

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC ..934
CS74/2020

In the matter between:

LAURA BERLOUIS

(rep. by Edit Wong)

1st Plaintiff

JONATHAN BERLOUIS

(rep. by Edit Wong)

2nd Plaintiff

and

THE ESTATE OF THE LATE

OGILVY BERLOUIS

(rep. by Basil Hoareau)

1st Defendant

MARYSE BERLOUIS

(rep. by Basil Hoareau)

2nd Defendant

Neutral Citation: *Berlouis & Anor v The Estate of the late Ogilvy Berlouis & Anor* (CS 74/2020 [2021] SCSC (31st December 2021).

Before: Pillay J

Summary: Opening of succession... Wills are subject to Article 913 of the Civil Code of Seychelles and gifts in excess of the disposable portion are liable to be reduced

Heard: 2nd July 2021 and 7th July 2021

Delivered: 31st December 2021

ORDER

[1] The plea in limine succeeds on the basis that there is no cause of action disclosed against the second Defendant and no reasonable cause of action disclosed against the first Defendant, the Plaintiff is dismissed.

[2] In view of the nature of this matter no order is made for costs.

JUDGMENT

PILLAY J

[1] The Plaintiffs seek to challenge the Will made on 20th December 2017 by the late Ogilvy Berlouis leaving the entirety of his estate to the second Defendant.

[2] The prayers per the amended Plaint is as follows:

- a) *that the Will of the 1st Defendant is declared void to the extent that it leaves the entirety of the 1st Defendant's estate to the 2nd Defendant;*
- b) *that the Plaintiffs and the other heirs listed in paragraph 2 of the Plaint are declared heirs under the Will;*
- c) *that the 1st Defendant provides all heirs with an inventory of the 1st Defendant's estate and that any dispositions to the 2nd Defendant are declared null and void and brought back to the hotch pot;*
- d) *that the 1st Defendant is ordered to distribute the estate of the 1st Defendant amongst all the heirs;*
- e) *that the 1st Defendant is to pay to the Plaintiffs the sum of SCR 100, 000.00 as moral damages...*

[3] In their defence the Defendants raised a plea in limine on the basis that:

- (1) *The Plaintiff has wrongly and illegally joined two different causes of action in the same suit despite the different causes of action being pursued against different Defendants and/or Defendants are not being sued in the same capacities, and consequently the plaint ought to be struck out or set aside.*
- (2) *The Plaint ought to be dismissed – in accordance with Section 92 of the Seychelles Code of Civil Procedure – as it is frivolous or vexatious and does not disclose any reasonable cause of action.*
- (3) *Further the Plaint ought to be dismissed – under the inherent powers of the Court – on the ground that it is frivolous or vexatious or an abuse of the Court's process.*

- [4] The defence of the Defendants as can be gleaned from the pleadings is that the deceased did nothing illegal by disposing of all his properties by Will.
- [5] The evidence of Laura Berlouis is that the deceased Ogilvy Berlouis is her father. The deceased also had three other children, Olivia, Barbara and Jonathan Berlouis. One Mervin More has been declared by the Court as the son of the deceased as well. In 2017 the deceased made a Will. In the Will the deceased left all his property to her step-mother, Maryse Berlouis. Maryse Berlouis has also been appointed as Executor of the deceased estate.
- [6] Jonathan Berlouis testified that he is the son of the deceased Ogilvy Berlouis. He was on good terms with his father who had always said that he would leave something for him when he passed away. However three years after the deceased passing he has heard nothing from the second Defendant. He seeks moral damages in the sum of SCR 50, 000.00.
- [7] The second Defendant testified on her own behalf that she was married to the late Ogilvy Yvon Berlouis. The deceased executed a Will on 20th December 2017.
- [8] Counsels were given time to file submissions however Learned Counsel for the Defendants failed to do so on the date given resulting in the Learned Counsel for the Plaintiff filing hers and then filing additional when the Learned Counsel for the Defendants eventually filed his.
- [9] Learned counsel for the Defendants submitted that there are two causes of actions contained in the Plaint; the first laid out in paragraph 6 that the first Defendant could not have left his entire estate to the second Defendant as he had only one quarter of his estate to dispose of and as such the disposition is void and the second in paragraph 8 being a claim for damages against the first Defendant.
- [10] It was his submission that the first cause of action is based on Article 920 of the Civil Code of Seychelles which has now been repealed as read with Article 913. It was his submission that this cause of action could only arise after the death of the donor and as such could not be brought against the donor but rather against those benefitting from the gift.

- [11] As for the second cause of action he submitted that it could only arise against the first Defendant. On that basis he submitted that the Plaintiffs have joined two different causes of action, against different parties contrary to section 105 of the Seychelles Code of Civil Procedure. Learned counsel further relied on the observations of the Court of Appeal in the case of **Andre v Jupiter SCA 19/2018** that “counsel for the appellant ought to have raised the issue of misjoinder of causes of actions as a plea in limine litis and had he done so, the suit ought to have dismissed or set aside on the ground of misjoinder of causes of action” as support for his contention that the Plaint ought to be dismissed on the ground of misjoinder of action.
- [12] With regard to his plea that there is no reasonable cause of action disclosed, Learned counsel for the Defendants relying on the case of **Contoret & Anor v Contoret [1973] SLR 257** submitted that “a claim challenging a disposition made in excess of the disposable portion, whether by gift inter vivo or by will, can only demand the Court to reduce the disposition to the size of the disposable portion, but not to declare the gift inter vivo or will void.”
- [13] In terms of the plea that the Plaint should be dismissed as it is an abuse of the process of the Court, Learned counsel for the Defendants submitted that the Court has inherent powers to either dismiss or strike out any pleading on the ground that it is an abuse of process. It was his submission that the misjoinder of the causes of action is an abuse of the Court’s process as was the Plaintiffs demand to declare the will null and void instead of demanding a reduction of the disposition made in excess of the disposable portion.
- [14] For her part, Learned counsel for the Plaintiff submitted that the law on dispositions that a person may make by Will is clear. She referred the Court to Article 913 of the Civil Code of Seychelles as well as the case of **Jimmy Basset v Anne Figini (born Basset) and Ors CS No. 145/2011** in which Dodin J relied on the above provision for his conclusion that:

“The obvious conclusion that can be reached from the above provisions of law is that although a person can dispose of part of his property by way of gift inter vivos or by will, a portion of the same must be reserved for the children depending on the number of children or the children’s surviving successors if the child has predeceased the testator.”

- [15] Learned counsel for the Plaintiff submitted that the Defendants having admitted that the deceased had more than 2 children then by virtue of Article 913 the deceased could not have gifted the entirety of his estate to the second Defendant by Will. It was her submission that the issue is not that the deceased disposed of all his property by Will but rather it is the distribution of his properties by Will which is in issue and a clear breach of the provisions of Article 913. It was learned counsel's argument that the by implication the dispositions in the Will to the second Defendant ought to be reduced to the disposable share that the first Defendant had.
- [16] As to the plea in limine that the Plaintiff has wrongly and illegally joined two different causes of action in the same suit, learned counsel for the Plaintiff relied on section 105 of the Seychelles Code of Civil Procedure for her proposition that the parties are the same and the capacities are the same, though the causes of action are different they are related.
- [17] As to the Pleint being frivolous and vexatious Learned counsel submitted that the plea cannot be maintained. She referenced the case of Frank Elizabeth v The President of the Court of Appeal CC No 2 of 2009 as authority supporting her argument that given that the Plaintiffs have a right accruing to them under article 913 which has been breached by the first Defendant there is therefore a reasonable cause of action and the Pleint is neither frivolous or vexatious.
- [18] In terms of the plea that the matter is an abuse of process learned counsel for the Plaintiff submitted that there is no basis to the plea. It was her submission that the Plaintiff has a genuine claim and to state that this is an abuse of process is ill conceived. It was her submission that the claim is genuine and not an abuse. Learned counsel submitted that though the Plaintiff had instituted another case against the first Defendant the cause of action in that matter was in relation to a transfer of land to another of his heirs while the current matter is in relation to dispositions under the Will.
- [19] On the claim for moral damages by the Plaintiff in the absence of a claim for material damages Learned counsel relied on the authority of Michel & Ors v Talma & Ors (2012) SLR 95 submitting that the Plaintiffs had suffered significant inconvenience.

[20] I will proceed first to deal with the plea in limine litis.

Plea in limine

Misjoinder of action

[21] To the first point, that *"The Plaintiff has wrongly and illegally joined two different causes of action in the same suit despite the different causes of action being pursued against different Defendants and/or Defendants are not being sued in the same capacities, and consequently the plaint ought to be struck out or set aside."*

[22] Section 105 of the Seychelles Code of Civil Procedure provides that

Different causes of action may be joined in the same suit, provided that they be between the same parties and that the parties sue and are sued respectively in the same capacities [...]."

[23] In effect then, in circumstances where there are different causes of action in one suit against different parties in different capacities, the Plaint will fall afoul of section 105 above.

[24] On my reading of the Plaint the claim for the Will to be declared void, found in paragraph 6 of the Plaint, is against the Estate of the deceased which the 2nd Defendant represents as its Executor. The claim for moral damages, found in paragraph 8 of the Plaint, is also against the first Defendant. From the Plaint it is obvious, and it is admitted, that the second Defendant is the sole beneficiary under the Will.

[25] However other than her being a beneficiary under the Will it is not made clear what claims are sought against the second Defendant. As far as I can see this is not an action for reduction but one for a declaration that the Will is void. As correctly stated by learned counsel for the Defendants, an action for reduction lies against the one who benefits from the gift, which in this case is clearly the second Defendant. But as I said there is no action for reduction.

[26] Given the circumstances it is wrong to say that there was a misjoinder of actions. The two causes of action are against the first Defendant. To my mind the issue is not so much misjoinder as whether there is a cause of action against the second Defendant.

Cause of action

[27] This leads us then to the second point raised by the Defence that “*The Plaintiff ought to be dismissed – in accordance with Section 92 of the Seychelles Code of Civil Procedure – as it is frivolous or vexatious and does not disclose any reasonable cause of action.*”

[28] Section 92 of the Seychelles Code of Civil Procedure provides that

“The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case...., the Court may Order the action to be stayed or dismissed, or may give Judgement on such terms as may be just.”

[29] The question whether a plaintiff discloses a cause of action must be determined upon perusal of the plaintiff alone, together with anything attached so as to form part of it, and upon the assumption that any allegations or implied allegations of fact in it are true. See **Get High (Pty) Ltd and Ors v Steve Gerrad and Ors (Commercial Case No. 08 of 2012). Joubert V Philoe & Ors (CS 75/2014) [2016] SCSC 243 (05 April 2016)**

[30] The pleadings disclose that the Plaintiffs firstly seek a declaration that the Will is void, secondly that they be declared heirs and provided with an inventory and thirdly that they be awarded damages. The prayers as can be observed at paragraph 2 above shows clearly that they are made against the first Defendant.

[31] Plaintiff’s counsel relies on the decision in **Racombo**. In **Racombo** the Plaintiff sought for the Will to be declared null and void or in the alternative to declare the dispositions in the Will contravened the law and was subject to reduction. Relying on **Desaubin and others vs Sedwick (SCA 12 of 2012) [2014] SCCA 20 (14 August 2014)** the Court reduced the donations in the Will to give effect to the principles laid out in Article 913 of the Civil Code.

[32] Indeed that was in line with **Contoret v Contoret** that in circumstances where dispositions exceed the amount provided in law, the only solution is to reduce the gift made in excess.

[33] The Plaintiffs by virtue of Article 913 of the Civil Code are reserved heirs. With respect the Plaintiffs at paragraph 6 have not pleaded that the gift to the second Defendant is subject

to reduction but on the contrary have pleaded that the gift is void. It is noted that the reduction in **Racombo** was made as there was an alternative prayer for reduction. Indeed as Learned counsel for the Defendants point out, if this Court orders a reduction in favour of the Plaintiffs, which would be the morally right thing to do, this Court would be acting in excess of its powers as in the current matter there was no prayer for a reduction but for a declaration that the Will is void.

[34] In the case of **Desaubin and others vs Sedwick (SCA 12 of 2012) [2014] SCCA 20 (14 August 2014)** Twomey JA

the full rigours of the forced heirship provisions of the law of Seychelles has to apply. Article 731 of the Civil Code states in no uncertain terms that:

“Succession shall devolve upon the children and other descendants of the deceased... (our emphasis).

She went on to add that;

Hence the Will of the testator can only be given effect within the confines of the law. In this respect Article 920 which states that at the opening of the succession, dispositions exceeding the disposable portion shall be reduced will apply.

[35] The deceased having drawn up a Will, so in terms of testate succession, **Article 913**

Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915 - 1.

Nothing in this Article shall be construed as preventing a person from making a gift inter vivos or by will in the terms of article 1048 of this Code.

[36] In line with **Contoret** and **Desaubin** there is no issue of declaring a Will void on the basis that the dispositions are not in accordance with Article 913. Any dispositions in a Will that is contrary to Article 913 is subject to reduction only.

[37] With that said I find that there is no cause of action against either the first or second Defendant.

Abuse

- [38] To the final point raised by the Defence, "*Further the Plaint ought to be dismissed – under the inherent powers of the Court – on the ground that it is frivolous or vexatious or an abuse of the Court's process.*"
- [39] I agree with Learned counsel for the Plaintiffs that the Plaintiffs had a right accruing to them and they were entitled to pursue it.
- [40] In fact the case of **Gomme v Maurel [2002] SLR 342** referred to by Learned counsel for the Defendants is right on point. The Court of Appeal referenced the findings in Kerr LJ and Sir David Cairns in *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 at 137 -139 "the purpose [of the doctrine of abuse of process] was to prevent abuse by not endangering the maintenance of genuine claims."
- [41] Justice Domah in the case of **Gomme** limited the application of the doctrine of abuse of process to the statements of "Lord Wilberforce, [when he delivered] the opinion of the Board in *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 425, [and] confined it to its "true basis": namely, the prohibition against re-litigation on decided issues. Abuse of process -
- ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.
- [42] The facts in the current matter cannot be said to amount to an abuse. It is beyond doubt that the deceased could not have gifted the entirety of his estate to the second Defendant in view of the provisions of Article 913. The Plaintiffs in the instant case do indeed have a genuine claim but sadly it was not brought in the proper manner.
- [43] The plea in limine having succeeded on the basis that there is no cause of action disclosed against the 2nd Defendant and no reasonable cause of action disclosed against the 1st Defendant. The Plaint is hereby dismissed.

[44] In view of the nature of this matter no order is made for costs.

Signed, dated and delivered at Ile du Port on ... 31st December 2021

