next flight.

[23] As to whether any ties that may exist between the Petitioner and his residence in Seychelles are durable, I note that the Petitioner’s residence in Seychelles is entirely dependent on his employment with Emirates Airlines which will only continue as long as the Airline continues to employ the Petitioner and to operate in Seychelles. I also take into account that the Airline may decide to send him to destinations other than Seychelles thereby ending his trips to Seychelles. Additionally, the fact that the accommodation is provided and paid for by the company shows that the residence of the Petitioner in Seychelles is entirely dependent on the company. I am therefore of the view that whatever ties that the Petitioner may have with Seychelles are not durable. In my view durable ties of a professional nature exist between the Petitioner and his residence in Dubai and not Seychelles.

[24] Consequently I am of the view that the facts of this case do not show that the Petitioner was habitually resident in Seychelles throughout the period of one year ending with the date on which the Petition was filed.

Counsel for the Petitioner, in his submission, quoted the case of *Wilmore v Wilmore* (1966) SLR 229, with respect to establishing residence. He submitted as follows: “In *Wilmore v/s Wilmore*, SLR 1966, 229, to establish residence, Justice Sauzier held “for this purpose residence only means personal presence in a locality, and, if accompanied by the required state of mind, neither its character or its duration is material” and he continued, “to constitute an *animus manendi*, a settled purpose is necessary of making the principal or sole permanent home in the country of residence.”

[25] In that case the wife Petitioner instituted divorce proceedings under the Matrimonial Causes Ordinance 1949 (Cap 91). In terms of that Act, the Court only had jurisdiction if the parties were at the time of institution of proceedings both domiciled in Seychelles. The Petitioner was a Seychellois and the Respondent a South African. Pursuant to section 2 of the Domicile Ordinance which provided that domicile must be determined in

accordance with English Law, the Court following the principles of the English Law of Domicile, held that the domicile of origin of the Respondent (husband) was South Africa and that it was incumbent on the Petitioner (whose domicile was dependent on that of her husband) to show that her husband had acquired a domicile of choice in Seychelles at the time of institution of the proceedings. In deciding whether the Respondent had acquired a domicile of choice in Seychelles, the Court considered passages from Rayden on Divorce 7th Ed. from which he quoted inter alia, the following:

“11. CHANGE OF DOMICIL – Any person not under disability may, at any time, acquire a new domicil by residing in another country with the intention of continuing to reside there for an indefinite time coupled with the absence of genuine intention of returning to reside permanently in the country in which he was hitherto domiciled: (a) for this purpose residence only means personal presence in a locality, and, if accompanied by the required state of mind, neither its character or its duration is material; (b) to constitute an animus manendi, a settled purpose is necessary of making the principal or sole permanent home in the country of residence. ..”

[26] It is clear that the way in which “residence” is defined in the above quotation from Rayden on Divorce is for the purpose of proving a change from a domicile of origin to a domicile of choice. This definition of residence does not apply to each and every instance where the word is used or as is being attempted here to prove habitual residence or domicile in terms of section 3 of the Matrimonial Causes Act. In any event, the Petitioner in the present proceedings is required to establish *habitual* residence and not merely residence. Furthermore, the applicable law in respect of the concepts of domicile and residence in Seychelles, is found in the Civil Code and not English law. This is made clear by section 2 of the Domicile Act (Cap 66) which provides that “*Subject to Articles 3 and 102 of the Civil Code of Seychelles* the law of Domicile shall be the law of England for the time being.” Emphasis is mine.

[27] If we were to follow English law however, the quotation from Rayden on Divorce makes clear that in order to establish residence both personal presence in a locality and a settled purpose of making the principal or sole permanent home in the country of residence is

required. When both these factors are clearly present, then the character or duration of the residence is immaterial. The character and duration of residence may be material in determining intention where this is not clearly proven. Conversely declarations of intention may be negated by a course of conduct inconsistent with such avowed intention as opposed to the real intention.

- [28]** In *Wilmore v Wilmore* (1966) SLR 229 the facts showed that the Respondent married in Seychelles, expressed his desire to stay there, and applied for a class F entry permit in terms of the Immigration Ordinance. However the Court found that his course of conduct and the character of his residence (he had not spent more than 6 months in any year for a period of eight years) was not only inconsistent with his declared intention but revealed an absence of a fixed and settled intention on his part to make Seychelles his permanent home.
- [29]** In the present case even if the Court believed that the Petitioner had been personally present in Seychelles for two weeks in each month of the year preceding filing of the petition, there is no evidence of a settled purpose on his part of making the principal or sole permanent home in the country of residence and the conditions for establishing residence as laid down in *Wilmore v Wilmore* are therefore not fulfilled. I am also of the view that the character and duration of the residence are not of such a nature as to establish a fixed and settled intention on his part to make Seychelles his permanent home.
- [30]** Counsel for the Petitioner also makes reference to the case of *Busch v Busch* (1971) SLR 350 in which a divorce Petition was filed under the Matrimonial Causes Ordinance 1949 (Cap 91) as amended by Ordinance No. 20 of 1967 which required that the wife Petitioner should have been ordinarily resident in Seychelles for a period of three years immediately preceding the commencement of proceedings. Ordinary Residence was interpreted as not requiring that the Petitioner be present in Seychelles throughout such period so that temporary absences for short or long periods would not break the period of such residence. Section 3(1) of the Matrimonial Causes Act which is applicable in the present case uses the term “habitual residence”. However the Court in *Coppolino v Coppolino* commenting on the definition of ordinary residence in *Butch v Butch* stated

that the relevant section of the Matrimonial Causes Ordinance uses the term "habitually resident." It went on to say that "Stroud's Judicial Dictionary defines "habitually" as "requiring a continuance and permanence of some tendency, something that has developed into a propensity, that is, present from day to day." In my view, the residence of the Petitioner in Seychelles does not fulfil these characteristics.

[31] Having found that the Petitioner was not habitually resident in Seychelles, could the Petitioner be considered as **domiciled** in Seychelles?

[32] Section 2 of the Domicile Act (Cap 66) provides that "Subject to Articles 3 and 102 of the Civil Code of Seychelles the law of domicile shall be the law of England for the time being."

Article 3 (3) of the Civil Code of Seychelles Act provides that "Status and capacity shall be governed by such laws as are from time to time enacted. Subject to this provision, capacity shall further be determined by the domicile of a person. *Domicile shall be inferred from the fact that a person retains or voluntarily establishes his sole or principal residence in a country with the intention of retaining or making that country the centre of his personal, social and economic interests.*" Emphasis is mine

Article 102 of the Civil Code of Seychelles Act which defines the term Residence establishes the relationship between residence and domicile:

"1. The residence of a person shall be the place in which he resides in fact and shall not depend upon his legal right to reside in a country.

2. In determining whether a person is habitually resident in a place account shall be taken of the duration and continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence.

3. *Residence or habitual residence shall only be an element to be taken into account by a Court in deciding whether a person has established a claim of domicil.*" Emphasis is mine.

- [33] In the case of Coppolino v/s Coppolino SSC112/2001, the Petitioner came to Seychelles from Italy with the intention of getting married and settling down. He transferred his pension funds to an account at a bank in Seychelles. However his marriage broke down and he returned to Italy after three months. He subsequently came back to Seychelles and filed a divorce Petition. He still had his financial interests in Seychelles and had come to Seychelles to settle down and with this in view he was living in concubinage with a woman who he intended to marry after obtaining his divorce. At the time he was a 63 year old pensioner. On the basis of those facts the Court was satisfied that the Petitioner had established his principal residence in Seychelles with the intention of making Seychelles the centre of his personal, social and economic interests in his retirement and accordingly found that he had satisfied the domicile requirement.
- [34] The Petitioner has deponed that he travels to Seychelles twice a month and stays in Seychelles for a week each time. He stays in Seychelles because his work as cabin crew with Emirates Airlines obliges him to do so and not because he has voluntarily established his residence in Seychelles with the intention of making Seychelles the centre of his personal, social and economic interests. The fact that the Petitioner's accommodation is provided and paid for by the airline confirms that view. In fact there is no evidence to show the Petitioner's intention of making Seychelles the centre of his personal, social and economic interests. The evidence also shows that Seychelles is not the Petitioner's sole or principal residence since he also resides in Dubai during the time when he is not in Seychelles or flying to the US or Italy. In fact since the Petitioner admittedly sometimes travels to destinations other than Seychelles from Dubai and comes back from these destinations to Dubai, this shows that he spends more time in Dubai than in Seychelles.
- [35] In view of the above therefore I find that there is insufficient evidence to establish the domicile of the Petitioner in Seychelles at the date when proceedings began.
- [36] I also wish to address the points put forward by Counsel for the Petitioner in support of his submission that the Petitioner is both domiciled and habitually resident in Seychelles throughout the period of one year ending with the date when proceedings began. The first

point is that the Petitioner is in a special category of persons habitually flying throughout several jurisdictions, as a cabin crew member. In my view, this is irrelevant if the legal requirements for habitual residence and domicile as specified above are not fulfilled.

[37] It has also been submitted that his employer as part of his conditions of work has allocated to him a permanent flat, for his continued use and residence, throughout his employment these past years and continuing, which he utilises and lives in for a week, every two weeks in Seychelles. As pointed out above, the testimony of the Petitioner shows that he has been flying to Seychelles since September, 2013, one year before the Petition was filed. This Court also disbelieves his testimony as to the duration of time he spends in Seychelles. Furthermore the fact that he has been provided with paid accommodation by his employer does not confirm that he is domiciled or habitually resident in Seychelles.

[38] As to his submissions that the Petitioner does not reside in Argentina or USA, this does not mean that the Petitioner has to reside in Seychelles because he cannot be considered as resident in other countries to which he travels in the course of his work. The assertion that Dubai is merely the headquarters of the airline and not the Petitioner's residence, is not borne out by the testimony of the Petitioner which shows that, in the Petitioner's words, "the base is in Dubai." The fact that the crew members fly out from Dubai to other destinations and return to Dubai before leaving for another destination is indicative of Dubai being the base from which the Petitioner operates. I also disagree with the submission that the Petitioner's use and living in a flat at Fisherman's Cove Estate, Belombre is settled, permanent, habitual, durable and professional for the reasons given in this Judgement.

[39] In view of this Court's findings that the Petitioner is neither domiciled in Seychelles nor was habitually resident in Seychelles throughout a period of one year ending with the date when proceedings began, I hold that this Court has no jurisdiction to entertain this Petition.

[40] The Petition is accordingly dismissed.

Signed, dated and delivered at Ile du Port on 3rd March, 2016

E. Carolus
Master of the Supreme Court