IN THE SUPREME COURT OF SEYCHELLES

Reportable
2021 SCSC …
MA 257/2021
(Arising in MC 61/2021)

In the matter between:

JONATHAN SEARLES **Applicant**
(rep. by Alexandra Benoiton)

and

WINSEL POTHIN **Respondent**
(rep. by Charles Lucas)

Neutral Citation: *Searles v Pothin* (MA 257/2021) [2021] SCSC …. (11 November 2021).
Before: Dodin J.
Summary: Writ Habere Facias Possessionem. Application for stay of execution of Ruling. Grounds for granting stay of execution.
Heard: Written submission and Oral submission on 28 October 2021
Delivered: 11 November 2021

ORDER

A case for stay of execution has not been made to the satisfaction of this Court as no sufficient reason has been advanced to grant a stay of execution.

The balance of convenience on whether to grant a stay of execution of the judgment tilts heavily on favour of the Respondent.

This Application is dismissed.

RULING

DODIN J

[1] The Applicant moved this Court for a stay of execution of the decision of the Court delivered on the 10th September, 2021 granting an application for *Writ Habere Facias Possessionem* against the Applicant, ordering the Applicant to vacate land parcel T477 within one month of the date of the Ruling.

[2] In a supporting affidavit, the Applicant states the following in support attached to a notice of motion starting from paragraph 4:

> *4. That I have filed a Notice of Appeal against the order. A copy of the Notice of Appeal is shown to me produced and exhibited herewith.*
>
> *5. I have been informed by my attorney and verily believe that there are substantial questions of law to be adjudicated upon at the hearing of the Appeal namely –*
>
> *(a) whether the Notice of Motion was in accordance with the law in that, at the time of its institution, the notice of motion had been signed by an attorney-at-law who did not hold a legal practitioner's license;*
>
> *(b) whether the learned Trial Judge erred in law in failing to address that the Respondent failed to satisfy the court of the need for urgency in the circumstances of the case; and*
>
> *(c) The Learned Trial Judge erred in law and on the facts in holding that the Appellant has no bona fide defence and no claim or right to T477 and in ordering the Applicant to vacate the property within one month of the date of the ruling.*

6. I aver that I have real prospects of being successful in my appeal.

7. That it is practical and in the interests of justice for this Honourable Court to grant an order to stay the execution.

8. That if the stay is granted, and the appeal fails, the Respondent will still be able to enforce the Order and thus no undue prejudice will be caused to the Respondent.

9. That if the Application is refused, and the said Order is executed and I will suffer irreparable hardship, substantial loss and prejudice which could not be compensated in damages and would also render my appeal to set aside the said Order nugatory.

10. That I currently have possession of the Land, I am of the advanced age of 84 years and I do not have alternative accommodation. That more harm will be done to me and I would suffer a greater risk of injustice by refusing the stay than to the Respondent by granting it.

11. On the basis of the matters aforesaid it is urgent, necessary, just and fair that the stay of execution is granted.

[3] The Respondent objects to the Application and in an affidavit in reply state the following from paragraph 2 onwards:

2. I object to the application for stay of execution which has filed out of time, beyond the one month's deadline Court Order. The Application was sworn and filed in court on the 11th October 2021. It is time barred and prescribed in law and ought not to be entertained by the court. Had the Applicant intended to seek a stay of execution of judgment, he ought to have taken steps during the course of the month from judgment date and not thereafter.

3. Paragraph 5 (a) of the Applicant's affidavit is incorrect altogether. i) I swore my affidavit before the Registrar of the Supreme Court

and not before a person who did not hold a legal practitioner's license;

ii) I presented my Writ application to the Supreme Court and its Registry accepted to list my case before a Judge of the Supreme Court;

iii) Initially, the Motion for the Writ, dated the 26th July 2021, bore the name of Charles Lucas, as my Attorney. However, I am informed he was fully licensed to appear in court on my behalf on the 17th August 2021;

iv) At the commencement of the proceedings, he moved the trial Judge to delete his name as my Attorney on the motion of the Writ, without objections from the Applicant's Attorney. The Court granted the application and deleted his name as Attorney for the Applicant in the Writ Notice of Motion;

v) Having amended the Notice of Motion, only my name appeared as Applicant. Henceforth, the issue of unlicensed counsel was rendered into a defunct non-issue.

vi) Therefore, this ground of appeal is frivolous and does not hold water.

4. *I am advised that Paragraphs 5(b) and 5(c) contravene Court of Appeal Rule 18(7). Both grounds of appeal are vague or generalised and cannot be supported by any evidence whatsoever. They revolve around the ambit of what has already been decided by the Court of Appeal in Jonathan Searles vs Winsel Pothin, SCA 07/14 when the Court is dismissing the Applicant's appeal confirmed ownership by the Respondent, despite the financial input of the Applicant in the house. The Applicant should not get a second bite at the cherry before the Court of Appeal should he*

proceed with allegations of having an interest in T477 which is res judicata.

5. *I am further advised that Paragraph 5 (c)'s allegations of error by the judge on facts are outrageously false. The Applicant purchased the life interest of Drixelle Monthy in T477. Her passing away factually terminated his right to occupy T477. Ever since, he ceased to have any right of occupation or possession. No court of law can reverse, extend or undo the expiry of the usufructuary interest of the Applicant, which duration was for the lifetime of a deceased person.*

6. *The Applicant has not pleaded any special circumstances as to why the Court should stay the execution of judgment and has lamentably failed to show that he has any real prospects of success in his appeal.*

7. *The Applicant is not truthful to the court in his averments at paragraph 10 of his Affidavit. I aver that he has alternative accommodation at Anse Talbot, Mahe and in fact on Friday 15th October he removed most of the furniture from the House on T477. The Applicant has alternative housing at Anse Talbot or in the alternative, being a man of sufficient means, he can afford to rent any accommodation of his choice. He shall suffer no hardship whatsoever should the judgment be executed.*

8. *I verily believe that the Applicant has no chances of success in his appeal whatsoever but he has failed it as a means to enable him to access a stay of execution in order to extend his occupation of T477. I aver that the Applicant is acting in bad faith and his actions amount to an abuse of right, despite the fact that he is not legally entitled to occupation any more.*

9. For the reasons, stated above, I pray that the court dismisses the application for stay of execution and award me costs.

[4] Learned counsel for the Applicant further submitted the following in support of the Application:

1. This Honourable Court gave a ruling on the 10th September 2021 granting the applicant for Writ of Habere Possessionem and ordering the Applicant to vacate the dwelling house on T477. The Applicant has appealed the decision and has filed this application for stay of execution pending the disposal of the appeal.

Out of time

2. So as to address a matter raised in the Respondent's Affidavit in reply, this application is not out of time. This same query was brought up by the Learned Judge at the first mention of this application and addressed by counsel for the Applicant. The Learned Judge, satisfied with the brief submission proceeded with the application. The Respondent has seen it fit to raise the matter again and for the sake of clarity this submission shall once again canvass the points.

3. The order was delivered on the 10th September 2021 and as the last day would have been a Sunday (a dies non), under the Section 57(1)(d)of the Interpretation and General Provisions Act (Cap 103) reads as follows:

Where the last day of a period is an excluded day, the period included the next following day not being an excluded day;

Section 57(4) of the said Act refers to an "excluded day" means a public holiday or a bank holiday declared under Section 51 of the Financial Institutions Act. Under the Public Holidays Act, SCHEDULE Section 2, Sunday is considered a public holiday.

Application for stay

4. In considering whether or not to grant a stay of execution, the law does not expressly provide for the considerations to be taken, case law has established the procedure to follow.

5. The most notable case is that of Macdonald Pool v Despilly William, Civil Side No. 244 of 1993 which determined that in an application for stay of execution, the considerations are the following five grounds:-

a. Where there is a substantial question of law to be adjudicated upon a the hearing of the appeal,

b. Where special circumstances so require,

c. Where there is proof of substantial loss that may otherwise result,

d. Where if the stay is not granted the appeal if successful, would be rendered nugatory,

e. If a stay is granted, and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment

6. These are detailed hereunder.

Where there is a substantial question of law to be adjudicated upon at the hearing of the appeal,

7. In order to meet this requirement, the Applicant has not merely made the statement that there is some prospect of success, the Applicant has laid down the grounds on which they are seeking the appeal in sufficient detail, and prima facie should satisfy this Honourable Court that there are serious questions of law and fact that the Appellate Court ought to consider and rule upon. It is not however for this Honourable Court to prejudge the appeal but only to make an assessment of whether the appellant has a good chance of success or the Appellant may be ruined if the stay is denied or if the appeal has little chance of succeeding.

8. As ruled in Ashraf Elmasry v Margaret Hua Sun, Civil Appeal SCA MA 37/2019, (arising in SCA 28/2019) the notice of appeal "does not need to be an elaborate discussion of law of facts.". The Honourable Judge also referred to:-

In Lawrence v Gunner [2015] NSWCA 322 where it was held that "it is appropriate to first consider whether the appellant has arguable grounds of appeal. A detailed examination of the merits of the appeal is neither necessary nor appropriate."

Additionally in Elmasry (supra), President Fernando referred to Karunasekera v Rev. Chandananda [2004] 2 Sri L.R which ruled that "The Court is not expected to go into the intricacies of the question of law to be decided in the appeal: it is sufficient if the court is satisfied that it prima facie appears that there is a substantial question of law to be decided in the appeal."

9. It is the Appellants humble submission that their notice of appeal raises substantial questions of law and facts to be dealt with by the court of appeal notably that:-

a. The notice of motion was not in accordance with the law in that, at the time of its institution, the notice of motion had been signed by an attorney-at-law who did not hold a legal practitioner's license;

b. The Learned Trial Judge erred in law in failing to address that the Respondent failed to satisfy the court of the need for urgency in the circumstances of the case;

c. The Learned Trial Judge erred in law and on the facts in holding that the Appellant has no bona fide defence and no claim or right to T477 and in ordering the Appellant to vacate the property within one month of the date of the Ruling

That by virtue of having averred their arguable case and the prospect of success, this have met this initial requirement.

Where special circumstances so require and where there is proof of substantial loss that may otherwise result

10. In respect of these two points the Appellant submits them collectively. As evidenced throughout the case, the Applicant is an 84-year-old man, who purchased the property approximately 24 years ago, he built the house thereon, and has always resided there. He has no alternative accommodation, despite the unsupported averments made in the Respondent's affidavit which the Respondent is expecting the court to rely on without evidence.

11. Furthermore, the affidavit in reply states that the Applicant started moving his belongings already, a statement which, in addition to being completely unsubstantiated, is completely false and misleading to this court.

12. Despite the applicants failing health due to his advanced age, having been in his house for so many years, should the application not be successful, there will be irreparable damage suffered by him. The inconvenience, stress and undue difficulty and trauma having to be evicted from his home of over 2 decades, when he still has an appeal pending would be irreparable. This is not a monetary ruling whereby money could be put in the bank, the matter in question is the Applicant's home, and only residence.

13. Should the appeal be unsuccessful, the Applicant can still leave the house, but should this application not be granted and he be ordered to leave, the chances and difficulty of the applicant returning to his house would be inordinate.

14. Furthermore the Respondent has not resided in the house for almost 10 years and therefore must have alternative accommodation to reside in. The only factor that has changed this year is the untimely death of the late Drixelle Monthy. The Applicant therefore submits that the Respondent would not be unduly prejudiced should this application succeed and the Applicant be allowed to continue residing in the house.

Where if the stay is not granted the appeal if successful, would be rendered nugatory,

15. In considering whether or not to grant the stay, the Court must also consider the balance of convenience, hardship or loss the parties may suffer. The applicant humbly submits that in the event that there is execution the likely injury to be suffered by him will be much greater than any likely to be suffered by the Respondent if the stay is not granted. The applicant is facing eviction from the only home he has known for a quarter century, the Respondent on the other hand merely maintains the status quo.

16. The very essence of the outcome of the appeal is the Applicants right to be in the property which if this application does not succeed will be rendered nugatory.

If a stay is granted, and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?

17. There is no risk that the Respondent will not be able to enforce her judgment should the appeal be unsuccessful. The subject matter of the appeal is property and a house which the Applicant cannot alienate or get rid of.

18. A submitted above, should the stay be granted and the appeal be unsuccessful, the Applicant need only remove himself from the house, which is the situation we are in now. However should the applicant be denied this application not only would he be greatly inconvenienced, but his whole appeal would be rendered nugatory.

The balance of convenience

19. The Applicant humbly submits that based on all facts as above, the balance of convenience lies with the Applicant. Not only is it favourable for both parties to maintain the status quo, but should this application fail, and the Respondent move into or have someone move into the house, and the appeal is subsequently successful, it would be inordinately inconvenienced to have to move out.

20. The Applicant humbly submits that as per Pool v Williams, he has made all the required averments and substantiated same for this application.

Learned counsel moved the Court to grant the stay of execution as prayed for pending appeal.

[5] Learned counsel for the Respondent made a short oral submission, stating that on the question of law, the Applicant has no ground to appeal on in that his lawful interest in the land ended at the death of Drixelle Monthy from whom he purchased her usufructuary interest. Upon her death, the Applicant has lost his right of occupation. In addition

learned counsel moved the Court to rely on the affidavit in reply of the Respondent which addresses the issues raised by the Applicant.

[6] Section 230 of the Seychelles Code of Civil Procedure states that:

> "*An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court or the appellate court so orders and subject to such terms as it may impose. No intermediate act or proceeding shall be invalidated except so far as the appellate court may direct*".

Therefore the fact that the Applicant has decided to appeal the decision of the Supreme Court is not in itself ground enough for granting a stay of execution.

[7] In the case of *Pool v William Civil Side 244/1993 (judgment delivered on 11 October 1996)* the Court determined that in considering whether to grant a stay of execution the Court must consider the following:

i. Whether an appellant would suffer loss which could not be compensated in damages;

ii. Where special circumstances of the case so require;

iii. If there is proof of substantial loss that may otherwise result;

iv. If there is a substantial question of law to be adjudicated upon at the hearing of the appeal; or

v. If the appeal would otherwise be rendered nugatory.

The case of *Chang-Tave v Chang-Tave [2003]SLR 74 (Civil Side 153/2002 judgment delivered on 6 March 2003)*, added two further issues to be considered in addition to the above, namely:

vi. Without by granting a stay the appellant would be ruined; and

vii. The appeal has some prospect of success.

[8] Considering all the above, the Court must be extremely caution in determining whether to grant a stay of execution of a judgment and must in addition be satisfied that such application is not frivolous, malicious or vexatious. In the case of *Avalon v Berlouis [2003 SCSC 20] (Civil Side 150/2001, judgment delivered on 8th September 2003)*, the Court stated that the Court will exercise its discretion to grant a stay of execution sparingly. It will not without good reason delay a successful plaintiff from enforcing the judgment obtained although as a Court of Equity it will not deny an unsuccessful defendant the possible benefit from the appeal process.

[9] In the current case, the Applicant has advanced the following grounds in support of the application for stay of execution found in paragraphs 8, 9 and 10 of the affidavit and supported by the final submission.

> *8.* That if the stay is granted, and the appeal fails, the Respondent will still be able to enforce the Order and thus no undue prejudice will be caused to the Respondent.
>
> 9. That if the Application is refused, and the said Order is executed and I will suffer irreparable hardship, substantial loss and prejudice which could not be compensated in damages and would also render my appeal to set aside the said Order nugatory.
>
> 10. That I currently have possession of the Land, I am of the advanced age of 84 years and I do not have alternative accommodation. That more harm will be done to me and I would suffer a greater risk of injustice by refusing the stay than to the Respondent by granting it.

[10] The arguments in paragraphs 8 and 9 treated together do not seem to have taken into consideration that the Applicant as at now and based on three judgments given against him on the issue of ownership of Title T477 has virtually no chance of canvassing and revering those three decisions including one judgment of the Court of Appeal which determined that the bare ownership of the land in question is unquestionably owned by

the Respondent. On the other hand, as long as the Applicant stays put on the Respondent's property, the Respondent is being deprived of the fruits of her judgments and her right to property as per the judgments and the law, not to mention our supreme law the Constitution of the Republic of Seychelles.

[11] As regards paragraph 10 of his affidavit, the Applicant leaves no doubt that he will not be able to compensate the Respondent for her loss if the Application is granted stating "*I am of the advanced age of 84 years and I do not have alternative accommodation"*. The Court does have a sympathetic eye for the Applicant but that is only as far as it goes. Secondly, contrary to learned counsel for the Applicant stating that the judge was satisfied with her explanation in respect of the filing for stay after 30 days, this Court never made any determination on the matter because it is not an essential issue fundamental to determine the question of whether to grant a stay of execution. It is only relevant in that it showed the contempt of the Applicant for the judgment of the Court and who now has the audaciousness of asking the Court to condone and regularize his disobedience of this Court's judgment. Lest we forget, "*he who comes to equity must come with clean hands"*.

[12] Having considered the Application and supporting affidavit of the Applicant and carefully studied the submission of learned counsel for the Applicant, I conclude that a case for stay of execution has not been made to the satisfaction of this Court. No sufficient reason has been advanced to grant a stay of execution and in fact the balance of convenience on whether to grant a stay of execution of the judgment tilts heavily on favour of the Respondent.

[13] Consequently, this Application is dismissed.

[14] I award cost to the Respondent.

Signed, dated and delivered at Ile du Port 11 November, 2021.

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Dodin J