IN THE SUPREME COURT

Reportable
[2022] SCSC 144
MA 102/2021
(MC 114/2016)

In the matter between:

CYRIL HITIE **APPLICANT**
(rep. by Serge Rouillon)

and

MAGGIE AH WENG **RESPONDENT**
(rep. by Wilby Lucas)

Neutral Citation:	*Hitie v Ah Weng* (MA 102/2021 arising in (MC 114/2016)) [2022] SCSC 144 (10 February 2022)
Before:	Dodin J.
Summary:	Request for stay of execution
Heard:	Written submissions
Delivered:	10 February 2022

RULING

DODIN J.

[1] This is an application by Cyril Hitie, the Applicant, for stay of execution of a judgment MC114/2016 delivered by this Court on 18th September, 2020. The Court ordered in the said judgment as follows:

> *"The land H11684 can be conveniently subdivided to allocate to the Petitioner and the Respondent a plot each. I order that the land is subdivided as per the proposal of the land surveyor Ah Kong and I allot the proposed plot number 1 to the Petitioner and proposed plot number 2 to the Respondent. The Petitioner shall meet the cost of land surveyor Ah Kong. Each party shall bear the remaining costs.*"

[2] The reasoning of the Court is found in paragraphs 6, 7, 8 and 9 of the judgment which state:

> *"[6] …It must be noted that the Court is not concerned with parcel H5284 owned by the Petitioner on which she has made some major developments. The issue is simply whether the demand made by the Petitioner for subdivision of H11684 to extract her share is reasonable, fair and just. If so, how should the land be subdivided and who should be allocated which plot.*
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> *[7] On the first issue of ending the co-ownership, I find that the land parcel H11684 is co-owned by the Petitioner and the Respondent who each have one half share. The Respondent lives in Australia whilst the Petitioner lives in Seychelles where the land is situated. The Petitioner has engaged in the development of her land and wishes to extract her share in the adjoining H11684 with a view for further development. I find that there is good cause to grant her prayer to end the co-ownership and to subdivide and allocate to the Petitioner and Respondent their respective plots.*
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> *[8] As regards the prayer of the Respondent the Court finds that the land H11684 can be conveniently subdivided to allocate the Petitioner and the Respondent a plot each. However, as this is co-owned property, the demand that the Petitioner meets all the costs is not founded on any ground and no evidence was adduced by the Respondent in support of his prayers other than his dissatisfaction with the encroachment on the co-owned property.*
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> *[9] Having heard the evidence and viewed the land and the proposed subdivision and allocation submitted by land surveyor Ah-Kong I find that if the Respondent is allocated the land adjoining the main road (plot 1) and the Petitioner the rear plot (plot 2) amalgamation will not be possible. Secondly, since there is already the Petitioner's soak away pit and a minimal part of the septic tank on plot 1 no prejudice would be caused to either party if plot number 1 is allocated to the Petitioner as per the proposal of the land surveyor Ah-Kong."*

[3] The Application is supported by an affidavit of the Applicant stating the reasons for which the stay of execution is being applied for. Much of the contents of the affidavit is repeated in the submission by learned counsel for the Applicant which relevant part is reproduce herein as follows:

> *"The affidavit avers that the applicant has have a very high chance of success in his appeal. But for that reason alone, no stay will be granted unless she satisfies the Court that, if the subject matter was dealt with, the appeal, if successful, would be nugatory.*
>
> *The Applicant has submitted substantial evidence and grounds in support of his claim that, if a stay of execution is not granted, the appeal, if successful, would be rendered nugatory. The Applicant has been the victim of several transactions leading up to the subdivision process all carried out behind his back while he resides in Australia.*
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> *He is now about to file a fresh Plaint (draft copy attached) against the Respondent with a claim for damages for the fraudulent judgment by consent entered by the Respondent without his consent or authority. It was this fraudulent selfish and reckless dealing which started a series of illegal acts by the Respondent to make sure everything goes in her favour and this has resulted in her positioning herself to get the best portion of the subdivided property.*
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> *Therefore, the Applicant believes it has a very good chance of success on appeal. The Applicant therefore genuinely believes that there are several important issues of law to be decided by the Appellate court, irreparable harm and damage will be caused to the Applicants if the stay is not granted and would only cause delay and can easily be compensated by an order of damages and if a stay is not granted any consequent judgment will be rendered nugatory and will consequently cause irreparable harm to the Applicant over and above the financial consequences of the judgment in this matter.*

On the question of important questions of law to be looked at and adjudicated upon, there is revealed in the facts of the various matters discussed a series of events which involves several serious legal and factual considerations which have lead to the final division of the property and these defining issues including a fraud and deliberate premeditated encroachments by the Respondent which has set her up for obtaining the better portion of the property on subdivision and her actions have resulted in exactly the result she wanted.

That if the judgment is executed, the Applicant would suffer irreparable substantial loss, damage and hardship due to the fact that Plot 2 is much more difficult and costly to develop and build upon and the said judgment now with the existing facts include two examples of encroachment on co owned land Titles H11684 and on Title H8160 and fraud in entering the consent judgment without the Applicants knowledge or authority.

That the appeal involves a serious miscalculation of the facts and a substantial question of law in terms of the proper sharing out of the shares of co-owners as per the legal registered rights of each owner.

That based on the above facts and law special circumstances justify granting a stay of execution and I aver that the appeal has substantial prospects of success and if the stay is not granted the appeal is successful, would be rendered nugatory in that the Respondent would have completed her acts of fraud and encroachment.

That it is therefore just and necessary that any execution is stayed pending the final determination of the Appeal to the Seychelles Court of Appeal.

That unless the Judgment of the Supreme Court dated 18th September 2020 in case, MC114 of 2016 is not stayed pending the decision of the Appeal Court, the Applicant will suffer great injustice, inconvenience and loss.

That by reasons of matters aforesaid it is just and equitable and in the interests of justice that the order for stay of execution is granted and further avers that the

appeal has merit and is not frivolous or vexatious and is raises serious questions of legal procedure, facts and law."

[4] The Respondent objected to the application for stay of execution and the reasons for the objection are contained in the submission of learned counsel for the Respondent which relevant extracts are also reproduced hereunder as follows:

"In the case of Macdonald Pool versus Despilly William Cs No. 13 of 1996, the court established circumstances in which a stay of execution would be granted namely: -

a) The Appellant would suffer loss which could not be compensated in damages.

b) Where special circumstances of the case so require

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

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

e) Where the appeal would otherwise be rendered nugatory

In 2013 Jean Ronald Hitie the brother of the Applicant and the Respondent petitioned the court vide case number 23 of 2013 for the extraction of his ¾ share in land parcel H5285 whereby the Applicant and the Respondent were made a party to this petition for division in kind for reason that they are joint co-owners of the ¼ remainder of title H5285. On the basis of documentary evidence placed before the Court, the petition for division in kind was resolved by way of a consent judgment which the Respondent endorsed on behalf of the Applicant who are permanently domicile in Australia as explained in paragraphs 4 and 5 of the Respondent's affidavit in support. This judgment by consent has never been an issue or a concern for the Applicant whereby it remains a valid judgment of the court.

The ¼ share of the Applicant and the Respondent represent 840 sqm in extent.

The Applicant is the registered owner of land parcel H8160 which is still vacant whereas the Respondent is the registered owner of parcel H5284 with a new commercial building thereon and the two property adjoin each other as per the attached sketch dated July 2021.

The Respondent petitioned the Court for the sub-division of parcel H11684 into two plots so that the Applicant and the Respondent can each be allocated with a plot. In the process of the sub-division there has been reasonable consideration for the Applicant to be allocated with the plot closer to parcel H8160 whereas the Respondent to be allocated with the plot closer to parcel H5284 which can be conveniently amalgamated later on.

On this consideration the Land Surveyor who was assigned to carry out the sub-division based on a logical approach he proposed and recommended for plot 1 to be allocated to the Petitioner and plot 2 to the Respondent.

As can be seen from the sketch plan the plot allocated to the Respondent is 400 sqm whereas the plot allocated to the Applicant is 436 sqm in size which also adjoin H8160.

The Applicant who permanently resides in Australia has never expressed any development plan for the vacant property H8160 which has remained as an undeveloped and abandoned property for years. With the allocation of plot 2 sub-division of H11684 with an area of 436 sqm it is considered as an advantage for the Applicant rather than a disadvantage. Therefore not granting a stay of execution will not affect the Applicant in any way as there is all indication the Appellate Court will maintain the decision of the trial court which has been guided by expert opinion as per a Surveyor's report dated 26th of February 2019 and produced in court which has not been objected nor challenged during the hearing.

On the basis of the evidence placed before the trial court and on the grounds in the memorandum of appeal there is no special circumstances as the case so

require. However to the contrary this special circumstances should be considered on the part of the Respondent who has invested into a commercial building with partial occupancy for reason that there is not enough space on H5284 for parking space. With the allocation of plot No.1, the Respondent can extend the parking area and finally obtain full occupancy of her investment.

This evidence is not available on record placed before the trial court and not been raised in the affidavit of the Applicant.

Having examined the grounds of appeal in the amended Notice of appeal, it doesn't raise any question of law but all are the factual issues and speculations on the alleged motive of the Respondent not being supported by any evidence. If however the Land Surveyor has been opined that parcel H11684 co-owned by the Applicant and the Respondent cannot be sub-divided, the alternative was to sell the property by licitation as the law provide.

As indicated above there is no chance for this appeal to succeed before the Court of Appeal.

Parties has to be mindful that the Court of Appeal will not interfere with the factual issues before the trial Judge.

This case was initiated in 2013, 8 years now and it will take another 2 years or more for this appeal to be heard before the Court of Appeal. The ¼ share co-owned by the Applicant and the Respondent in parcel H11684 they inherited which means there was not expenses or cost for the acquisition of such interest in this property H11684. The Respondent has made a significant investment towards the construction of a commercial complex and there is not enough space to cater for the parking space for her tenants and it is on that basis that the Planning Authority has withheld occupancy for few apartments until she can provide additional parking space. With the allocation plot 1 which adjoined the parcel on which the commercial complex has been built this can provide space for the extension of its parking requirement requested by the Planning Authority to

allow full occupancy. Above all the Respondent is paying back a commercial loan for this investment. Delaying the finalization of the proposed sub-division will impact on the Respondent to honour her financial commitment towards the lending bank.

[5] Both parties made further submissions in response to each other's submission but I do not find these further submissions to add anything more to the above as they address factual issues not relevant to the determination by this Court whether or not to grant the prayed for stay of execution.

[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 or file another plaint in respect of the 2013 case which resulted in a judgment by consent are irrelevant to the determination of this application except in so far as the chances of success on appeal of the current case for which the stay of execution is prayed for.

[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.

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

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

vii. The appeal has some prospect of success.

[8] In the case of *Jonathan Searles v Winselle Pothin (MA 257/2021*) delivered on 11 November 2021, the Court stated the following in respect to such application for stay of execution:

"… 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] Having considered the issues raised by the Applicant in respect of this application and the reasons stated in his affidavit I am in agreement with learned counsel for the Respondent that this appeal is principally based on the interpretation and evaluation of facts by the trial judge and allegations that there were fraudulent acts by the Respondent in case MC23/2013 which were not even matters for this Court to consider in MC114/2016 for which judgment the Applicant is appealing against.

[10] I therefore find that the Applicant has not met the following threshold required on the balance of probabilities that the Appellant would suffer loss which could not be compensated in damages or other that substantial loss may otherwise result or that without granting the stay, the Applicant would be ruined. It must be noted that the

Applicant has resided in Australia for a great length of time and there is not a shred of proof that he has invested a single cent in the transactions to subdivide and partition the co-owned land. Secondly there is no indication that the land in question are about to be alienated so that the status quo ante cannot be re-established. If that is the fear of the Applicant proper procedures for relevant specific injunction may be filed before the appropriate forum. The proverbial dictum of "*using a sledgehammer to crack a nut*" finds comfortable home here. On the other hand, there is overwhelming evidence that the Respondent has invested heavily on her parcel of land and the adjoin co-owned plot and stands to make substantial loss which the Applicant has not proved that he can or is willing to compensate should a stay of execution be granted. Hence the balance of convenience lies overwhelmingly in favour of the Respondent.

[11] I find further that the grounds of appeal raised by the Applicant are at the most frivolous and vexatious, raising no substantial question of law to be adjudicated upon or has any reasonable or some prospect of success. Further the Applicant has raised no other special circumstance related to the case on appeal in support of the application.

[12] Finally, as stated above, there is no indication or evidence adduced by the Applicant that the land in question would lose value or would be alienated or dealt with in any other way prejudicial to the Applicant by the Respondent. Land is land and is essentially immoveable property. There is no subliminal or magical way the Respondent can make the land disappear and make a judgment of the Court of Appeal in favour of the Appellant nugatory.

[13] Considering the findings above, I find no reason to grant a stay of execution as prayed for by the Applicant. This Application is dismissed.

[14] I award costs to the Respondent.

Signed, dated and delivered at Ile du Port on 10th February 2022.

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Dodin J.