

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC ..1019
CN 06/2019

CLIFF LAPORTE
(*rep. by Nichol Gabriel*)

Appellant

vs

DOREEN ASMANN
(*rep. by Alexia Amesbury*)

Respondent

Neutral Citation: *Laporte v Asmann* CN 06/2019 SCSC 14 November 2019.

Before: Dodin J

Summary: Sections 65 to 69 of the Seychelles Code of Civil Procedure do not place any specific requirement for defence to have been filed but rather on the appearance or non-appearance of the parties on the date fixed in the summons or by adjournment. Sections 127 and 128 of the Seychelles Code of Civil Procedure are specific in respect of failure to file defence. Appellant failed to file Defence. The judgment entered by the learned Senior Magistrate in terms of section 128 of the Seychelles Code of Civil Procedure was correct and is upheld. The appeal is dismissed in its entirety.

Heard: 19 September 2019

Delivered: 14 November 2019

ORDER

The Appellant failed to file a Defence. The judgment entered by the learned Senior Magistrate in terms of section 128 of the Seychelles Code of Civil Procedure was correct. The appeal is dismissed in its entirety.

JUDGMENT

DODIN J

- [1] The Respondent Doreen Asmann brought a claim for damages in the sum of 200,000 rupees against the Appellant Cliff Laporte in the Magistrate's Court stating in her pleadings that the Appellant used slanderous words, intimidations and threats which resulted in her suffering hurt, distress and embarrassment in public. The Appellant was served with summons to appear 28th September 2017 and was required by the Court to seek a lawyer to file his defence and to return on the 23rd October 2017 with his defence.
-
- [2] On the 23rd October 2017 Counsel for the Respondent informed the Court that there was new development and that the matter might be settled. The matter was adjourned to 20th November 2017 at 9 am for judgment by consent.
- [3] On the 20th November 2017 Counsel for the Respondent was absent but the Appellant informed the Court that he was waiting for the agreement for signing. The case was adjourned to the 22nd January 2018 for defence or judgment by consent. On the day learned Senior Magistrate informed the Court that Counsel for the Respondent has sent a letter dated 19th November 2017 stating that the Defendant was supposed to have settled the matter but has not yet done so.
- [4] On the 22nd January 2018 Counsel for the Respondent moved for default judgment since no defence had been filed and the Appellant was absent. The Court however adjourned the case to the 27th April 2018 for judgment with a notice to the Appellant to file an application to vacate the date of judgment and file his defence. The Appellant appeared in Court later at 9.30 am and Court moved to vacate the default judgment to allow the Appellant to file his defence. The case was mentioned on the 27th April 2018 for the filing of defence or judgment by consent and then adjourned again to the 25th June 2018.
- [5] On the 25th June 2018 learned Counsel for the Respondent was absent for medical reason and the matter was set for mention on the 23rd July 2018 at 9 am. The Appellant also informed the Court that he was not agreeing to the negotiations and that he wanted the case

to be heard although he had not filed his defence. The Appellant stated that he needed to seek the services of a lawyer and he had also applied for legal aid had been refused but that he can organise himself better and get a lawyer.

[6] On the same day learned Counsel for the Respondent moved the Court for a date for Ex-parte hearing. The Court set the case for hearing and gave the Appellant a last opportunity to file his defence and engage a lawyer. He was also warned that the matter would proceed ex-parte if he was not ready for hearing on the 18th February 2019. On the 18th February 2019 both the Appellant and the Respondent were absent in Court. Learned Counsel for the Respondent was present. The Court was informed that the Appellant's mother had passed away and the he had gone to Mahe as a result. Learned Counsel for the Respondent moved the Court for a judgment as per Section 128 of the Seychelles Code of Civil Procedure. The learned Senior Magistrate entered judgment for the Respondent in the sum of 200,000 rupees with interest and costs.

[7] The Appellant feeling aggrieved by the judgment of the learned Senior Magistrate now appeals against the said judgment raising the following grounds of appeal:

- 1 *The learned Senior Magistrate erred in hearing the plaint and entering judgment in favour of the Respondent when the Appellant had shown good cause for his absence in Court on the date of the hearing.*
- 2 *The learned Senior Magistrate erred in proceeding to enter a default judgment against the Appellant when in actual fact counsel for the Respondent had moved for the matter to be heard ex-parte with notice to the Appellant.*
- 3 *The learned Senior Magistrate erred in entering judgment on behalf of the Respondent in the absence of evidentiary support to prove her case on a balance of probabilities.*
- 4 *In all circumstances of the case the decision of the learned Senior Magistrate was wrong in law and in principle.*

- [8] Learned counsel for the Appellant submitted that on the date of the hearing the Appellant showed good cause why he could not be present in Court in view of the passing away of his mother. The Respondent was also absent and no good cause were shown as to why she was absent in Court to plead her case. It was set either as a hearing or an ex-parte hearing and it required the presence of the Plaintiff who would have to give evidence on oath in person and not by Counsel.
- [9] Learned Counsel further submitted that the learned Senior Magistrate should have referred to earlier proceedings where it was indicated that should a hearing not happen on the date in question the matter would be heard ex-parte. However he proceeded to rule in favour of the Plaintiff/Respondent by entering a default judgment under Section 128 of the Seychelles Code of Civil Procedure. The provision of section 128 of the SCCP was never prayed for by the Respondent and in all circumstances it is ultra vires. Learned Counsel submitted that an ex-parte application is found in Section 65 of the Seychelles Code of Civil Procedure.
- [10] Learned Counsel submitted that the two procedures are totally different and the learned Senior Magistrate could have opted for the one moved earlier by the learned Counsel for the Respondent that is ex-parte. That did not happen and judgment was entered in the absence of any hearing let alone an ex-parte hearing. The Appellant could then have sought from the Court an order to vacate the ex-parte order or ruling and set the case for continuation.
- [11] Learned Counsel for the Appellant hence moved the Court to quash the judgment of the learned Senior Magistrate.
- [12] Learned Counsel for the Respondent submitted in reply that the Appellant took two years and still did not file his defence. She further submitted that the learned Senior Magistrate rightly applied section 128 of the Seychelles Code of Civil Procedure and not section 69 which applies where defence has been filed.
- [13] Learned counsel moved the Court to dismiss the appeal in its entirety.

[14] This appeal is based entirely on the proceedings of the 18th February, 2018 before the learned Senior Magistrate sitting in the Praslin Magistrate's Court. The following appear in the record of proceedings:

"Court: Today the matter is fixed for trial, Defendant is absent. Defendant informed Registry that Defendant's mother passed away this early morning so has to go to Mahe.

Mrs. Amesbury: It is now almost two years since the case has been filed and the Defendant has been warned and re-warned and today the case is for hearing. Defence has not been filed and wish to move for judgment as per Section 128 of the Civil Procedure Code. I met Defendant in the morning and asked him for his Defence, he said that he has a lawyer. Neither the Defence nor lawyer is present today.

*Court: Neither is the defence of the Defendant on file nor a lawyer representing him is present in Court on the trial date. All that the Defendant has informed the Registry is that of the demise of his mother this morning. If such was the case there should have been a lawyer present as he had informed the Court on previous occasions or defence filed in Court by him or his lawyer, none appears to have been done. I indeed had given ample time and opportunity to Defendant to file his defence but he has not done so. Neither is his counsel present in Court to represent him or inform if he/she is representing the Defendant. Hence based on the motion under Section 128 of the Civil Procedure Code made by counsel for the Plaintiff and the Defendant not filing defence and not even having a lawyer present in Court, I enter Judgement for the Plaintiff on her claim for using slanderous words, intimidation and threats thereby Plaintiff suffering hurt, distressed and embarrassing her in public and to the *tore* [sic] of sum of SR200, 000/- as damages with interest and cost accordingly. Hence suit is disposed off accordingly."*

[15] The provisions of the Seychelles Code of Civil Procedure relied upon by learned counsel for the Appellant and Respondent in their respective submissions are sections 65, 66, 67, 69, 127 and 128 of the Seychelles Code of Civil Procedure which provide as follows:

65. *If on the day so fixed in the summons when the case is called on 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.*

66. *If the court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.*

67. *If on the day so fixed in the summons, when the case is called on, the defendant appears and the plaintiff does not appear or sufficiently excuse his absence, the plaintiff's suit shall be dismissed.*

If the defendant admits the plaintiff's claim or part thereof, the court shall give judgment for the plaintiff for so much of the claim as is admitted. If the defendant has claimed a set off (compensation), the court may proceed to the hearing of the set off and may give judgment thereon.

69. *If in any case where one party does not appear on the day fixed in the summons, judgment has been given by the court, the party against whom judgment has been given may apply to the court to set it aside by motion made within one month after the date of the judgment if the case has been dismissed, or within one month after execution has been effected if judgment has been given against the defendant, and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall set aside the judgment upon such terms as to costs, payment into court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side.*

127. *If the defendant denies the plaintiff's claim or any part thereof, the court shall adjourn the case to a date to be fixed by the court and shall order the defendant to file a statement of defence on or before such date.*

128. *On the date to which the suit has been adjourned under the last preceding section, the parties shall appear and the Court shall then adjourn the suit to a date to be fixed by the court for the hearing.*

If the defendant has neglected to file his statement of defence within the time ordered by the court, the court may either give judgment for the plaintiff on his

claim or grant further time, subject to such order as to costs, as to the court may seem fit."

- [16] Sections 65 to 69 do not place any specific requirement for defence to have been filed but rather on the appearance or non-appearance of the parties on the date fixed in the summons or by adjournment. Sections 127 and 128 are specific in respect of failure to file defence.
- [17] From the proceedings of the 22nd February, 2018 it is clear that the learned Senior Magistrate applied the provisions of section 128 of the Seychelles Code of Civil Procedure. It is obviously reflected in the proceedings prior to the 18th February, 2018 that the Appellant was ordered to file his defence but that on each occasion he failed to do so, the last occasion being the 18th February, 2018. Had it been an issue of being present in Court when defence had been filed, then the learned Senior Magistrate would have erred to apply section 128 of the Seychelles Code of Civil Procedure. Since the instant case is based on the failure of the Appellant to file his defence, then the learned Senior Magistrate decided correctly under the provision of section 128 of the Seychelles Code of Civil Procedure. Hence grounds 1 and 2 of the Appeal are misconceived and are dismissed accordingly.
- [18] In respect of the 3rd ground of appeal, and in accordance with the previous finding that the learned Senior Magistrate determined the matter correctly under section 128 of the Seychelles Code of Civil Procedure, I find that section 128 of the Seychelles Code of Civil Procedure does not require a hearing of the Plaintiff where defence has not been filed. The Court can give judgment on the basis of the undefended claim or grant further time for defence to be file subject to such order for cost. Hence ground 3 of the appeal also misconceived and has no merit and is dismissed accordingly.
- [19] Considering that the 1st, 2nd and 3rd grounds of appeal have failed and been dismissed, I find that the learned Senior Magistrate followed the correct procedures in law and principle in the circumstances of this case. The judgment entered by the learned Senior Magistrate in terms of section 128 of the Seychelles Code of Civil Procedure is upheld accordingly and the appeal is therefore dismissed in its entirety.

[20] I make no order for cost in respect of this appeal.

Signed, dated and delivered at Ile du Port Victoria on 14 November 2019.

A handwritten signature in black ink, appearing to be 'Dodin J', written over a horizontal line.

Dodin J