

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2019] SCSC ... 727
EXP 134 /2017

In the ex parte matter of:

ALEXIS MONTHY
(rep. by Serge Rouillon)

Petitioner

and

MIRANDA ESPARON
(rep. by Alexandra Madeleine)

Respondent

Neutral Citation: *Monthy v Esparon* (XP 134/2017) [2019] SCSC 727 (4th September 2019)
Before: Pillay J
Summary: Sale by licitation – objection – stay of proceedings – grave hardship
Heard: 6th September 2019 and 6th June 2019
Delivered: 4th September 2019

ORDER

Licitation proceedings shall proceed

RULING

PILLAY J

- [1] The Respondent in the case, Mirenda Esparon, objects to the sale of the property by way of licitation on grounds that proceedings for division in kind is possible and ought to be substituted in place of licitation proceedings and secondly on the basis that grave hardship will be caused to the Respondent.

- [2] This Court proceeded to hear the Respondent on her objections. In summary she objected to the sale by way of licitation on the basis that she was the one who had contributed the most to the purchase of the property.
- [3] In answer to the application for stay of the licitation proceedings counsel for the Petitioner submitted that the Court cannot easily accede to the request of the Respondent on the basis that the Petitioner had definite shares in the property as well as the Respondent's omissions to bring her case relating to hardship and subdivision issues in a reasonable and timeous manner.
- [4] Counsel submitted that the parties were given clear guidance by the Court of Appeal of their rights and possible further actions they could follow to liquidate their rights. Neither side brought an application for a declaration of their share in the co-ownership so the presumption under Article 815 applies and both parties are deemed to have equal shares.
- [5] Counsel further submitted that the Respondent failed to adduce any credible evidence of hardship she may suffer if the property is sold except perhaps some financial loss.
- [6] Counsel submitted that the Respondent had brought no evidence to support her claim that she would not be able to buy another place with her share of the proceeds of sale. On that basis counsel prayed for an order that the property be sold with minimum delay.
- [7] Counsel for the Respondent restricted her submissions to the objection on the ground of hardship in view of the fact that her motion for an adjournment to bring in evidence with regards to substitution of proceedings for division in kind was denied.
- [8] Counsel submitted that the Respondent gave un-contradicted evidence that she is currently in occupation of the co-owned property and has been in occupation for the past 22 years and did not own any other property to which she could conveniently move if the property is sold.
- [9] It was counsel's submissions that the risk of hardship to the Respondent is impacted by the fact that she has made substantial improvements to the property which would enhance its

value. Counsel submitted that the risk of her client being evicted from her home is sufficiently grave.

- [10] By way of ruling dated 27th February 2019 the objections were ordered to be heard as per the grounds listed in the Petition, which were on the basis that proceedings for division in kind should be substituted in place of licitation and the proceedings for licitation should be stayed on the basis of hardship.
- [11] On 5th June 2019 the hearing proceeded with the evidence of the Respondent. Following her evidence her counsel requested a postponement so she could get the surveyor in. Mr. Rouillion strongly objected to any adjournment on the basis that his client had health problems and needed the process to be completed. Noting the remarks of the Court of Appeal with regards to the delay in case **Monthy v Esparon (2012) SLR 104** the motion for an adjournment was refused.
- [12] I note at page 39 of the proceedings that Miss Madeleine indicated that the objections were mainly on the issue of hardship. Attempts had been made at mediation but the sticking point it seemed was the value and the division.
- [13] In the case of **Laporte v Sullivan and Ors (1981) SCAR 191** the respondents resisted the petition for licitation on the ground that the property could conveniently be divided in kind and that greater hardship would be caused to the respondents than the petitioner if the order for licitation was granted. After hearing the parties the Supreme Court found that the property could conveniently be divided in kind. An order staying the licitation proceedings was made and an order substituting proceedings for division in kind was made.
- [14] In the case of **Rajasundaram & Ors v Pillay (SCA 09/2013) [2015] SCCA 12 (17 April 2015)** the Court of Appeal found that – “It is true that a co-owner may oppose a sale by the fiduciary or the executor, but in those cases the Code provides that only a postponement of the sale can take place. Further, in those situations article 821 of the Code provides that the Court may make an order for postponement of the sale two alternative grounds-

“1st That greater hardship would be caused by refusing to grant the order staying the proceedings in licitation than by granting it.

2nd That the property may be conveniently and profitably divided in kind amongst those entitled. In that case the Court, in order to effect such partition, shall decide the manner of partition and the allocation of the divided property amongst the persons entitled.”

- [15] It is not in doubt that the Court has power to stay proceedings or substitute proceedings for division in kind if satisfied that the property can be conveniently divided in kind.
- [16] The issue is whether on the facts the Court should exercise its discretion to postpone the licitation proceedings. Has the Respondent shown that greater hardship will be caused to her than the Petitioner by the sale? Has the Respondent shown that the property can conveniently be divided in kind?
- [17] Essentially the Respondent seeks a postponement in order for her to seek a declaration as to her share in the property.
- [18] In the case of **Chiffone v Volcere (151 of 2008) [2010] SCSC 88 (26 January 2010)** Karunkaran J granted the motion to stay the demand in licitation pending the determination of a suit which the respondent filed against the petitioner in the Supreme Court of Seychelles for the determination of the shares of the parties in their co-owned property. The respondent’s position in the above matter was that he owned more than half share in the property. In granting the stay Karunkaran J found that “Obviously, it is important in a practical point of view as well as logical too, that the proportionality of shares each entitled to, in the proceeds of sale by licitation ought to be determined before the property is sold in a public auction.”
- [19] In contrast, the parties in the case at hand have been before the Court for a number of years.
- [20] I note the following paragraph from the Court of Appeal judgment between the parties in 2012 –

“Much as one might have sympathy for either party and it is certainly not the wish of this Court that the rights of the parties in co-ownership, rights now denied to the appellant,

continue in a state of limbo, it was up to the respondent who wished no longer to remain in indivision to bring the correct suit to court. In cases of co-ownership there are three options available under the Civil Code to the joint owner who does not wish to remain in indivision: sale by licitation, partition or action de in rem verso (based on unjust enrichment). Vide Edmond v Bristol (1982) SLR 353. These remedies could have been availed of by the respondent.”

- [21] What is the test for hardship? Effectively the test is will greater hardship be caused to the Respondent if the application for stay is refused or will greater hardship be caused to the Petitioner if the application for stay is granted?
- [22] In the case of **Appiani v Geers (1995) Civil Side 35 of 1995** the Court found that “the Court has the discretion to adjourn a case at any time before the sale takes place, but the discretion must be exercised judiciously if the applicant shows strong grounds of necessity or expediency.”
- [23] I note that the **Appiani** case above arose out of different facts but the principle in my view applies in that the Court must always exercise its discretion judiciously.
- [24] On the one hand the Respondent argues that she has contributed the most funds and eviction will cause greater hardship to her whereas on the other hand the Petitioner argues that he needs the money from the sale for medical treatment as well as the fact that the Respondent had failed to bring her case in a timeous manner hence will suffer greater hardship if the application for stay is granted.
- [25] The Respondent having to vacate the house upon the sale of the property is in essence a natural if not normal process of separation.
- [26] Furthermore, without giving the impression and that is not to say that separation is not a difficult process to go through, hardship suggests some extraordinary circumstance. I take for example a co-owner or a dependent of a co-owner with a physical disability whose house is in a location that’s easily accessible and fitted with specialized equipment, in those circumstances to sell the property and move that co-owner out of the property would in my view cause greater hardship than postponement of the sale.

- [27] As for the Petitioner, is the Petitioner not suffering greater hardship by not being allowed to liquidate his share in the property after 14 years of going back and forth to Court in addition to another 7 years of inaction by the Respondent? As the Court of Appeal stated in its judgment “he was unlawfully ejected and has not as a co-owner been able to enjoy his property.” If the Respondent in fact was concerned about the risks of eviction should she or would she not have sought a declaration of her share as clearly explained to the parties in 2012 by the Court of Appeal? To my mind she was put on notice by the Court of Appeal in 2012 and it was for her to protect herself or for that matter take steps to declare her share since then, as opposed to waiting until the Petitioner attempted to liquidate his share and then object to the Petition.
- [28] The Respondent having failed to seek a declaration that she owned the property outright or owned a greater share in the property, she is subject to Article 815 which provides that in the absence of any evidence to the contrary, it shall be presumed that the co-owners are entitled to equal shares.
- [29] For the above reasons this Court is not satisfied that greater hardship will be caused by refusing the application for stay of licitation proceedings.
- [30] There being no evidence produced to support the objection to licitation on the basis that the property could conveniently be divided in kind the said objection is dismissed.
- [31] Accordingly the objection to licitation proceedings and application to order division in kind in lieu of licitation and further decline to order a stay of proceedings on the basis that the Petitioner will suffer greater hardship is declined.
- [32] In the circumstances the licitation proceedings shall proceed.
- [33] So it is ordered.

Signed, dated and delivered at Ile du Port on 4th September 2019

