

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MC58/2016

[2018] SCSC

**JOCELYN AH-YU
OF MONT-FLEURI, MAHE**
Applicant

versus

**LUCILLE DIDON
ANTONIO GABRIEL**
Respondents

Heard: 18th day of October 2017

Counsel: Mr. B. Hoareau E. Chetty for Applicant

Ms. Gill standing in for Mr. B. Georges for Respondent

Delivered: 25th day of January 2018

JUDGMENT

S. GOVINDEN J

[1] This Judgement arises out of an Application through Notice of Motion duly supported by Affidavit of Jocelyn Ah-Yu (“Applicant”), filed before the Court on the 2nd day of June 2016, against Lucille Didon and Antonio Gabriel (“Cumulatively Respondents”), wherein it is prayed for a *Writ Habere Facias Possessionem* (“Writ”), to be issued against the Respondents, ordering them to quit, leave and vacate the two bedroom house located on Parcel C 6823, which they are illegally occupying.

[2] ***The Respondents filed an Affidavit of the 2nd Respondent Antonio Gabriel (swearing on his own behalf and that of the First Respondent), of the 9th of November 2016 and attested before Notary Bernard Georges (same Counsel representing the Respondents in this matter), and filed on the 14th November 2016 before the Registry of the Supreme Court.***

(Emphasis mine).

[3] Learned Counsels moved the Court to rely on the filed Affidavits which leave was granted and thereafter both parties respectively filed written submissions on the 26th July 2017 and 22nd January 2018 and of which contents have been duly noted for the purpose of this Judgement.

[4] For the purpose of the Application the salient factual background as per the records of proceedings reveal as follows.

[5] The Applicant by way of Affidavit evidence afore-referred avers that she is the proprietor of Parcel C6823 and the house situated thereon (“Property”) purchased from Norman Bastienne (“Vendor”), (*by instrument of Transfer of the 29th July 2009 and registered on the 12th August 2009 Exhibit A1*).

[6] The Applicant further avers that as per Certificate of Official Search of the Land Registrar with respect to the Property, it is confirmed that she is the owner of Parcel C6823.

[7] It is further averred by the Applicant that there is a two bedroom house on the property (“house”) which was built by her used to house one Mr. Lidell Bill and Mrs. Clemencia Bibi, to reside in it on the basis of an Agreement dated the 24th July 2009 (“Agreement”), which the Vendor, who was then still owner on the Property, had entered into with them, by which they were to have a “*droit d’habitation*” in respect of the house for their lifetime (*Exhibit A3*).

[8] It is further averred that Mr. Lidell Bill and Mrs. Clemencia Bibi *now deceased* passed away on the 1st June 2012 and 27th February 2015 respectively and that since their demise, the Respondents have been illegally occupying the house without any legal right or authority to do so.

[9] It is averred in no uncertain terms by the Applicant that, “*as proprietor of parcel C6823 I have never granted any authorizations to the Respondents to occupy the house*”.

[10] The Applicant further avers that she has amicably requested the Respondents to vacate the house but they have refused to do so. In that she even had a meeting with them on the 12th March 2015, whereby they agreed to vacate at latest the 15th May 2015 but that unfortunately they failed to do so to date and still in occupation of the house.

- [11] It is averred finally, that the Applicant is in urgent need of the house for her own use as she intends to move back and reside in Seychelles and that she is in possession of a permanent resident permit which allows her to reside permanently in the Seychelles and that she has no other house in the Seychelles.
- [12] The Respondents by way of the afore-said Affidavit [Paragraph 2] above, admits ownership of the Property by the Applicant thus *Exhibits A1, Certificate of Official Search, Exhibit A2, and the agreement between the Vendor and Mr Lidell Bill and Mrs Clemencia Bibi who are now deceased.*
- [13] The Respondents deny existence of “*a droit d’habitation*” in favour of Mr. Lidell Bill and Mrs. Clemencia Bibi and further avers that it does not in any event affect their right to reside in the said house hence denying averment of illegal occupation by the Respondents since the passing away of Mr. Lidell Bill and Mrs. Clemencia Bibi in the 2nd Respondent being the nephew of the latter and the first Respondent the 2nd Respondent’s partner residing with him.
- [14] It is admitted further by the Respondents that they were never allowed authorization to reside in the house upon the demise of Mr. Lidell Bill and Mrs. Clemencia Bibi by the Applicant but that same was not required as they had the authorization to do so by Mr. Lidell Bill and Mrs. Clemencia Bibi and that they have nowhere else to go and they have been advised that they have rights to occupy the house as tenants in terms of tenants and or “superficiare” in respect of the house.
- [15] The intended use of the house by the Applicant is denied and it is averred without any further proof exhibited as part of the ***Affidavit*** that it is unsuited as a residence for the Applicant and that their continued presence in the house has no effect on the Applicant’s occupation of her Property.

(Emphasis is mine).

- [16] I shall in the light of the above summary of evidence for and against the Application move on to consider the applicable legal standard and analysis thereto and I note based on the pleadings inclusive of the submissions thereto.
- [17] The law with regards to the grant of a “*writ habere facias possessionem*” originating from the powers of the Supreme Court in Articles 806 to 811 of the French Code of Civil Procedure applicable to the Seychelles by virtue of the French Code of Civil Procedure (Promulgation) Act, is well settled in this Jurisdiction. And at this juncture, I wish to point out that such writs ought to be differentiated from applications and or Motions arising from the provisions of Section 6 of the Courts Act (Cap 52), *whereby “the Equitable Powers the Supreme Court come into play to administer Justice and to do all*

acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles”, and our law as far as Writs is concerned is not silent hence its non-applicability in this and or similar cases.

[18] The vital principles governing the grant of Writs are provided the following elements are present together-

- (i) Firstly, if it is to eject a person occupying property merely on the benevolence of the owner (being proprietor and or Lessor), such a person should have neither right nor Title over the said premises (inclusive of no serious and or a bona fide defence to the Application);
- (ii) Secondly, if it is the only remedy available and in that there is an urgency for the granting of the Writ; and
- (iii) Thirdly, if there exist an alternative recourse, then it is advisable that the Applicant should apply for it.

[19] The above principles according to the law are in my belief relevant in the instant Application.

[20] I shall analyse this foremost the legal objections as raised in the Submissions and which follow from the Pleadings as filed as well as on the facts as per the evidence of facts of the Applicant.

[21] Firstly, a very crucial point of law has been raised by Learned Counsel for the Applicant as part of their submissions which point I find important to consider and elaborate in detail to avoid such irregularities in future.

[22] The point of law as raised in respect to the Affidavit as filed by the 2nd Respondent Mr. Antonio Gabriel (supra). It is submitted that the Affidavit of the 2nd Respondent is defective hence null and void ab initio for the Affidavit is sworn before Notary Bernard Georges, who is the Attorney-at-Law representing Respondents. Reference is also made to the provisions of Order 41 of Rule 8 of the Supreme Court of England applicable in Seychelles by virtue of Section 17 of the Courts Act with respect to the fact that, “*no affidavit shall be sufficient if sworn before the solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that solicitor*’. It is thus submitted in the end result, that the 2nd Respondent could not have sworn his Affidavit before Bernard Georges, as he is the Attorney-at-Law representing him and the 1st

Respondent in the present case hence it being void and of no effect. Reliance is made on the Supreme Court cases of (*Church v/s Boniface (2011) SLR 260*) and on the of (*Appeal case of Morin v/s Pool (2012) S.L.R. 109*).

- [23] Now, with reference to the submission of the defective Affidavit, this Court notes that the Affidavit of the 2nd Respondent was sworn before Notary Bernard Georges, his Counsel in this matter (for Ms. Gill stood in on his behalf) and hence relevancy of the point as raised by Learned Counsel for the Applicant.
- [24] It is trite, that in this Jurisdiction that there are several instances in the Seychelles Code of Civil Procedure (“SCCP”), the Seychelles Court of Appeal Rules (“SCAR”), as well as subsidiary legislations like the Supreme Court Rules regarding Interception of Correspondence or Other Means of Communication, the Supreme Court Rules regarding Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities and the Constitutional Court rules regarding Application, Contravention, Enforcement, or Interpretation of the Constitution, where the filing of an Affidavit is required to support an Application or filing before the Court.
- [25] According to Section 171 of the SCCP, entitled “*Before who affidavits may be sworn*”, *affidavits may be sworn in Seychelles in any cause or matter and “before a Judge, a Magistrate, a Justice of the peace, a Notary or the Registrar.....”*.
- [26] While several provisions of the SCCP, SCAR and other Rules of the Court require an Affidavit, it is not immediately clear that the Courts Seychelles have dealt with the issue of a defective affidavit uniformly. While a brief review of the Jurisprudence in the Seychelles suggests that the Courts of Appeal dismisses filings or Applications that do not have the required Affidavit, certain lower Courts in Seychelles have issued Rulings suggesting that there is a certain amount of latitude in how to address a defective Affidavit or “unsworn affidavit”.
- [27] In the case of (*Louis v/s Constitutional Appointment Authority, SCA 26 of 2007*), the Applicant filed a petition for special leave to appeal pursuant to section 17 of the SCAR. The Respondent, however, objected to the Petition contending that it was untimely, the prescribed fees had not been paid, and that it had not been supported by properly attested affidavit. The purported affidavit lacked a name and signature.

- [28] Because the affidavit could not be considered an affidavit as a matter of law, it found that the document was void and therefore that there was no valid petition before the court. In dismissing the petition, the court of Appeal stated that the Notary Public who had signed the document should have realized that he was signing a document which lacked the basic features of an affidavit. Having determined that the application contained “several fatal flaws”, the court dismissed the petition.
- [29] Relatively, in the matter of (*Morin v/s Pool (2012) SLR 109*), (as cited by Learned Counsel for the Applicant) (*supra*), the Court of Appeal dealing with the issue of a lawyer acting as oath taker of his own client’s affidavit, acknowledged the decision in *Louis case* and stated that, “*We are unable to find fault with the reason of ... the court of Appeal in such cases and therefore feel bound to follow their approach.*”
- [30] While the Court of Appeal’s finding would tend to indicate that an unsworn affidavit should be dismissed, the court’s formulation of “bound to follow” a decision, may also be interpreted in two alternate ways namely, firstly, in that it may be interpreted as suggesting or according courts a certain amount of deference in how to best deal with a defective affidavit; and secondly, it may be interpreted narrowly as simply a confirmation of what a court can do (i.e. determine that an unsworn affidavit is defective and therefore dismiss it), as opposed to a broader interpretation confirming what a court cannot do (i.e. determine that an unsworn Affidavit is defective, but allow the party to cure the defect).
- [31] In this regards, the Supreme Court in (*Krishnamart & Company v/s Opportunity International (2007) SLR 73*), acknowledged there cases where the courts had seemingly found that they had a certain amount of latitude to deal with a defective affidavit and not dismiss it outright: namely, the cases of (*Paul Chow v/s The Commissioner of Elections, CC 3/2007*), (*United Opposition v/s Attorney General (unreported) CC 8/1995*), and (*Mrs Mersia Chetty v/s Krishna Levy Chetty (unreported) SC 417/2006*).
- [32] In a gist, in *the Krishnamart case* the defective affidavit was stamped by an attorney instead of a notary public stamp. Moreover it appears from the ruling, that the attorney who had stamped the affidavit with an attorney at law stamp was a well-known public notary who had mistakenly used her attorney stamp instead of her notarial stamp. *Despite the applicant’s argument that her signature and not the stamp was proof of its authenticity and that she could have easily come to court to rectify it after filing the*

affidavit, the court dismissed the application. It explained that it would be unfair for the court to take on the onerous duty of speculating or venturing to look into the intentions behind her mistake. In dismissing the application, the court remarked that the applicant and his counsel ought to have been more diligent and responsible by perusing the pleading for possible defects. Importantly, despite dismissing the application, the Supreme Court seemed to suggest that the alternatives available to the court for addressing the defect were not limited to dismissal. It stated that, “In my view no amount of explanation can remedy the situation apart from rectifying it by way of amendment or filing a new affidavit.”

(Emphasis is mine).

- [33] Moreover, in reaching its findings the court considered the cases of *Chow, United Opposition and Mersia Chetty*, but found the facts distinguishable.
- [34] In the *Chow* case, the defects at issue were explained as follows, “*For instance, it averred in paragraph 5 of the petition that the 1st Respondent announced the dates of the election on the 20th March 2007, whereas it was done on the 26th March 2007. A more material error contained in paragraph 8 of the Petition was the averment that the 1st Respondent can only hold elections 30 days after the proclamation. As submitted by the Attorney general, that would have meant that the 1st Respondent was correct in fixing the dates of the election to commence on the 50th day after the proclamation.*”
- [35] The Constitutional Court explained that, it “*expects the petitioner and his counsel to have acted with more diligence, seriousness, and with responsibility and at least peruse the pleadings once after typing for possible defects.*” And it expressed its strong disapproval of such irresponsibly drafted pleadings. However, given that the Petition concerned the constitutionality of an impending General Election which affected the whole country, the court explained that it was, “*prepared to acknowledge human errors and omissions regarding certain defects in an affidavit.*” Moreover, it noted that, “*those errors and omissions were however permitted to be mended under Rule 5 (3) as they did not constitute any new matter not pleaded in the Petition.*”
- [36] Likewise, in the cases of *United Opposition and Mersia Chetty*, the Constitutional Court and the Supreme Court reached a similar position. In the former, the case involved inter alia, a petition and purported affidavit filed under section 3 of the rules regarding

application to the constitutional court. The petition was filed by Bernard Georges, in his capacity as an attorney and the affidavit was filed by the same attorney, but in his capacity as a public notary. The Constitutional court found that the affidavit was deficient, but noted that opposing counsel had not challenged the petition on those grounds and that failure to file a proper affidavit in a future constitutional case could be regarded as being a failure to comply with Rule 3 (1). However, despite finding the affidavit deficient, the Constitutional court felt that, ***“seeking redress of infringements of fundamental rights and contraventions of the provisions of constitution should not generally be defeated by procedural deficiencies, unless such deficiencies are fundamentally fatal to the maintenance of such petitions.”***

(Emphasis is mine).

- [37] In the latter case of *Mersia Chetty*, the Supreme Court stated that, ***“...merely not being supported by an affidavit is not enough reason to warrant a dismissal of a motion especially where the grounds to be argued require no evidence and are, for instance, purely matters of law. A motion drawn in the prescribed form and in general terms sufficiently setting out the prescribed form and in general terms sufficiently setting out the grounds on which it is made would suffice where no evidence is required.”***

(Emphasis is mine).

- [38] Finally, in the case of (*Mrs. Lea Raja M. Chetty v/s Mr. Mariapen Srinivasen Chetty, CS 327 of 2006*), a case dealing with an application for a freezing order signed by an attorney and an affidavit signed by the same attorney in his capacity as public notary, the Supreme Court concluded that, *“given the relationship of the parties, their state of affairs, as well as the redress ought and the urgency of the application, the court was prepared to entertain it the way it is in the interest of justice”*. In reaching this conclusion, the Supreme Court referred to the court’s ruling in the *United Opposition*.

- [39] Now, as demonstrated in those various cases, while the Court of Appeal has interpreted the requirement for having a proper affidavit more strictly, and dismissed applications with defective affidavits, lower courts dealing with constitutional issues and urgent applications have focused on the nature and content of the purported affidavit, and have interpreted the affidavit requirements less strictly by characterizing the more liberal approach as being in the better interest of justice.

[40] Now, this Court having carefully scrutinised the stance of the Court of Appeal being the highest court of the land and the other subordinate Courts with respect to the issue of “defective affidavits” finds that, in striking an appropriate balance for respecting the integrity of our legal system guarding the importance of form and procedures all the while acknowledging that rules of procedure are the hand maid of justice, and also noting that the affidavit evidence of the 2nd Respondent is the sole legal document with respect to facts to be relied upon for the purpose of determining this application and this matter not falling within the parameters of “the exceptions” as enunciated in the cases of *United Opposition, Mersia Chetty and Lea Chetty*, I find myself bound to follow the narrow interpretation of the Court of Appeal in *Morin case* and the Supreme Court *Krishnamart case* (supra). I find that well-known Counsel and Notary Bernard Georges, ought to have been more diligent and responsible in this case by perusing the pleadings for ascertaining possible defects in the affidavit of his client and had this been done at the appropriate time, then Counsel could have still “rectified the defective affidavit by way of an amendment or filing a new affidavit”. Since the essential legal exercise has not been done by Learned Counsel and or Respondents, then I find that the defect in the affidavit in that it is sworn by the same attorney who is representing the Respondents contrary to Order 41 of Rule 8 of the Supreme Court of England [paragraph 21] above, is fatal to the Respondent’s pleadings and hence void and of no effect.

[41] I find thus on the basis of the very clear analysis of the defective Affidavit evidence of the 2nd Respondent (***which defect as ruled is fatal to his defence ab initio***) as presented, that the Application remains uncontested for reasons given.

(Emphasis is mine).

[42] Now, following from the above and analysing the “uncontested” affidavit evidence of the Applicant in the present case in line with the prerequisites to be met for such an Application for Writ, firstly, the Applicant has established ownership of the property and the house being occupied by the Respondents(*Exhibit A1*). (*Exhibit A2*), being the Certificate of Official Search further confirms ownership of the Applicant with an, “*encumbrance thereon namely as “entry No2. Droit d’habitation* in favour of Mr. Lidell

Bill and Mrs Clemencia Bibi” and (*Exhibit A3*), in furtherance to its clauses 1 as read with clauses 4 and 5 of the agreement between Mr Lidell Bill and Mrs Clemencia Bibi and Mr Norman Bastienne. Paragraph 1 of the agreement *Exhibit A3*, reveals that, “*The Land Owner will build a one bedroom house in accordance with Planning laws and regulations on Parcel C6823 and will grant the Occupiers a droit d’habitation until their death rent free in the said house*”. Clause 2 provides that, “*the occupiers are not allowed to sublet, assign, or part with the possession of the said house provided to them, nor to cause any structural alteration or addition to be made to it*”. Clause 4 further provides that, “*The occupiers will need the prior permission of the land owner to bring in any relative to live with them, and such permission will be subject to that person vacating the house forthwith after the termination of the droit d’habitation upon the death of the last surviving occupiers*”. Clause 5 finally provides that, “*If the land owner sells the said property before the rebuilding of the new house, he undertakes to sell the property subject to the purchaser agreeing to be bound by this Agreement*”.

[43] In furtherance to the above cited *clauses of Exhibit A3*, the conditions of instrument of transfer *Exhibit A1* provides that, “*The transferor hereby warrants and represents to the Transferee knowing that the Transferee is relying on the said warranties and representations in entering into this transfer- (a) that the Property is free from encumbrances, lien,, right or pre-emption, usufructuary interest, droit d’habitation or other analogues right save “for a house occupied by Mr. and Mrs Clementia Bibi which the Transferee has full knowledge of and has accepted to take the Property subject thereto;”*

[44] It is thus abundantly clear, that in the absence of any evidence to the contrary, the Applicant has proved on a balance of probabilities that she is the owner of the Property and the house as averred in his affidavit and upon the demise of Mr. Lidell Bill and Mrs Clemencia Bibi leading to the termination of their *droit d’habitation* of the house as per *Exhibit A3* respectively. (*supra*).

[45] Secondly, as indicated above, the second essential condition for such an Application to succeed, is that it should be the only remedy available and which to my mind is directly linked with the urgency for the granting of the Writ and this principle has been clearly established as rightly pointed out by Learned Counsel for the Applicant in the matter of

(Simon Bertie Chrisostome v/s Therse Macgaw C.C. 32/92), wherein Perera J., ruled that “...the principle has been well established, this writ is available to a party whose need is of an urgent nature and who has no other equivalent legal remedy at his disposal...”

[46] The Applicant it is to be noted at paragraph 10 of his Affidavit explains of the urgent nature of the Application and sustains same with proof of permanent residency in Seychelles.

[47] Thirdly, it is also a prerequisite for such an Application to succeed that the Respondents should have demonstrated no serious and or bona fide defence and this inclusive of “no right nor Title over the questioned premises.

[48] As to the third point, it is up to the Court to examine the evidence as is necessary in order to determine whether the Respondent has a serious defence or not (*Reference is made to Gujadur v/s Reunion Ltd & Ors (1960) MR 208 and Gopaul v/s Bagobin and Ors (1992) MR 268*), the Supreme Court of Mauritius quoted with approval from (*Hossen Opticians v/s Mauritius printing Co Ltd 1977 MR 270*) that, “An applicant who has established his right to the property should be granted the writ... Unless the respondent has put forward a defence which is both bona fide and one which is seriously raised, and It is not sufficient for the respondent to state facts which if established would constitute a defence [before a trial court], but... he must also aver such facts and circumstances as are likely to help the judge in assessing the seriousness of the defence.”

[49] Now, moving to the present case with regards to the third aspect of the condition of a serious and bona fide defence inclusive of a right thereto, it is clear based on the basis of the Ruling on the defective affidavit which is fatal to the Respondents’ case, that they have not satisfied the Court of any serious and or bona fide defence.

[50] In that light as illustrated on the evidence as per contents of *Exhibits A1, 2 and 3* [Paragraph 41], arising out of the Affidavit of evidence of the Applicant the Respondents have no right and or a serious defence arising out of either the instrument of transfer, neither the certificate of Official Search as read with the Agreement as between Mr, Norman Mancienne, the Applicant and Mr Lidell Bill and Mrs Clemencia Bibi before their demise.

[51] It follows, thus based on the contents of *Exhibits A1, 2 and 3* (supra) that the evidence of the Applicant has clearly met the conditions for a Writ as prayed in the absence of any

genuine proof of interest and or bonafide and or serious defence to the Applicant's Application.

[52] It follows therefore, that on that basis, I allow this Application and I order the Respondents to quit, leave and vacate the property owned by the Applicant forthwith.

Signed, dated and delivered at Ile du Port on 25th day of January 2018.

S. Govinden
Judge of the Supreme Court