

SUPREME COURT OF SEYCHELLES

Reportable/Not Reportable / Redact
[2019] SCSC ...
MA 11/2019
Arising out of CS 90/2018

In the matter between:

KING FUK SIDNEY
(rep by Mr. Gabriel)

Applicant

and

TAKALAND COMPANY LTD & OR
(rep by Mr. Pardiwalla)

Respondents

Neutral Citation: *Sidney King Fuk v Takaland Company Limited & Or* (MA 11/2019) [2019] SCSC

Before: Andre J

Summary: Application for leave to appeal against an interlocutory Ruling – Article 16 of the Civil Code of Seychelles (Cap 33)-Sections 12 of the Courts Act (Cap 52)

Heard: 15th March 2019

Delivered: 20th May 2019

ORDER

Application refused

RULING

ANDRE J

Introduction

- [1] This Ruling arises out of an Application of the 7th January 2019 as filed on the 16th January 2019, wherein King Fuk Sidney (*“Applicant”*), seeks leave of the Court to appeal against an Interlocutory Ruling of this very Court of the 22nd November 2018 in Cs No. 90 of 2018.
- [2] The Respondents vehemently object to the Application for being out of time, the non-residency of the Applicant in Seychelles and lack of evidence of the Applicant owing property in Seychelles hence the appeal being misconceived without any chance of success on appeal.

Factual and procedural background

- [3] On 20th July 2018, the Applicant filed a plaint against *“first Respondent”*, Takaland Company Limited a registered company in Seychelles and *“second Respondent”* Mr Jean Pierre Latour who is the director of first Respondent. The Applicant alleges that he entered into a business agreement with the second Respondent to secure a buyer for property owned by Takaland Company Limited for a payment of five percent commission. The Applicant claims that he fulfilled his end of the agreement and got a buyer who paid 12,500,000 USD for the property, however, the Respondents have not paid his commission. As such he is requesting the Court to give a Ruling that the Respondents pay him 625,000 USD with interest at the commercial rate and cost.
- [4] In their Defence, the two Respondents have denied any obligations to the Applicant because after the sale of the property it was revealed that the Applicant had not acted in good faith as he had misrepresented that he is a licenced estate agent and failed to disclose his personal interests in the business transaction.
- [5] On 11th September 2018 the Respondents filed a counterclaim and stated therein that as a result of the Applicant’s actions they had suffered loss and damages and prayed for the court to dismiss the Applicant’s claim and grant them 1,000,000 USD in damages with interest at the legal rate and costs.

- [6] The Respondents filed Notice of Motion on the 16th October 2018 supported by an affidavit for security for costs and damages. In the affidavit, the second Respondent averred that their statement of defence and counterclaim are made in good faith and have reasonable chances of success. Therefore, in light of the fact that the Applicant is not resident in Seychelles and has no known assets valuable enough to enable the enforcement of a Ruling against him the Respondents requested for the Applicant to be ordered to pay security for costs and damages that amounts to Seychelles Rupees Three Hundred and Eighty Seven Six Hundred and Ninety Nine and Sixty (SR 387,699.60/-) and One Hundred dollars (100,000 USD). The former amount being the estimated costs and the latter is 10% of the damages claimed by the first Respondent in the counterclaim.
- [7] On 23rd October 2018, the Applicant responded to the application filed by the Respondents for security for costs and damages via an affidavit. In the affidavit, the Applicant argued that Article 16 of the Civil Code of Seychelles is irrelevant in the present case because the Court has the discretion to grant an Order for security costs and damages. The Applicant argued that the application for costs and damages must be unsuccessful because he is a Seychellois national with assets in Seychelles and is not an insolvent person. Furthermore, the Applicant argued that under section 219 of the Seychelles Code of Civil Procedure the Respondents cannot simultaneously be *Defendants and Plaintiffs*, as the counterclaim has made the *Defendants into Plaintiffs*.
- [8] On 22nd November 2018, this Court delivered its Ruling on the Motion and concluded that the Motion was brought under Article 16 of the Civil Code of Seychelles. It was further held that the Court's discretion under Article 16 of the Code is based on the Court being satisfied that one of the parties in the civil suit is a non-resident. It was held in that regards that:

“In this case as illustrated through the affidavit of the Plaintiff/Respondent himself and corroborated by submission of his Learned Counsel paragraph [15], that the Plaintiff is non-resident in Seychelles for he is not resident as analysed simply by virtue of his national status and or being the Honorary Consul for Seychelles to that matter, hence, it

follows that the requirement of non-residency have been proved by the Defendants/Applicants in their Motion”.

[9] Article 16 of the Code of Seychelles has two tenets: the first tenet of non-residency was addressed above and the second tenet is the requirement of “good reason” being shown by the party requesting for the order for security for costs and damages. This Court ruled further on that point that, *“for the purpose of the sought Order, to my mind, it shall encompass insufficient assets in Seychelles to meet an Order for costs and damages”*, to fulfil the requirement of good reason. It was considered that the Plaintiff’s assertions that he has assets in Seychelles that made an adverse judgment against him enforceable as “unsubstantiated”. As such, it was held that, *“in the absence of uncontroverted evidence to the contrary, the Defendants’/Applicants’ averment and claim that the Plaintiff/Respondent is not known to have assets in Seychelles valuable enough to satisfy a Judgment against him is plausible, reasonable and stands uncontroverted”*.

[10] This Court ruled that the Motion met the requirements under Article 16 of the Code and that the security for costs and damages sought by the Respondents are reasonable and adhere to established principles and ordered the Applicant to pay security for costs (is the estimated costs of the Respondents) of Seychelles Rupees Three Hundred and Eighty Seven Six Hundred and Ninety Nine and Cents Sixty (S.R. 387,699.60/-).

[11] Further this Court examined the *ratio decidendi* of **(JFA Holding v Latitudes Consulting (2011) SLR 342)**, case that noted that it is not the practice to order the whole amount claimed as damages, nonetheless, the amount of security granted should ensure that the suit is enforceable. Drawing from the **JFA Holding case**, that granted the sum of 10% of the damages claimed, this Court ruled that the Applicant pay (100,000 USD) which is 10% of the damages sought under the first Respondent’s counterclaim as security for damages.

[12] On 7th January 2019, the Applicant gave notice of appeal against the interlocutory Ruling outlined above given on 22nd November 2018 by this Court which grounds of appeal in essence that, *“The finding to allow for the application for security for costs was based on error and faulty application of Article 16 of the Civil Code. The trial judge failed to*

establish the jurisdiction of the court in her finding under this article; the trial judge erred in law by making her decision based on an inaccurate finding that the Appellant did not have assets in the Seychelles that would make the counterclaim against the Appellant enforceable; the trial judge erred by making a ruling for the security of costs based on Article 16 of the Civil Code that was not pleaded in the Affidavit; and that the trial judge erred by ordering the Appellant to pay the full amount requested by the Respondent.”

Relevant Law and Legal Analysis

- [13] First and foremost, it is to be made clear that Court is not hearing the appeal hence cannot and should not preempt its ultimate conclusion hence a very good chance on Appeal as averred by the Applicant should not be within the realms of determination by this Court at the instance of the current Application.
- [14] What transpires in the impugned Ruling of this Court is that, *evidence before the court clearly reveals that although the Plaintiff is a Seychellois national, he is, however, a non-resident in Seychelles and reference made to Article 102 of the Code which provides clarity on this issue stipulating that, ‘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 court’. Therefore, the fact that he is Seychellois is not synonymous to his residency being Seychelles”.*
- [15] It is clear that the requirement under the Article 16 of the Code that the Court have good reason to make an order for security of costs and damages “is a subjective one” (Reference to **(De Riedmatten v Maurel (6 of 2000) [2005] SCSC 12 (05 October 2005)**) hence it was ruled that *in light of failure by the Plaintiff to provide sufficient proof to the court that a ruling against him is enforceable and took the view that there is ‘good reason’ to make an order of security of costs and damages.*
- [16] One of the grounds of appeal is that the, *“trial judge erred by ordering the Appellant to pay the full amount requested by the Respondent”*. Although, the court has discretion in determining the amount for security for costs and damages, Seychelles Court of Appeal

in the case of (**Village Management Ltd v Albert Geers and Village Du Pecheur (Pty) Ltd (SCA3/95)**), established principle to guide in the courts exercise of its discretion:

“Although the amount of security for costs awarded is always in the discretion of the court, the amount is in practice based on an estimate of party and party costs usually up to the end of the proceedings. In a case, as this, in which a substantial portion of the damages claimed would have to be determined at the discretion of the Court after evidence would have been gone into, it is inappropriate to order security in the entire amount claimed. In the circumstances, even if the Leaned Judge had had jurisdiction to order security for costs, I would have held that the amount of security was utterly inappropriate and based on an improper exercise of discretion”.

[17] In turn, the **JFA Holdings case** was relied upon by this Court where it held that, *“With regard to security for damages it is not the practice to order the whole amount claimed as damages to be paid as security for payment of damages”* and it held that, *“however, [i]t is up to the court to determine the amount of the security. Such security must not be such an amount as would discourage the other party from pursuing its claim before this court. At the same time such security ought to assure the applicant no.1 that the pursuit of its claim for damages will not be in vain”.**“I am inclined to award security for damages in the sum of 10% of the claim for damages by the applicants”.*

[18] To my mind this Court has clearly adhered in its impugned Ruling to settled guidelines set by legislation and case law in this Jurisdiction determining the amount for security of cost and damages (supra).

[19] Turning thus to relevant grounds for this Court to grant leave to appeal, I refer to Section 12 (2) (a) (i) of the Courts Act which provides that:

(1) *Subject as otherwise provided in this Act or in any other law, the Court of Appeal shall, in civil matters, have jurisdiction to hear and determine appeals from any judgement or order of the Supreme Court given or made in its original or appellate jurisdiction.*

(2) (a) *In civil matters, no appeal shall lie as of right-(i) from any interlocutory judgment or order of the Supreme Court (b) In any such cases as aforesaid the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal*

(c) *Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.”*

[20] In the m case of **(Morel v Registrar of the Supreme Court (CS 339/2002) [2005] SCSC 66 (10 June 2005)**, two principles that need to be taken into account when considering an Application for Leave to Appeal to the Seychelles Court of Appeal against the Ruling of the Supreme Court was enunciated namely, as to whether, the intended appeal raises issues of public interest, and there is arguable ground of appeal, and such ground has a reasonable chance of success.

[21] After a careful scrutiny and analysis of the record and evidence led thus far before the Court, it is abundantly clear that the Appellant has failed to satisfy any of these elements. There is further, to my mind no inherent public interest implications involved in this case as argued by Applicant in his said Affidavit which warrants leave to appeal.

Conclusion

[22] Section 12 (2) (a) (i) of the Courts Act provides that, “*the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal*”.

[23] Based on the above analysis, this Court finds that the two conditions outlined in Article 16 of the Code to determine the discretion of the Court to order for security for costs and damages have been met, as such, the Application for leave of appeal is dismissed accordingly.

Signed, dated and delivered at Ile du Port on 20th May 2019.

ANDRE J