

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 1103

MA139/2022

Arising in DV 16/2021

In the matter between:

**RITA LYDVINE PAYET FORMERLY PAYET OF
ENGLISH RIVER, MAHE, SEYCHELLES**

(Represented by Mr. Guy Ferley)

Petitioner

AND

**GREGOIRE CHRISTIAN PAYET OF
LA DIGUE, SEYCHELLES**

(Ms. Edith Wong)

Respondent

Neutral Citation: *Payet v. Payet* (MA139/2022) [2022] SCSC 1103

(09 December 2022)

Before: Adeline, J

Summary: Application for adjustment of matrimonial property/Ancillary relief application/Preliminary objection to application/ Claims that Application is foul of Rule 34 (1) of the Matrimonial Causes Rules/ Application made out of the prescriptive limitation period of two months after degree nisi made absolute

Heard: By Submission

Delivered: 09 December 2022

FINAL ORDER

In constructing the substantive law under Rule 34 (1) of the Matrimonial Causes Rules, the phrase “where a prayer for the same has not been included in the petition for divorce or nullity”, must be taken to mean that, where a prayer for a matrimonial property adjustment order or ancillary relief has been included in the petition for divorce, or nullity of marriage, Rule 34 (1) of the Matrimonial Causes Rules does not apply.

In the circumstances, the preliminary objection is overruled and the motion is therefore dismissed.

RULING

Adeline, J

[1] This ruling, pertains to an application, made by petition, for an adjustment Order of matrimonial property as ancillary relief. As per her pleadings supported by affidavit evidence, the Petitioner Rita, Lydvine, Pointe formerly Payet (“the Applicant”) applies to this Court for the following Orders;

“a. An Order that all the properties registered in the name of the Respondent be valued.

b. An Order that the shares in the company Gregoire’s Company Limited formerly known as Gregoire’s Company (PTY) Ltd be valued.

c. An Order that the Petitioner be awarded her residential home situated at English River, namely land parcel V5664.

d. An Order that, the Petitioner is awarded a share in each of the following properties registered in the Respondent’s name:

(i) The properties situated at La Digue, namely land parcels LD92, LD1230, LD945, LD1245, LD1247, LD1248, LD926, LD927, LD105, LD1016, LD1014, LD923, LD1061, LD1350, LD1057, LD1060, and LD1352, or the equivalent in monetary terms.

e. An Order that the Petitioner is awarded a half share in the Respondent’s share in Gregoire’s Company Ltd, which currently owns land parcels LD23, LD128, LD152, LD153, LD216, LD223, LD917, LD919, LD980 and LD1041.

f. An Order that the Petitioner is awarded a half share in the following businesses:

i. Gregoire's Boutique and

ii. La Digue Lodge.

g. Any other Orders that this honourable Court deems fit and proper in the circumstances of the case.

- [2] In reply to the application, the Respondent, through Counsel, raises this preliminary objection whilst reserving its right to file a reply on the merits of the petition, contending that;

"The Petitioner is in breach of Rule 34 (1) of the Matrimonial Causes Rules in not seeking leave of the Court for filing her petition out of time".

- [3] It is, therefore, an opportune moment to remind ourselves of the text of Rule 34 (1) of the Matrimonial Causes Rules ("the Rules") under SI 19 of 1993 that provides for the following;

"34 (1) An application for a periodical payment or lump sum payment in accordance with Rule 4 (1) (b) or (c) or in relation to property in accordance with Rule 4 (1) (f) (h), (i) or (j) where a prayer for the same has not been included in the petition for divorce or nullity of the marriage may be made by the Petitioner at any time after the expiration of the time for appearance to the petition, but no application shall be made later than two months after Order absolute except by leave".

- [4] It is also appropriate to refer to Rule 20 of the Rules, that provides that;

“20. No pleading shall be filed out of time without leave. Applications for leave shall be made by motion supported by affidavit”.

- [5] In her written submission on behalf of the Respondent, learned Counsel submits, that the Petitioner / Applicant is foul of Rule 34 (1) of the Rules; *Contending that, the law as regards to divorce is found under Article 144 to 259 of the Civil Code of Seychelles Act, 2020. Learned Counsel contends, that Section 8 of the Civil Code of Seychelles (Consequence of Enactment) Act 2021, repealed the Matrimonial Causes Act, but Section 9 (3) of the same Act retains the regulations made thereunder by providing for the following;*

“(2) Subsidiary legislation made under the Matrimonial Causes Act in force at the commencement of this Act, will continue in force under the Civil Code of Seychelles Act, 2020 (Act 1 of 2021) in relation to Matrimonial an en menage causes”.

- [6] Learned Counsel cites the case of *Hossen v. Choppy* (MA188 of 2019), stating, that Carolus J strictly applied Rule 34 (1) in her Judgment delivered on the 30th June 2022, dismissing the application for similar reliefs after the Petitioner had failed to petition the Court for such orders within the prescribed limitation period of two months after the order of divorce was made absolute, and leave of the Court had not been sought for to file pleadings out of time.
- [7] Learned Counsel relies on *Hossen* (Supra) to argue that, the fact that the Applicant had not seek for leave to file the petition out of time that is fatal, and therefore, the petition should be dismissed.

- [8] Learned Counsel quotes an extract from the Judgment of her Ladyship in Hossen (Supra) which she submits, is very instructive on the law, notably, the following;

“.....as it is, leave was not sought and the Court is not even aware of the reasons for the delay, and in the words of Edmund Davies, LJ, in Revici:

Prentice Hall Incorporated, “if no excuse is offered, no indulgence should be granted”. Accordingly, on the basis of the above, and on the strength of the above authorities, I find that the filing of the petition out of time without seeking leave of the Court is fatal to the petition which stands to be dismissed”.

- [9] In his written submission, learned Counsel for the Petitioner / Applicant, submits, that the Respondent’s preliminary objection has no merit and should, therefore, be dismissed with costs.

- [10] Learned Counsel refers this Court to the amended divorce petition in DC16/2021 quoting the prayer to read;

“Wherefore, the Petitioner prays this Honourable Court for a Judgment;

1). Dissolving the said marriage and granting a decree nisi to the Petitioner to be made absolute in six weeks.

2). An Order for Matrimonial property adjustment, maintenance and ancillary relief.

- [11] Learned Counsel, not disputing the validity of Rule 34 (1), and the fact that the petition has been filed out of time, submits, that the correct interpretation of Rule 34 (1) of the Rules, is that, leave of the Court is not required for the filing of a petition for ancillary relief out of the prescriptive limitation period if there was included in the divorce petition, a prayer for an Order for matrimonial property adjustment, maintenance and ancillary relief.

- [12] Therefore, the likely outcome of this motion revolves around the correct interpretation of Rule 34 (1) which although quoted in an earlier paragraph of this ruling needs to be quoted again for the sake of expediency. Rule 34 (1) of the Rules reads;

“An application for a periodical payment or a lump sum payment in accordance with Rule 4 (1) (b) or (c) of in relation to property in accordance with Rule 4 (1) (f), (h), (i) or (j) where a prayer for the same has not been included in the petition for divorce or nullity of marriage may be made by the petitioner at any time after the expiry of the time for appearance to the petition, but no application shall be made later than two months after order absolute except by leave. (The underlined emphasis, being learned Counsel for the Petitioner’s ground for his stance that leave was not required).

- [13] It is known from the case of Hossen (Supra) that non-compliance with Rule 34 (1) read with Rule 20 of the Rules is fatal to a petition for ancillary relief. It is also known from the case of Hossen (Supra) that her Ladyship did not have to pronounce herself where a prayer for the same has not been included, or was included in the petition for divorce, correctly so, because she was called upon to address a procedural issue without the need for strict interpretation of Rule 34 (1) in substance, that would have otherwise required her Ladyship to look into the substance of the Rule and to come up with an interpretation that she would have considered and decided to be the correct interpretation.

- [14] The fact that in the instant case, the issue has been raised by Learned Counsel for the Respondent, it necessitates an interpretation of Rule 34 (1) in a way as

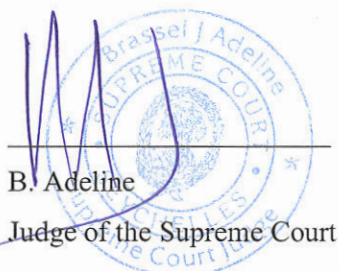
to give effect to the significance of the phrase “Where a prayer for the same has not been included in the petition for divorce or nullity of marriage”, failing which, in substance Rule 34 (1) would be misconstrued because it would not reflect the drafters, and indeed, the legislators clear intention, and what they sought to achieve by the Rule.

[15] My interpretation of the substance of Rule 34 (1) is that, where an application for ancillary relief does form part of the prayers in the petition for divorce, Rule 34 (1) does not apply, presumably, because that constitutes early notice of the intention of the Petitioner at the commencement of proceedings for divorce to file in Court ancillary proceeding in the future.

[16] Therefore, in constructing the substantive law under Rule 34 (1) of the Matrimonial Causes Rules, the phrase “where a prayer for the same has not been included in the petition for divorce or nullity”, must be taken to mean that, where a prayer for a matrimonial property adjustment order or ancillary relief has been included in the petition for divorce, or nullity of marriage Rule 34 (1) of the Matrimonial Causes Rules does not apply.

[17] In the circumstances, the preliminary objection is overruled and the motion is therefore dismissed.

Signed, dated and delivered at Ile du Port on 09th December 2022.


B. Adeline
Judge of the Supreme Court

