SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 643
MC 19/2020

In the matter between:

MARK EDWARD DAVISON **Petitioner**
(rep. by Frank Elizabeth)

and

GANOKWAN PHANSUWAN DAVISON **Respondent**
(absent/unrepresented)

Neutral Citation: *Davison v Davison* (MC 19/2020) [2021] SCSC 643 (8 October 2021).
Before: E. Carolus J
Summary: Nullity of Order appointing Respondent as Executrix for Procedural Irregularity; Effect on acts performed by the executrix: Distinction between *"actes nuls de plein droit"* and *"actes simplement annulables"*.
Heard: 15 July 2021
Delivered: 8 October 2021

ORDER

(a) I set aside the Order of Allear then CJ, dated 16th November 2006, appointing the respondent Ganokwan P. Davison as executrix of the estate of the late George R. Davison, as a result of which as from the date of this judgment, the respondent is no longer executrix of the estate of the said George R. Davison, and the testamentary executors remain the sole executors of his estate.

(b) I direct the Registrar General to amend its records accordingly to reflect the Order at paragraph (a) above.

(c) If the applicant wishes to have any specific acts performed by the respondent in her capacity as executrix of the said George R. Davison, declared null, he should make the appropriate application before the Court.

(d) I make no order as to costs.

JUDGMENT

E. Carolus J

Background & Pleadings

[1] The petitioner is the son and the respondent is the widow of the late George R. Davison ("the deceased"). The petitioner has filed the present petition seeking to set aside a ruling of the Supreme Court dated 16th November 2006 appointing the respondent as executrix of the estate of the deceased. The petition is supported by an affidavit sworn by the petitioner acting in his capacity of as duly appointed executor and representative of the estate of the deceased, and relevant supporting documents.

[2] On the application of the petitioner in MA47/2020, the Court granted leave for service of notice of the petition on the respondent out of the jurisdiction in Thailand, by order dated 1st July 2020. Service not having been effected, on 1st April 2021 the Court made an order for substituted service out of the jurisdiction by way of advertisement, pursuant to a further application by the petitioner in MA68/2021. The petitioner having provided proof that notice of the proceedings had been duly advertised as per the Court's order, service was deemed to have been effected. However the respondent was neither present nor represented in Court on the returnable date. Consequently the matter was heard ex-parte. The sole witness was the petitioner who testified on oath at the hearing. His testimony is in essence the same as his affidavit evidence.

[3] The relevant facts as they appear from the affidavit and oral evidence of the petitioner as well as the documentary evidence are as follows.

[4] The deceased passed away on 2nd January 2005 at Anse Soleil, Mahe. This is borne out by his death certificate.

[5] He left a holographic will dated 1st August 1997 ("the Will"), which was presented to and opened by Karunakaran J on 4th November 2005, who drew up and signed a Memorandum of Presentation and Deposit of Will on the same date in CS No. 267 of 2005 ("the Memorandum"). The Will was transcribed on 5th January 2006 in Volume 83 No. 295 with the Land Registrar and registered on the same date in Register A52 No.1438. A copy of the Will and the Memorandum are exhibited.

[6] Paragraph V of the Will reads as follows:

> *V. I hereby appoint as joint Executors of my estate my son, Mark Edward Davison, Robert Alexander Horsman and Bernard Georges as co-Executors of my Estate and shall be reimbursed such expenses and receive remuneration for their services as they shall mutually agree upon.*

[7] The final paragraphs of the Memorandum state:

> *… In pursuance of the intention of the testator, I hereby confirm the appointment of the three executors namely Mark Edward Davison, Robert Alexander Horsman and Bernard Georges to execute the said "Will and Testament" of the testator.*
>
> *Accordingly, the testamentary appointment of the said three executors is approved in terms of Article 1026 of the Civil Code of Seychelles.*
>
> *Consequently I direct the Registrar of the Supreme Court of Seychelles to transcribe the said Will and Testament and forward the same to the Registrar of Deeds for the purpose of registration.*

[8] By a Court Order dated 16th November 2006 in Ex-Parte Ganokwan P. Davison C/S No. 308/2006 (exhibited), then Chief Justice Allear appointed the respondent as executrix of the deceased's estate. The Order was registered with the Land Registrar on 10th January 2007 in Register A53 No. 343. It is stated at paragraph 2 of the Order that

> *I am satisfied on the documentary evidence adduced in support thereof that the applicant is the widow of the late Georges Rogers Davison <u>who died intestate</u> at Anse Soleil, Mahe, Seychelles on the 2nd January, 2005.* Emphasis added.

[9] The petitioner avers that he is informed by his attorney and believes that: the respondent's appointment as executrix of the deceased was unlawful and contrary to

law as the law permits only a maximum of three executors to be appointed and the three testamentary executors had been appointed before the respondent; that Allear then CJ erred in stating in his Order of 16th November 2006 appointing the respondent as executrix that the deceased died intestate when the deceased had left a Will which had been transcribed and registered on 5th January 2006; and further that he erred in granting the motion ex-parte because both counsels for the respondent and the petitioner were known to the Court and were readily available for service of summons. The petitioner avers that the respondent's appointment was unlawful for the aforementioned reasons and should therefore be set aside forthwith.

[10] In terms of the petition, the petitioner prays for the Court to set aside the ruling dated 16th November 2006 and to confirm that the respondent is not and never was the executrix of the estate of the late George R. Davison. He further prays the Court to order the Registrar General to amend its records to reflect the same and for any other orders that the Court deems fit in all the circumstances of the case. He also prays for costs.

Analysis

[11] The petitioner prays for the setting aside of the order of Allear then CJ dated 16th November 2006 appointing the respondent as executrix of the estate of the late George R. Davison. The grounds on which he relies on are threefold. He argues firstly that the order is unlawful and contrary to law as whereas only a maximum of three executors is permitted to be appointed by law, even before the appointment of the respondent, three testamentary executors had already been appointed and their appointment confirmed by the Court, and the Will appointing them registered on 5th January 2006. Secondly the order was made on the basis that the deceased died intestate whereas he had left a Will which had been transcribed and registered on 5th January 2006 before the appointment of the respondent. Thirdly he objects to Allear then CJ granting the motion ex-parte claiming that both counsels for the respondent and the petitioner were known to the Court and were readily available for service of summons.

[12] The issue which arises for the determination of this Court is whether it has jurisdiction to set aside an order of the same Court.

[13] In the case of *Attorney General v Marzorcchi & Anor* (SCA 8/1996) [1998] SCCA 6 (9 April 1998) the respondent, after judgment had been delivered, filed a notice of motion supported by affidavit for an order that the appeal be re-heard on the ground that the respondents were not heard before judgment was delivered. The Court identified the critical question for its determination as *"whether the Court has jurisdiction to set aside its own judgment on account of the irregularity and to make an order for a re-hearing of the appeal"*. It quoted with approval paragraph 556 of Halsbury's Laws of England, Vol. 26, 4th Edition, as follows:

> *556.* ***Amendment after entry of judgment or order.*** *As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been entered either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. The object of the rule is to bring litigation to finality…*

[14] The above sets out the rule that a court is *functus officio* once it has rendered a judgment or order. However paragraph 556 goes on to state that the rule is subject to a number of exceptions, as follows:

> *… but it is subject to a number of exceptions. For example, a clerical error or an error arising from an accidental slip or omission may be corrected under rules of court or the court's inherent jurisdiction. The court has inherent jurisdiction to vary or clarify an order as to carry out the court's meaning or make the language plain or to amend it where a party has been wrongly named or described unless this would change the substance of the judgment. The court will treat as a nullity and set aside, of its own motion if necessary, a judgment entered against a person who was in fact dead or a non-existent company or, in certain circumstances, a judgment in default, or a consent judgment. Where there has been some procedural irregularity in the proceedings leading up to the judgment or order which is so serious that the judgment or order ought to be treated as a nullity, the court will set it aside.*

[15] Our law sets out some of these exceptions and provides for circumstances in which the doctrine of functus officio does not apply and a judgment of the Supreme Court may be

revisited or set aside by the same Court. For example section 69 of the Seychelles Code of Civil Procedure ("SCCP") empowers the Court to set aside a judgment given ex-parte. It provides:

> *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.*

[16] Under sections 147 and 150 of the SCCP respectively, the Court is permitted to correct mistakes in a judgement and suspend or vary judgments. These provisions are reproduced below.

> *147. 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.*
>
> *[…]*
>
> *148. 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] Sections 172 to 175 of the SCCP makes provision for setting aside a judgment by way of third party opposition. Vide *Zalazina & Anor v Zoobert Ltd & Ors* (SCA28/2011) [2013] SCCA 10 (03 May 2013) with regards to this procedure. These provisions are reproduced below:

> *172. Any person whose interests are affected by a judgment rendered in a suit in which neither he nor persons represented by him were made parties, may file an opposition to such judgment.*

173. Such opposition shall be formed by means of a principal action to which the parties to the suit, in which the judgment sought to be set aside was obtained, shall be made defendants.

174. Such opposition by a third party shall not delay the execution of the judgment sought to be set aside unless the court orders a stay of execution.

175. Execution of judgments ordering a party to give up possession of an immovable property shall not be stayed by an opposition to such judgment made by third parties whenever such judgments are res judicata between the parties to the original suit.

[18] Section 194 of the SCCP allows the Court to set aside a judgment and order a new trial in certain circumstances. The provisions relevant to a new trial provide as follows:

194. A new trial may be granted on the application of either party to the suit –

(a) where fraud or violence has been employed or documents subsequently discovered to be forged have been made use of by the opposite party;

(b) when new and important matter or evidence, which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the hearing of the suit, has since been discovered or become available;

(c) when it appears to the court to be necessary for the ends of justice.

195. Application for a new trial shall be made by petition supported by an affidavit of the facts, and shall be served on the opposite party in the same manner and subject to the same rules as to time for appearance as in the case of plaints.

196. Application for a new trial must be made, -

(a) if judgment was given against the defendant in default, within three months from the date when execution of the judgment was effected or from the earliest date on which anything was paid or done in satisfaction of the judgment;

(b) in all other cases, within three months from the date of the judgment.

197. Where a new trial is applied for on the grounds of forgery, fraud or new evidence, the period of three months mentioned in section 196 shall only run from the

day on which the forgery or fraud shall have been known or the new evidence discovered, provided that in the last two cases there is written proof of the day on which such fraud or new evidence shall have been discovered.

[19] In addition to the statutory exceptions to the principle of functus officio, our jurisprudence has also developed certain exceptions to the rule. This is for example where a judgment by consent has been entered without following the procedure prescribed in section 131 SCCP. Vide *Gill v Freminot & Anor* (4 of 2006) [2006] SCCA 7 (28 November 2006) where the Court of Appeal set aside a consent judgment for non-compliance with the procedure prescribed for entering such judgments.

[20] It is clear that neither the statutory nor the jurisprudential exceptions mentioned above find their application in the present case. Section 69 of the SCCP although it deals with judgments given ex-parte, refers to cases where one of the parties to a case filed inter-partes fails to appear in Court on the returnable date of the summons, as a result of which judgment is given ex-parte. In the present case the application giving rise to the order sought to be set aside was itself an ex-parte application. Further there is a time frame for filing an application to set aside the ex-parte order which is long gone. Section 47 of the SCCP is not applicable either, the correction of a clerical mistake or errors arising from any accidental slip or omission in the Order not being in issue here. As to section 150 of the SCCP, this matter not having arisen and the present application not having been made during the sitting of the court at which the order was given, that provision is also not applicable. The procedure for third party opposition also seems not to be applicable in the present case as it seems to apply to judgments made in a suit and has to be made by way of an action i.e. a plaint as defined in section 2 of the SCCP. It is also doubtful whether an application for a new trial under section 194 could be granted in the circumstances of this case as not only is that provision applicable to inter-partes suits but there is a time frame for filing such application. In any event a new trial has not been applied for.

[21] What then are the options open to the petitioner in this case? In *Attorney General v Marzorcchi* (supra), on the particular facts of that case, the Court stated that the irregularity complained of was a procedural one namely that the respondents had not been heard before judgment was given. In that respect it stated:

We … are faced with what appears to be an irregularity which taints the validity of the proceedings and renders them a nullity. In such a situation, the doctrine of functus officio has no application and is therefore, of no consequence. Further, where a procedural irregularity of the nature complained of has occurred, as in this case, a judgment or an order given in these proceedings, must surely be treated as a nullity. In the circumstances, the Court must exercise its inherent jurisdiction to set aside the said judgment or order.

And concluded:

… We are, therefore, satisfied that the irregularity before us being a serious procedural irregularity rendered the proceedings a nullity. Consequently, the judgment is set aside. The order of the Court is that the appeal be re-heard by a differently constituted majority of the Bench.

[22] On the other hand, in the present case the petitioner is complaining that the order sought to be set aside was unlawful and contrary to law as it appointed a fourth executor whereas only three executors are permitted to be appointed by law, and furthermore the order was made on the basis that the deceased died intestate although the deceased had died testate. The relevant legal provisions insofar as it concerns these points are Articles 1025 and 1026 of the Civil Code of Seychelles Act which provide as follows:

Article 1026

The testator may appoint not more than three testamentary executors. Any executors appointed shall act as fiduciaries with regard to the rights of the persons entitled under the will, as provided by this Code, and also with regard to the distribution of the inheritance. The appointment of such executors shall be confirmed by the Court.

Article 1026

If the succession consists of immovable property, or of both immovable and movable property, and if the testator has not appointed a testamentary executor or if an executor so appointed has died or if the deceased has left no will, the Court shall appoint such an executor, at the instance of any person or persons having a lawful interest. A legal person may be appointed to act as an executor. But a person who is subject to some legal incapacity may not be so appointed.

[23] Article 1025 prohibits only a testator from appointing more than three testamentary executors. It does not actually prevent a Court from doing so although it may be argued that, by inference the same limit would apply to Court appointed executors. However the purport of Article 1026 is that it is only when a testator has not appointed a testamentary executor (or two or three for that matter) that the Court may appoint an executor. It is only if a person dies intestate, or leaves a will but does not appoint an executor in the will or appoints an executor who subsequently dies, that a Court can appoint an executor. In the present case the deceased left a will in which he appointed three testamentary executors but Allear then CJ appointed the respondent as executrix of the estate of the deceased on the basis that the deceased had died intestate and in the absence of a will, without appointing testamentary executors. Therefore it would appear that the appointment of the respondent as executrix was contrary to the aforementioned provisions. However in my view, this does not constitute procedural irregularities but errors of law and of fact by the trial judge which should properly have been dealt with by an appeal of the order sought to be set aside to the Court of Appeal.

[24] This Court is however mindful that the application giving rise to the impugned order was made ex-parte and that the Court dealt with it and made its order without the petitioner and the other testamentary executors having had notice of those proceedings and the opportunity to oppose the ex-parte application. It is possible that they may therefore not have had knowledge of the Order when it was delivered on 16th November 2006, or within the prescribed time limit for appealing against such Order, bearing in mind that the Order was only registered on 10th January 2007. While the trial judge cannot be faulted for proceeding with an ex-parte application for the appointment of the widow of a deceased person as the executor of the estate of that person in the absence of any knowledge that the deceased had died testate and appointed three testamentary executors, or knowledge of the existence of any other heirs of the deceased, who should have been made a party to the proceedings, it cannot be denied that a procedural irregularity has occurred in that the petitioner and his co-executors were not heard in these proceedings. Had they been heard presumably they would have raised the legal points against the appointment of the respondent as executrix of the deceased that they are now raising in support of their application to have the Order set aside.

[25] I am of the view that such procedural irregularity is of such a nature, in the words of Silungwe J.A. in *Attorney General v Marzorcchi* (supra), *"that taints the validity of the proceedings and renders them a nullity"* and consequently the ensuing order should also be treated as a nullity and set aside.

[26] But the matter does not end here. I note that one of the petitioner's prayers is for the Court to confirm that the respondent is not and *never was* the executrix of the deceased's estate. As a result of this Court's pronouncement of the nullity of Allear then CJ's Order of 16th November 2006 appointing the respondent as executrix of the estate of the deceased, the appointment of respondent falls and she can no longer perform any acts in that capacity from the date of this judgment. This deals with the first part of the applicant's prayer.

[27] The second part of the applicant's prayer is for confirmation that the respondent *never was* the executrix of the deceased's estate. Such confirmation would imply that all acts done by the respondent in her capacity as executrix prior to the date of this judgment are invalid or null. At first sight, this seems to be a logical consequence of the order appointing the respondent as executrix being found a nullity and set aside. But the matter is not that simple. The fate of such acts will depend on their nature.

[28] As an executrix the respondent had a duty **"***to make an inventory of the succession to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will, as the case may be"* under Article 1027 Civil Code. In terms of Article 1029 she had a duty to represent the estate in all legal proceedings and to act in any legal action to declare the will null. In terms of Article 1028, in her capacity as executrix, she was under an obligation to act as a fiduciary of the succession and was bound by the rules relating to the functions and administration of fiduciaries. As to her fiduciary duties, she was under a duty to hold, manage and administer property forming part of the succession honestly, diligently and in a business-like manner as if she was the sole owner thereof; to render full and regular account of her management of the property until termination of her functions, and to render account of her administration at the end of her functions. As an executrix she also had power to

sell property of the succession subject to certain conditions. See Articles 825, 826 and 827.

[29] The nullity of the order appointing the respondent as executrix should not affect simple acts of administration carried out by her in her capacity as executrix. It is other more serious acts such as acts of disposition that she was empowered to carry out that are of concern. Such acts invariably concern third parties who may have been *"tiers de bonne foi"* and affect their rights. These acts may include for example contracts for the sale of land forming part of the succession.

[30] Contracts fall within the definition of *"actes juridique"* which are defined as *"manifestement de volonté destinée a produire des effets de droits"* Lexique Termes Juridiques, 10e Édition, Dalloz. It is recognized that the nullity of an *"acte juridique"* i.e. a contract, has certain undesirable effects in that execution or part execution of the contract may already have occurred prior to it being declared null, and that to revert to the situation existing before such execution may cause great prejudice to the parties or even third parties. In that regard Dalloz, Encyclopedie Juridique 2e Edition, Repertoire de Droit Civil, Tome VI Vo. Nullité states that -

2. Du fait qu'elle se présente comme un contrôle a posteriori de la validité des actes juridiques, la nullité entraine des graves inconvénients. Tant que le jugement prononçant l'annulation n'a pas détruit l'apparence créée contrairement a la réalité, l'acte peut etre l'objet d'une exécution et ainsi produire ses effets. Certes, l'annulation aura pour conséquence de détruire des tels effet, mais cette destruction risque d'être lourdemment préjudiciable tant aux parties qu'aux tiers.

[31] In order to limit these undesirable effects, certain rules have been established whereby the nullity of a contract may only be invoked by certain persons, and within a certain prescriptive period. There are also rules which allow certain effects of a contract to subsist despite its nullity or for the contract to be retrospectively validated. These rules are explained as follows in Dalloz (supra) –

3. Notre droit s'est efforcé de limiter les inconvenients qui resultant de la nullité. Une première atténuation consiste en ce que la nullité de l'acte est instituée par la loi, non pas à l'égard de tous, mais dans l'intérêt exclusif d'une ou de plusieurs personnes

déterminées qui peuvent seules l'invoquer. Une seconde atténuation résulte de ce que l'acte devient inattaquable après qu'un certain temps s'est ecoulé. Ces deux atténuations qui aboutissent à rendre obligatoire l'exécution de l'acte lorsque la ou les personnes qui ont le droit de demander la nullité n'agissent pas dans le délai accordé, se complètent parfois d'une troisième dont le but est d'éviter le boulversement de situations déjà etablies, l'acte nul n'étant pas alors privée de tous ces effets, ou pouvant même être validé après coup.

[32] A distinction is made between "*actes nuls de plein droit*" and "*actes simplement annullable*", and depending on which category it falls in, an "*acte juridique*" will either produce its full effect notwithstanding its nullity or be invalidated, by application of the aforesaid rules. This is explained as follows:

14. Selon une doctrine qui peut être considérée comme classique, il y a deux sortes d'actes nuls : 1° les actes nuls de plein droit. Tels sont : les actes qu'une disposition légale déclare nuls, quels que soient d'ailleurs les termes employés par la loi (Comp. not. C. civ., art. 156, 1131, 1974); les actes faits en violation d'une prescription ou d'une prohibition formelle de la loi, bien que la nullité n'en soit pas expressément prononcée ; les actes contraires à l'ordre public ou aux bonnes moeurs ; les actes auxquels fait defaut une des conditions essentielles à leur existence juridique. Toute personne intéresée est autorisée a se prevaloir de la nullité de ces actes : c'est ce qu'on exprime en disant que la nullité en pareille cas est absolue. D'autre part, elle n'est susceptible d'être couverte ni par une confirmation ou d'une ratification, ni par la prescription. Enfin cette nullité existerait de plein droit, sans qu'il soit nécessaire de la demander en justice, et si, parfois, le juge doit trancher un litige relative a cette nullité, ce n'est pas lui qui pronounce cette nullité, son role se borné à la constater.

15. 2° Les actes simplement annulables c'est-à-dire ceux qui existent, même juridiquement, tant qu'un jugement ne les a pas annulés. Tels sont, notamment, les actes nuls à raison d'un vice du consentement, ou l'incapacité de l'une des parties. La nullité de pareils actes ne peut pas être invoquée par toute personne ayant intérêt, mais seulement par celles que la loi, en l'édictant, a voulu protéger ; spécialement par la partie dont le consentement a été vicié, ou l'incapable. D'autre part, elle est susceptible d'être couverte par l'effet d'une confirmation … ou de la prescription … Cette nullité est sanctionnée par les actions en nullité ou en rescission, auxquelles se réfèrent les articles 1304 et suivants du code civil. En effet, les nullités relatives doivent etre prononcées par le juge : celui-ci ne se borne pas a constater une nullité qui aurait joué de plein droit. Emphasis added.

[33] The difficulty in the present case is that the Court has no knowledge of the acts, if any, performed by the respondent in her capacity as executrix. The Court is therefore not only not in a position to know whether any "actes juridiques" have been performed, but if they have been, the exact nature of those acts and whether they are *"nuls de plein droit"* and subject to a *"nullité absolue"* or *"simplement annulables"* and give rise to a *"nullité relative"* with the attendant consequences attached to each type of *nullité.* Furthermore the applicant has only asked the Court to confirm that the respondent is not and never was the executrix of the deceased. It has not asked the Court to declare any specific act of the defendant a nullity. Therefore, for the reasons given above, in particular that no information has been provided with regards to any acts of the respondent performed in her capacity as executrix, the Court declines to make a pronouncement that may affect any such acts. Should the applicant wish to have any specific *"actes juridiques"* of the respondent's declared null, he should make the appropriate application before the Court.

Decision

[34] For the reasons given above, I partly grant the petition and make the following Orders –

(a) I set aside the Order of Allear then CJ, dated 16th November 2006, appointing the respondent as executrix of the estate of the late George R. Davison, as a result of which as from the date of this judgment, the respondent Ganokwan P. Davison is no longer executrix of the the estate of the late George R. Davison and the testamentary executors remain the sole executors of his estate.

(b) I direct the Registrar General to amend its records accordingly to reflect the Order at paragraph (a) above.

(c) If the applicant wishes to have any specific *"actes juridiques"* performed by the respondent in her capacity as executrix of the late George R. Davison, declared null, he should make the appropriate application before the Court.

[35] I make no order as to costs.

Signed, dated and delivered at Ile du Port on 8th October 2021

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E. Carolus J