

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2019] SCSC  
MA 178/2019  
(Arising in DV 32/2008)

In the matter between

**MARIE-CLAIRE ESPARON**  
*(rep. by Wilby Lucas*

**Petitioner**

and

**DANIEL AZEMIA**  
*(in person)*

**Respondent**

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**Neutral Citation:** *Esparon v Azemia* (MA 178/2019) [2019] SCSC

**Before:** 10 September 2019  
Twomey CJ  
**Summary:** Setting aside consent judgement - power and jurisdiction of courts.  
**Heard:** 17 July 2019  
**Delivered:** 10 September 2019

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**ORDER**

The application is dismissed with costs.

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**RULING**

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**TWOMEY CJ**

[1] In May 2009, an order for a *decree nisi* of divorce between the Petitioner and the Respondent made on 12 December 2008 was made absolute. Subsequently, in July 2009, the Petitioner applied for ancillary relief to the divorce pursuant to the Matrimonial Causes Act, namely the division of the matrimonial property.

[2] The Petitioner averred in an affidavit in support of this application that she had a three-quarter share in the matrimonial home through her financial contributions for its

purchase, construction and other non-monetary contributions. In response, the Respondent claimed that he jointly contributed to the construction of the matrimonial home and was paying for the housing loans and the maintenance of the house and its surroundings.

[3] The matter became protracted and eventually on 24 January 2013, the Petitioner's Counsel indicated that the parties had come to an agreement and needed time to prepare a judgment by consent for submission to the Court. On 28<sup>th</sup> March 2013, after several further adjournments with no consent judgment in sight and with neither Counsel for the parties appearing for hearings, the Court adjourned the matter *sine die* with liberty for the parties to reinstate the matter.

[4] In November 2013 on application by the Petitioner, the matter was reinstated and on 27 May 2014 both parties and their respective Counsel signed a judgment by consent on the following terms:

1. That Parcel S3869 be transferred to the parties' three children equally, namely Peter Georges Esparon, Lisa Daniella Azemia and Valerie Marie-Anne Laure Azemia (hereinafter The Children)
2. The Children agree and transfer the usufruct interest of Parcel S3869 to the parties for their lifetime.
3. The judgement by consent be in full and final settlement of the adjustment of the matrimonial property dispute between the parties and consequently neither of them have any legal beneficial interest whatsoever nor any claim of right in respect of any property that either of them presently own or might own in the future.

[5] Five years later, in May 2019, the Petitioner applied by motion supported by affidavit for leave to set aside the judgment by consent. In her supporting affidavit, the Petitioner deponed *inter alia* that the matrimonial home was built from a loan taken from Seychelles Housing Development Corporation (SHDC) which was still outstanding in the sum of SR119, 836.98.

- [6] She also averred that at the signing of the judgment by consent, she had been simply informed by her lawyer that she had to transfer the house into her children's name and that she would thereafter together with the Respondent own a usufructary interest in the house. However, after a manifestation of violence by the Respondent, a protection order was ordered by the Family Tribunal and the Respondent was excluded from the home until the expiry of the order in 2016.
- [7] The Petitioner further averred that after the Respondent's return to the family home, she was for a period of time obliged to live elsewhere but that she was subsequently compelled to return to the family home because of financial pressures and that the Respondent's behaviour towards her has remained the same.
- [8] She has further averred that her children are not making the repayments toward the housing loan and even if she were to pay the loan instalments the house would never be hers. She avers that she was misled into entering into the judgment by consent which has operated to her detriment and that it is in the interest of justice that it be set aside.
- [9] The Respondent was served with the motion but did not file any response. At the hearing, I asked Counsel to support the application to set aside the judgment by consent with legal provisions and authorities in regard to the powers of the court in this respect.
- [10] In his submissions, Counsel for the Petitioner has admitted that the laws of Seychelles are silent as to the circumstances in which a judgment by consent can be set aside or varied but submits that the Constitution provides the Court with jurisdiction to adjudicate in matters before it. He further submits that section 6 of the Courts Act empowers the Supreme Court of Seychelles to be a Court of Equity and Section 4 of the Courts Act empowers the Supreme Court of Seychelles to exercise the same powers as the High Court of Justice of England.
- [11] On this basis he has relied on the authorities of *Pardiwalla v Pardiwalla* (1993) SLR 126, and *Jeanne v Cecile and Ors* (2012) for the Court to exercise its power and to set aside the consent judgement.

[12] I have difficulty following Counsel's statements especially since the constitutional and legal provisions together with the legal authorities he has relied on do not in any way, shape or form support his submissions.

[13] The constitutional and legal provisions bestowing adjudicating powers and legal and equitable jurisdiction to the Supreme Court do not individually or conjointly give the Court the right to set aside a decision or order when it is *functus officio*. I shall explicate further but note first of all that section 131 of the Seychelles Code of Civil Procedure (SCCP) provides that:

*"The parties may at any stage of the suit before a judgment, appear in Court and file a judgment by consent signed by both parties, stating the terms and conditions agreed upon between them in settlement of the suit and the amount, if any, to be paid by either party to the other, and the Court, unless it sees cause not to do so, shall give judgment in accordance with such settlement."*

[14] In the present case as I have pointed out above the parties and their respective counsel appeared in Court and agreed and signed the judgment by consent the terms of which are set out above. It was then entered as a judgment of the Court.

[15] There are instances when the Court is permitted to alter, vary or supplement an original order and set aside judgments. In the first instance, section 147 of the SCCP provides that clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court on motion.

[16] In a second instance, a legal remedy is also available for the amendment of decisions and pursuant to section 150 of the SCCP where:

*"The Court may, after hearing both parties, alter, vary or suspend its judgment or order, during the sitting of the Court at which such judgment or order has been given."*

[17] The limitations to the above provision are obvious. The amendment to a judgment can only be made while the Court is sitting, otherwise it is *functus officio* in respect thereof.

To permit amendments sought in terms of substantive issues in the judgment that would have to be relitigated would of course also violate the fundamental principle of finality to litigation.

[18] In a third instance, a judgment of the Court obtained ex-parte due to nonappearance of a party, can be set aside by the Court in terms of Section 69 of the SCCP; and in a fourth instance a judgement given *inter partes* which is vitiated by fraud, violence or through discovery of new evidence or in the interests of justice can be set aside by the same Court by ordering a new trial in terms of Sections 194-204 of the SCCP.

[19] In a fifth instance, a Court order may be varied to provide a time frame for undertakings to be performed when such was not provided for in the original decision. That was the decision in *Pardiwalla* (supra) where the Court found that by virtue of section 3 A of the Courts Act, the Supreme Court of Seychelles could invoke the procedure of the High Court of England and pursuant to Order 42 Rule 2(2) of the Supreme Court Rules (UK) by a supplemental order specify a time frame within which the conditions of a consent order should be complied with when the same had not been specified in the original order.

[20] The present application is not one which falls within the parameters of any of the above instances. What is being sought here is the setting aside of a whole order to which the parties had agreed and which had been made a judgment of the Court. Ultimately the Petitioner seeks to render a decision of the Court a nullity.

[21] She has given no valid legal reason why the Court should do so. I have also noted that several averments of the Petitioner's affidavit are incorrect. On the basis of the attachments to her affidavit, namely a certificate of official search of Title S3869, I find that the Petitioner and the Respondent are still the registered owners of the same. The land was never transferred to the parties' children. Additionally, her averments as to the fact that the Family Tribunal Order has expired is not correct. The matter was to be reviewed in 2016. She is of course at liberty at any time to revive that order if she so wishes.

[22] There are other legal avenues open to the Petitioner to resolve the situation she finds herself in but it is certainly not the one she has chosen or was ill advised to in this case. Ultimately, the application to set aside the judgment by consent is dismissed.

Signed, dated and delivered at Ile du Port on 10 September 2019.

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Twomey CJ