

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 10
(MA 317 of 2017 arising in DC 45 of 2017)

[2020] SCSC ...
DV 79/2010

In the matter of:

EFNA GEVA ANNE VIDOT

(rep by Ms. A. Benoiton)

Petitioner

and

ROLAND ETIENNE YOUNG-KONG

(rep by Mr. C. Lucas)

Respondent

Neutral Citation: *Vidot v Young-Kong* (MA 317 of 2017 arising in DC 45 of 2017) [2021] SCSC 10. (18 January 2021)

Before: Andre J

Summary: Division of matrimonial property

Heard: 27 November 2020

Delivered: 18 January 2021

ORDER

The Court makes the following orders:

- (i) The parties must each share equal shares in the matrimonial property, namely, title C 5294;
 - (ii) The property is to be placed on sale by licitation or otherwise and the proceeds from the sale are to be distributed in equal shares;
 - (iii) The petitioner must have the first option to buy the property;
 - (iv) The burden of paying the existing loan from Barclays bank must be shared by both parties equally; and
 - (v) Each party is to bear its own cost.
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JUDGMENT

ANDRE J

Introduction

- [1] This Judgment arises out of a Petition by Efna Geva Anne Vidot (Petitioner) of 15 November 2017 against Roland Etienne Young-Kong (Respondent) for ancillary relief (including the matrimonial home and division of matrimonial property). The Petitioner seeks for orders as follows: That the land comprised in title C5294 situated at Les Cannelles, Mahe, Seychelles and the matrimonial home standing thereon, which is registered in the names of both the Petitioner and the Respondent be transferred to the Petitioner; that the Respondent pays the cost of this case; and that the court makes any other orders that it deems fit and reasonable in the circumstances.
- [2] The Respondent by way of affidavit in reply of the 14 February 2018, invites the court to interfere with the half undivided share of the Petitioner and to allocate at least 60 to 70 percent of her share in C5294 to him plus costs of the suit.

The factual background

- [3] The parties were married and divorced on the 17th of July 2015. The divorce was made final on the 15th of September 2015. During the marriage, the parties purchased land, title C5294 located at Les Cannelles Mahe, Seychelles. The parties each owned ½ a share in the property.

Petitioner's case

- [4] Based on the financial records produced as exhibits, the Petitioner took loans from the Housing Finance Company Ltd (SCR150,000), Cable and Wireless (SCR260,000), and later on, refinanced these loans from Barclays Bank (SCR600,000). Petitioner further testified that the loans were to start the construction of the house on the title C5294. According to her, she was solely responsible for the payment of the loans, including the

Barclays Bank loan, which she is still currently paying. She further testified that the Respondent made very little contributions towards the construction of the house and general household expenses. According to her, this was because the Respondent was starting a maintenance business, was not always in employment, and did not have a steady income. Currently, the Respondent contributes SCR50,00 per day as the daily school allowance towards the child's expenses since the separation.

- [5] Based on the above, the Petitioner moved the Court to make orders, namely that the land compromised in title C5294 situated at Les Canelles, Mahe, Seychelles as well as the matrimonial home thereon, which is currently registered in the names of both the Petitioner and the Respondent be transferred to the Petitioner; that the Respondent must pay the cost for this case; and that the Court make any other Orders it deems fit and reasonable in the circumstances.

Respondent's case

- [6] The Respondent admitted that both parties purchased land, title C5294 situated at Les Canelles, Mahe, Seychelles and that they are co-owners of the land. The Respondent testified that it is not disputed that the Petitioner took out a loan of SCR260,000 from her employer, Cable and Wireless, however, he added that it was not to purchase the land or for the construction of the house.
- [7] The Respondent further testified that he and the Petitioner took a joint loan of SCR150,000 from the Housing Finance Company to build the house but it was insufficient. According to him, he paid the monthly instalments of SCR2,973 inclusive of interests until August 2012.
- [8] The Respondent claims that he was employed by Seychelles Breweries Limited as a mechanical maintenance technician. He further testified that in July 2010, he and the Petitioner agreed that he would resign from his work and focus on the construction of the house. This was based on his experience in carpentry, mason, plumbing, and electrical works. Upon resigning, he was paid a sum of SCR214,180.41 as a benefit and he alleges that he used the full amount for the house project.

- [9] After resigning, he kept doing part-time work and the money was used for the upkeep of the household and for purchasing building materials. In terms of the construction of the house, he further claims that he cleared the ground; dug the foundations; built all the lintels and scaffolding; and that the cost of his labour amounted to SCR250,000.
- [10] According to his version, the loan from Barclays Bank of SCR600,000 was partly used to settle the HFC loan and the Petitioner used the rest to purchase her vehicle. Furthermore, the Respondent averred that it was his labour that dug out all foundations, built all lintels and scaffolding. He claims that he had hired a mason to assist with the project. He goes even further to add that the cost of his labour amounted to SCR250,000.
- [11] The Respondent states that despite the averments in the Petitioner's affidavit, the Petitioner did not apply all funds to the construction of the matrimonial house. Instead, the Respondent claims that the Petitioner bought a car bearing registration number S13809 (refer to Exhibit R6) for her personal use and leisure.
- [12] The Respondent avers that he applied his labour and funds to repair, maintain and improve the value of the car and avers that he is entitled to at least SCR75,000 from the proceeds of the sale thereof, which the Petitioner retained. He also averred that in 2013 he took out a loan from Barclays Bank for the sum of SCR83,000 as he had run out of funds to carry out the construction of the house and he claims he has fully repaid the said loan.
- [13] The Respondent further averred in his reply, that whilst the Petitioner was repaying the loan, he was the only person providing for the family, household expenses and bills at an estimation of SCR6,000 monthly for 48 months; amounting to SCR288,000 and the Respondent is claiming 50% of his expenses, amounting to SCR144,000.
- [14] He averred that when the Petitioner left him, the house had yet to be completed and even though he carried on spending and putting in the labour work, the house is still not completed. The Respondent claims that the Petitioner deserted him and removed all furniture that she had purchased. The Respondent further averred that his financial contributions far exceed that of the Petitioner. He averred that despite the pleadings stated

by the Petitioner, she never gave him any funds to purchase construction materials whatsoever.

- [15] In the result, the Respondent prays that the Court will interfere with the half undivided share of the Petitioner and allocate to him at least another 60-70% of her share in C5294 and the cost of this suit.

Applicable law and discussion

- [16] The Constitution of Seychelles gives every person the property right that includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others. The division of the property in question must be interpreted and applied within this Constitutional framework. The relevant provision of the **Matrimonial Causes Act (MCA)** is section 20(1)(g) which provides that:

20. (1) Subject to section 24, on the granting of a conditional order of divorce or nullity or order of separation, or at any time thereafter, the court may, after making such inquiries as the court thinks fit and having regard to all the circumstances of the case, including the ability and financial means of the parties to the marriage-

...

(g) make such order, as the court thinks fit, in respect of any property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child.

- [17] When this section is read together with the Constitutional provision relating to the right to own property, it gives the court a wider discretion to bring some equity in the distribution of matrimonial property after divorce. This discretion must also be exercised judiciously, guided by the need to bring equity between the parties. This is what Bramford J in **Mensah v Mensah [1998-99] SCGLR 350 at 355** in the Supreme Court of Ghana meant when he stated that:

"... the principle that property jointly acquired during the marriage becomes the joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce have no application in marital relations between husband and wife who jointly acquired property during the marriage." (Own emphasis)

- [18] In other words, when dividing joint property belonging to the parties during the subsistence of the marriage, it requires an application of equitable principles, unless one

spouse can prove separate proprietorship or agreement or a different proportion of ownership. The above approach does not entail that the assets obtained by the spouses during the subsistence of the marriage fall under a system of community of property. This is what the Court meant in *Maurel v Maurel SCA 1/1997 (9 April 1998)* when it noted that the MCA does not establish ‘*in any form, the system of community of property between spouses during marriage*’. It does, however, grant the Court discretion to take account of all of the circumstances of the case when making an order in respect of any property of a party to a marriage. The Court of Appeal in *Esparon v Esparon 12/1997, LC 1998, [1998-1999] SCAR 191* noted that:

“When considering ‘all the circumstances’ under section 20(1) of the Matrimonial Causes Act, a court may have regard to –

- a) Standard of living before the breakdown of the marriage
- b) Age of the parties
- c) Duration of the marriage
- d) Physical and mental disability of either party
- e) Contributions made by each party to the welfare of the family, including housework and care roles; and
- f) Any benefit which a party loses as a result of the divorce.

“Ability and financial means’ under section 20(1) of the Matrimonial Causes Act covers factors such as income, earning capacity, property and financial resources that each party has or is likely to have in the foreseeable future as well as the financial needs and obligations each party has or is likely to have in the foreseeable future.”

[19] In *Esparon v Esparon* (supra) the court went on to say that:

“all the circumstances of the case, [and] may have regard, without being exhaustive, to such matters as the standard of living enjoyed by each of the parties before the breakdown of the marriage, the age of the parties and duration of the marriage, any physical or mental disability of any party, the contributions made by each to the welfare of the family, including looking after the home or caring for the family or the value to either party of any benefit (like a pension) which a party will lose as a result of the divorce....”

[20] The Matrimonial Causes Act must also be read and applied together with Article 815 of the Civil Code, which deals with co-ownership. It states as follows:

“Co-ownership arises when a property is held by two or more persons jointly. In the absence of any evidence to the contrary, it shall be presumed that co-owners are entitled to equal shares.”

- [21] The Petitioner took out loans for the construction of the house and is still paying these loans. Bagnell J had to deal with the repayment of loans taken by one of the spouses during the subsistence of the marriage in the case of ***Cowcher v Cowcher* [1972] All ER 943** and how that affects the share of the other party and stated the following:

“... the mere payment by one beneficial owner of a mortgage installment properly payable by the other could not alter the beneficial interest, or, in my view, imply an agreement to alter these interests”.

- [22] The Seychelles Court of Appeal in ***Andre Edmond v Helen Edmond* S.C.A. no. 2 of 1996** took a similar view with Article 815 of the Civil Code and held that-

“Where a co-owner has discharged an obligation jointly incurred by the co-owner, in respect of the property under the co-ownership, that the co-owner may recover what he has spent beyond his share of liability from the other co-owner or co-owners would not affect the entitlement of the co-owner to equal shares”.

- [23] In ***Figaro v Figaro* (1982) SLR 200 at p.206-207** Sauzier J said the following on co-ownership:

“When the husband and the wife are co-owners of the matrimonial home their proprietary rights are governed by the provisions of Article 815, - et seq of the Civil Code of Seychelles. In the absence of evidence to the contrary, they are presumed to be entitled to equal shares.”

- [24] Similarly, in ***Chetty v Emile* [2008-2009] SCAR 65** the Seychelles Court of Appeal stated that:

“[C]ontributions towards matrimonial property cannot be measured in pure monetary terms, in hard cash. As stated earlier, the love and sweat and the long vigil to bring up a family by the spouses all have a role to play in the accumulation of matrimonial property. The cooking, the sweeping, the cleaning, the sewing, the laundering, tending to the children, and the many other nameless chores in a home are not things for which a value can be put on but certainly contribute towards the building up of the matrimonial property.”

- [25] The legal position regarding the matrimonial property was recently stated in ***Albert v Albert* (MA 39/2019 (arising in DV 97/2018)) [2020] SCSC 618 (01 September 2020)** where the court stated that:

“Most of the provisions in the Code Civil in relation to marriage, divorce and matrimonial property were repealed by the Status of Married Women Ordinance 1948 and the Matrimonial Causes Ordinance of 1949, which was replaced by the Matrimonial Causes Ordinance in 1973 and 1992. Prior to this, the French matrimonial regime that had largely grown out of customary law and the principle of community of property was applicable in Seychelles. This was replaced by the English based separation of property principles. A matrimonial property regime as such is unknown in English common law; there are no proprietary consequences flowing from the marriage and each spouse owns his/her property separately. The court is however given wide statutory powers to make property adjustments as it thinks fit on the divorce of the parties (Section 25, Matrimonial Causes Act 1973 (England)).

With the repeal of the provisions relating to community of property in the Civil Code and the enactment of the Matrimonial Causes Act of 1992 in Seychelles, the matrimonial property regime in Seychelles has shifted from the French approach to that of the English common law principle of individual ownership. Section 20 thus gives the court seized with a divorce or judicial separation, the power to order a settlement as appears appropriate to remedy an unfairness upon divorce...”

- [26] In addition to the above, one has to take into account the lapse of time and the current value of whatever each party contributed or is still contributing in the present day (see ***Samori v Charles* (SCA No: 38/2009) [2012] SCCA 35 (07 December 2012)**). What most of these cases confirm is the wide discretion given to the Court in striking a balance to ensure that no party is placed at a disadvantage by the divorce. This is what Fernando J (as he then was) meant in ***Hoareau v Hoareau* [2013] SLR 155 (SCA 37/2011)** when he stated that ‘*each case has to be decided on the basis of its own facts*’. The Court will look beyond the financial contributions of the parties to also consider ‘*indirect contributions which the family explicitly or impliedly intended during the subsistence of the marriage*’.

Evaluation of evidence and determination

- [27] Turning to the undisputed facts in this case: it is not in dispute that the parties purchased the piece of land, parcel C5294, measuring 1014 square meters for SCR40,000. The intention was clear namely, to build their family home. Fully understanding their financial means, they registered the land in both their names and in equal shares. The parties made arrangements to finance the construction of the house, starting with the loan of SCR150,000 from the Housing Finance Company Ltd. The Respondent devoted more time towards overseeing the construction of the house, assuming the role of a

'supervisor'. On the other hand, based on the exhibits produced, the Petitioner's role was largely limited to the loan repayments.

[28] It was the version of the Respondent that not all the money she obtained from the Barclays loan was used for the construction of the house. He submitted that some of the monies were spent on purchasing the Petitioner's vehicle. The Petitioner obtained a vehicle loan from her employer to the value of SCR100,000.

[29] While the parties were married, they dreamt of building their own home. It also did not matter who paid off the loan. Being the 'technical' person and the only person with some construction knowledge, carpentry, masonry, the parties agreed that the husband would quit his job and focus on the construction of the house. During cross-examination, the Petitioner conceded that the Respondent injected his payout from the previous employer into the construction; testified that the Respondent did some work including *mold* for the pillar, two pillars for the veranda, the *mold* for the kitchen top, the painting, installed the toilet, supervised the construction, among others.

[30] On the other hand, the wife took out loans from her employer and later refinanced the loans from Barclays bank. Again the intention was clearly to focus on the construction of their house. Moreover, they are registered as co-owners in parcel C5294. It was not disputed that both parties contributed towards the purchase of the land.

Court of Appeal approaches to matrimonial property

[31] In addition to the cases discussed above, the Court of Appeal has on several occasions dealt with the division of matrimonial property. In the majority of the cases, the Court has recognized the non-monetary contributions and concluded that the parties owned the properties in half shares. I repeat these cases here for emphasis on the trend by the apex court. In *Charles v Charles (1 of 2003) (1 of 2003) [2005] SCCA 13 (22 June 2005)*, the central point at issue in this case related to the settlement of matrimonial property following divorce between the parties. The court while noting the principle set out in *Lesperance v Lesperance SCA No. 3 of 2001* refused to grant equal shares in the immovable property noting that the Appellant's contribution had been minimal and the

court adjusted the Supreme Court order and awarded 65% for the Respondent and 35% for the Appellant, thus increasing the award by the Supreme Court by 23.64%.

[32] In *Edmond v Edmond Civil Appeal No 2 of 1996*, while it was the husband who repaid the mortgage, the court held that there was no evidence that the parties had pre-arranged to contribute to the purchase of the property in any particular proportions as would determine their respective shares in the property. The court went on to state that the evidence only showed that the husband discharged the obligation, which the parties had incurred jointly. In the final determination, the court set aside the trial court award made to the wife and confirmed that the *husband and wife held the property in equal shares*.

[33] Lastly, in the *Pillay v Pillay (SCA 9/2012) [2014] SCCA 47 (12 December 2014)*, the parties were married and upon their divorce entered into an arrangement whereby the respondent occupied the upper floor (Apartment A2) and the appellant occupied the ground floor (Apartment 1). Both parties had separate access to the property with the Respondent using the back access and the Appellant using the front access. The main issue by the Appellant was that the property arrangement had not afforded him a clean break from his unhappy relationship with the Respondent. More particularly, he had to suffer the presence of the male visitor for whom the Respondent left him.

[34] On the main property in question (Plot A), which was in the joint names of the parties, the court ordered for the sale of Plot A at market price and the proceeds shared between the two parties in equal shares; and for the appellant to have the first option to buy same.

Conclusion and Final determination

[35] Now, applying the principles established by the cited Court of Appeal cases above and having regard to the specific facts of this case, an equitable division of the matrimonial property is required and I thus order as follows:

[i] The parties must each share equal shares in the matrimonial property, namely, title C 5294;

- [ii] The property is to be placed on sale by licitation or otherwise and the proceeds from the sale are to be distributed in equal shares;
- [iii] The Petitioner must have the first option to buy the property;
- [iv] The burden of paying the existing loan from Barclays bank must be shared by both parties equally; and
- [v] Each party is to bear its own cost.

Signed, dated and delivered at Ile du Port on 18 January 2021.



ANDRE J

The image shows a handwritten signature in blue ink over a circular official seal. The seal contains the text 'Samoa SUPREME COURT SEYIATHES' and 'Supreme Court Judge'. The signature is written in a cursive style, with the name 'Andre J.' clearly visible.