

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 03/2018

Appeal from Magistrates Court Decision 01/2015

[2018] SCSC 853

GIOULKHIZAD ANTAT

Appellant

versus

**1. BELLE VUE ESTATE LIMITED
2. BELLE VUE PROPERTY OWNERS ASSOCIATION**

Respondents

Heard: Written submissions on 10 July 2018, 11 July 2018, 22 August 2018

Counsel: Mrs. Laura Valabji for appellant
Mr. France Bonté for respondent

Delivered: 21 September 2018

JUDGMENT

Twomey, CJ

[1] This is an appeal from two decisions of Learned Magistrate Burian; the first delivered on 23 January 2018 relates to her decision to grant an ex parte hearing in the matter and her subsequent decision at that hearing; and the second a refusal by the Learned Magistrate to stay the execution of that decision on 28 September 2018.

- [2] The facts of the case are simple. The Respondents filed a claim against the Appellant on 6 January 2015 for the sum of USD 5,940 together with commercial interest for the non-payment of a monthly levy of USD 270 due under a contract of sale of land and outstanding for twenty-two months. The Appellant in her statement of defence stated that the levy was not applicable and not due under the contract. She counterclaimed in the sum of SR 346,000 for rental expenses incurred as a result of the Respondents preventing her from building her house and enjoying the property she had bought from them.
- [3] When Counsel and the Appellant failed to put up an appearance at the hearing of the case on 19 September 2017, the Learned Magistrate proceeded to hear the matter *ex parte*. In a decision she delivered on 28 September 2017, she found that the Appellant had breached the terms of the purchase agreement to pay the monthly levy of US 270 for the maintenance of the property and for security provisions. She awarded the sum of USD 14,850 together with commercial interests and costs to the Respondent.
- [4] It is to be noted that between the close of the filing of pleadings on 25 March 2015 and the hearing of the matter by Magistrate Burian, there were no less than eight adjournments in this matter spanning two years, appearance before four different magistrates and two applications to set aside *ex-parte* hearings. The two decisions of the Learned Magistrate after the second *ex-parte* hearing are the subject of this appeal.
- [5] First, the grounds of appeal against the ruling of 28 September 2017 summarised are as follows:
1. The Learned Magistrate erred in fact for failing to take into account that the Appellant and her Counsel had failed to attend court for the hearing for good reason.
 2. The Learned Magistrate erred in law in failing to consider the Appellant's right to be heard and not to be penalised as a result of Counsel's or Court's administrative error or inadvertence.
 3. The Learned Magistrate erred in law in applying Practice Direction 2 of 2017 to this matter when such a Practice Direction was not applicable to the matter and in any case had been issued after the hearing of the matter.

[6] Secondly, the grounds of appeal against the decision of 23 January 2018 may also be conveniently summarised as follows:

1. The Learned Magistrate failed to take into account that the case had been partly heard and proceeded to rehear the matter without any application for a rehearing being made.
2. The Learned Magistrate erred in hearing the matter *ex parte* without so listing as such pursuant to Practice Direction 1 of 2017.
3. The Learned Magistrate erred in finding that the Appellant was bound by the sale agreement.
4. The Learned Magistrate erred in awarding the sum of USD 14,850 in the absence of any supporting evidence and in the absence of such a claim.

[7] With regard to the first group of grounds relating to the refusal of the Learned Magistrate to set aside her decision given after an *ex parte* hearing, learned Counsel for the Appellant has submitted that the right to be heard is “one of the tenets of natural justice” and is reiterated in the Seychelles Code of Civil Procedure and the Courts Act. I might add that such a right is also provided for in our Constitution which guarantees the right to a fair hearing. In respect of procedural rules, Counsel has referred the Court to sections 65 and 69 of the Seychelles Code of Civil Procedure replicated respectively in Rules 18 and 52 of the Magistrates Court (Civil Procedure) Rules.

[8] These Rules provide in relevant part:

“18. If on the day so fixed in the summons when the case is called and the plaintiff appears but the defendant does not appear or sufficiently excuse his absence, the court after due proof of the service of the summons, may proceed to the hearing of the suit and may give judgment in the absence of the defendant, or may adjourn the hearing of the suit ex-parte.

52. On the date fixed by the court for the hearing of the suit, the parties shall appear and the court shall proceed to the hearing of the suit. The court may, at any

stage of the suit, if sufficient cause be shown and subject to such order as to costs as to the court may seem fit, grant time to the plaintiff or defendant to proceed in the prosecution or defence of the suit and may adjourn the hearing of the suit.”

- [9] In relying on the rules above, Counsel for the Appellant has submitted that sufficient cause had been shown for her non-appearance. She avers in a supporting affidavit to her application before the Learned Magistrate that the matter had been set for continuation on 19 September 2017 “but upon her return to Seychelles in early August was in a predicament as [she] had an urgent matter scheduled for the 19 September. [She] attempted to reschedule the case... [She] wrote a letter to the Registrar requesting a rescheduling of the continuation date.” She further avers that she subsequently found out that the Registry had not received her letter.
- [10] By no stretch of the imagination, in my view, does that amount to sufficient cause. The authorities cited by Counsel in support of her submission have no relevance to the circumstances of the present case as they concern cases where there was genuine and sufficient cause for nonappearance. As was rightly pointed out by the learned Magistrate in her ruling of 23 January 2018, it was Counsel’s duty to follow up on her request for a rescheduling of the case. There was clearly *laches* on the part of the Appellant having regard to the evidence before the trial court.
- [11] Counsel for the Appellant has also submitted that the decision to proceed with the matter *ex parte* was in breach of the Appellant’s fair trial rights. This submission finds no favour with this Court. It cannot be emphasised enough that although one has a right to a fair trial, one does not have a right to multiple trials.
- [12] Insofar as the submission concerning the non-applicability of the Practice Direction is concerned, it must first be pointed out that Counsel has erroneously referred to Practice Direction 2 and not Practice Direction 1 which was cited by the Learned Magistrate and which concerns absences by Counsel from court. In any case, it cannot be underscored that the Practice Direction 1 of 2017 relating to the absence of Counsel is derived from the provisions of the laws of Seychelles which were in operation on the date of the hearing. Of

relevance to this case are the following provisions of the Legal Practitioners (Disciplinary Measures And Reinstatement) Rules made under the Legal Practitioner's Act:

“Rule 8 (2)(a) Subject to paragraph (b), where it is not possible for the legal practitioner to appear personally or to brief a partner or another legal practitioner employed by his or her chambers, he or she shall brief another legal practitioner acceptable to the client to appear on behalf of his or her client.

(b) Where the legal practitioner considers a particular appearance in circumstances described in paragraph (a) to be of minor decisive value to the final outcome of the matter, he or she shall not be required to obtain the client's consent to such other legal practitioner.

8(3) (a) A legal practitioner shall ensure that he or she is able to competently appear at all court hearings scheduled on any particular day.”

[13] The provisions are clear. Counsel is an officer of the court and has to discharge duties in a professional and diligent manner at all times including those times when her personal appearance is not possible. The Appellant's submission that the Practice Directions based on these provisions were either not relevant or not in force at the time of the hearing is in any case misconceived as Practice Direction 1 is dated 20 June 2017. Efficient and just court administration dictates that Counsel assiduously discharges her duties pursuant to the provisions of the law. For these reasons all the grounds of appeal relating to the ruling of 23 January 2018 are dismissed.

[14] With regard to the grounds of appeal concerning the decision of 28 September 2017, I do not see how the Appellant was inconvenienced by the matter being reheard on 19 September 2107. The Appellant was in any case absent and she suffered no injustice by a rehearing of the evidence by the learned Magistrate. After all the learned Magistrate was the fourth magistrate onto whom the matter had been passed. It would have been unjust to proceed with a part heard matter as she was not appraised of the evidence already led. Her rehearing of the matter in the circumstances cannot therefore be faulted.

[15] Similarly, the Learned Magistrate can also not be faulted for hearing the matter *ex parte* given the provisions of Rule 18 of Magistrates Court (Civil Procedure) Rules above cited. The transcript of proceedings shows that on the 19 September 2017, the Appellant was absent and Counsel for the Respondent moved and was granted an *ex parte* hearing.

[16] With regard to the ground of appeal concerning the sale agreement, it is noted that the Learned Magistrate found on the unchallenged evidence of Alex Ellenberger that the sale agreement had restrictive covenants attached, namely that the Appellant was bound by the payment of a monthly levy once the owners' association was registered, which it duly was in 2012. This is supported by Exhibit P1, the transfer document, which stipulates that the land is transferred to the appellant with the conditions attached. The pertinent condition is the following:

“All subdivision owners shall become members of the Belle Vue Property Owners Association. All subdivision owners to pay a monthly levy... to cover all common property/ road/ infrastructure/maintenance/security provisions... as determined from time to time.”

[17] The transfer document and conditions were legally enforceable against the Appellant and her failure to pay the levy in the circumstances inexcusable.

[18] The last ground of appeal in relation to the award made has some merit. The Respondent's claim was for USD 5,940 and not for *USD 5,940 and continuing* which would have permitted the crystallisation of the claim at the time of the hearing and permitted the award of USD 14,850 due on the 19 September 2017 when the case was heard. Furthermore, the Respondents magnanimously abandoned their claim for interest at the hearing which was still subsequently granted by the Learned Magistrate but the Appellant chose not to make this a ground of appeal.

[19] In the circumstances I do find that the award of USD 14,850 was *ultra petita* and cannot be sustained. Equally, since the interest granted was not challenged on appeal and the court is not in a position to make a case for the Appellant, the interest as granted by the learned Magistrate will stand but on the lesser amount claimed in the Plaintiff.

[20] The appeal is therefore partially allowed. For the avoidance of doubt the Appellant is ordered to pay the Respondents the sum of USD 5,940 at the rate prevailing at the time of the decision of the Learned Magistrate, together with interest at the commercial rate and with costs.

Signed, dated and delivered at Ile du Port on 21 September 2018.



M Twomey
Chief Justice



Dr. Mathilda Twomey
Chief Justice
Supreme Court of Seychelles

