

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 1124

MA 97/2022

(Arising out of DC 227/2019)

In the matter between:

**GENEVIEVE CAROLINE CHRISTEL
ROSE, FORMELY RICHEMOND**

(represented by Mr. Guy Ferley)

Applicant

and

ROBIN RICHEMOND

(represented Ms. by Samantha Aglae)

Respondent

Neutral Citation: *Rose vs Richemond* (MA97/2022) [2022] SCSC 1124 (15th December 2022)

Before: Adeline J

Summary:

Heard: By submission

Delivered: 15th December 2022

FINAL ORDER

The preliminary objection to the motion for a property adjustment order is hereby dismissed for the following reason;

- (i) the pleadings are not supported by an affidavit of facts and evidence, and therefore, the Respondent has not adduced any evidence before this Court to prove the allegations raised therein. On merit, in the interest of justice, the motion is allowed, and accordingly, this Court grants the Applicant/Petitioner leave to proceed with ancillary relief proceedings for a property adjustment order out of the prescriptive limitation period of two months from the date the decree nisi was made absolute in accordance with Rule 34(1) read with Rule 20 of the Matrimonial Causes Rules.

RULING

Adeline J

[1] The Applicant, one Genevieve Caroline, Christel, Rose formerly Richemond, (“the Applicant”) of Ma Constance, Mahé, Seychelles by notice of motion supported by an

affidavit of facts and evidence, pursuant to Rule 34(1) read with Rule 20 of the Matrimonial Causes Rules, applies to this Court for leave to proceed with her petition for a matrimonial property adjustment order out of the prescriptive period of two months from the date the order of divorce was made absolute.

[2] The Applicant's ex-husband, one Robin Richemond, ("the Respondent") of Ma Constance, Mahé, Seychelles objects to the motion.

[3] In her affidavit in support of the motion, the Applicant deponed, interalia, by making the following averments;

"3. That I was married to the Respondent on the 14th day of May 2008, and our divorce was made absolute on the 15th day of September 2020. I hereby attach a copy of our divorce certificate, marked as exhibit.

4. That I am legally advised by the Attorney to this application, and verily believe that I am required by law to seek leave of this honourable Court to file my petition for an order of adjustment of matrimonial property if my said petition is filed outside the prescribed time limit.

5. I state that, I was unable to file my said petition within the prescribed time because.

a. Around the time that my divorce was made absolute, Mr. Anthony Derjacques, who was my Attorney at the time, had informed me that he would not be able to proceed with my claim for adjustment of matrimonial property as he was to be appointed as a Minister. As such, I had to find another Attorney to represent me, thus resulting in the delay in me filing my said petition within the prescribe time, and

b. As our matrimonial property assets consists of several parcels of Land business and companies, and due to the strains caused by the COVID 19 pandemic, it has taken me a considerable amount of time to acquire the necessary documentation from the Registration Division to attach to the affidavit of my property adjustment petition. I hereby attach a copy of my petition and affidavit in support, marked as exhibit 2.

c. That I am legally advised by the Attorney to this application and verily believe, that it is necessary for me to attach all documents that I intend to rely on at the hearing of my petition to my affidavit, failing which my said affidavit may be rendered defective by the Court.

6. That despite our divorce being made absolute in the year of 2020, I am still residing in our matrimonial home which is registered in the Respondents sole name, with our children. I state, that if leave is not granted by this honourable Court, our children and I would be deprived of our place of abode.

7. In addition to the foresaid averments as contained in paragraph 5 above, I am legally advised by the Attorney to this application and verily believe, that I have reasonable grounds for the delay in filing my petition for adjustment of matrimonial property and that, it is in the interest of justice for this Honourable Court to grant me leave to proceed with my said petition.”

[4] In answer to this application, the Respondent raises a plea in limine litis objecting to the grant of leave to file for adjustment of matrimonial property out of time for the following reasons;

“1. The Applicant is out of time and has not shown good causes as to why the Court is to extend the prescribed time limit filed 19 months after decree absolute certificate.

2. The Applicant is seeking for an equitable remedy from the Court and has not come before the Court with clean hands.”

[5] In her written submission, learned Counsel for the Respondent found it appropriate to spell out the relevant rules under the Matrimonial Causes Rules (“MCR”) that is called for consideration for the determination of this application, notably, Rule 20 and Rule 34(1). Rule 20 of the MCR, is couched in the following terms;

“No pleadings shall be filed out of time without leave. Application for leave shall be made by notice of motion supported by affidavit”.

[6] Rule 34(1) of the MCR is couched in the following terms;

“An application for a periodical 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 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”.

[7] Learned Counsel for the Respondent submits, that the Applicant should have filed her application two months after the order of divorce was made absolute for her to have been within the time prescribed by section 34(1) of the MCR, but did so, 19-20 months thereafter. Learned Counsel also submits, that notwithstanding the reasons given for the delay, the reasons are not justified, “ and does not show good cause as to why the prescribed time limit should be extended for her to file her petition for adjustment of matrimonial property”.

[8] As per Learned Counsel’s submission, the decree nisi of divorce was granted on the 24th July 2020, and made absolute on the 15th September 2020. The Applicant’s Attorney, Mr. Anthony Derjacques, Attorney at law, knew even before he sworn into office as a Minister on the 4th November 2020 that he would be appointed Minister. It is the submission of learned Counsel, that Mr. Anthony Derjacques, and Mr. Guy Ferley representing the Applicant, did form a legal chamber registered as Ferley and Associates on the 1st December 2020. Learned Counsel submits, that because of this arrangement, there was a continuity of legal representation of the Applicant and that, in any case, the applicant could have chosen another Attorney. Learned Counsel is of the view, that “it is unconceivable that the Applicant was not aware that her present Attorney from the Ferley and Associate Chamber will be the one representing her”.

[9] It is the submission of learned Counsel, that the Applicant knew all along that, there were matrimonial property issues to be resolved between the parties as she was in negotiation, through her Lawyer with the previous Lawyer representing the Respondent. Learned Counsel notes, that the Applicant changed Lawyers 3 times, during which time, she knew

all of the Respondent's assets, which were the subject matter of the negotiation. It is also the submission of learned Counsel that, the documents annexed to the Applicant/Petitioner's affidavit as exhibits, were obtained from the Registration Division in the year 2019 and 2020, with sufficient time after the decree of divorce absolute was granted.

[10] Learned Counsel submits, that the offices of the Registration Division remained open to members of the public, including Attorneys, during the COVID-19 pandemic despite of the health restrictions, and that in her affidavit, the Petitioner fails to state how she was prevented from having access to the office of the Registration Division to obtain the documents she needed and are exhibited to her affidavit. Learned Counsel also submits, that the documents exhibited with the affidavit by the Petitioner, were received by her during the COVID-19 pandemic and certified by an Attorney who shares the same office as the partner of the Applicant's Attorney, thus indicating, that the Petitioner was not looking for a new Lawyer to represent her.

[11] It is submitted by learned Counsel, that it was not necessary for the Petitioner to be in possession of all the documents pertaining to the assets in dispute to file an application for an order for adjustment of matrimonial property out of time, as these documents would have been needed as evidence after leave had been granted for the Petitioner to file her petition out of time.

[12] It is the submission of learned Counsel, that "Save for Cavern Self Catering Apartment" which is a business registered in joint names between the Petitioner and the Respondent, the other properties, businesses and companies which is owned by the Respondent and other partners are not matrimonial properties. Learned Counsel explains, that the concepts of "community property", no longer being part of our law, means, that the Petitioner cannot have acquired interest in those properties. Learned Counsel submits, that "property acquired by one spouse with their own money or resources remains personal property". Learned Counsel cites the following cases as case law authorities in support of these proposition, namely, *Maurel v Maurel* [1998-1999] SCAR 57, *Etienne v*

Constance [1977] SCR 233 at page 240, *Albert v Albert (MA)* 39/2019 (arising in DV97 2018 [2020] SCSC 618 (01 September 2020 at paragraph [91 – 93]).

[13] Learned Counsel submits, that the court of Appeal in *Michel & Ors v Talma & Anor* [2012] SCSC 36, stated that, “the historical basis for the limitation of actions is one based in equity, namely, that equity defeats delay”, and that, the Court is only empowered to extend those time limits for good cause. Learned Counsel explains, that there must be strong justification to allow applications out of time to ensure fairness and certainty, and that as such, “equity demand coming before the court with clean hands, and in this regard, “the Applicant was not truthful in her affidavit as to the reasons for the delay”. It is the submission of learned Counsel that, the “Applicant is still being represented by the law chamber of Mr. Antony Derjacques who has now partner with the present Attorney representing the Applicant”. Learned Counsel is of the view, that based on her conduct, the Applicant “has not come before the Court with clean hands”.

DISCUSSION AND THE LAW

[14] It is observed, as correctly pointed out by learned Counsel for the Applicant/Petitioner, that amid the Respondent’s objection to the grant of leave for the Applicant/Petitioner to enter proceedings for a matrimonial property adjustment order or ancillary relief out of time, that the Respondent has failed to tender evidence before this Court by way of affidavit or otherwise, countering the averments made by the Applicant/ Petitioner in its affidavit in support of the application. All that the Respondent has done is to object to the motion for the grant of leave on the basis that the Applicant/ Petitioner “ has not shown good cause as to why leave should be granted”. Learned Counsel has also raised her objection, on the basis that the remedy being sought for is an equitable remedy, and that, the Applicant/ Petitioner has not come before the Court with clean hands to get the order being sought for.

[15] It is also observed, based on learned Counsel for the Respondent’s objection, that the objection is not one based on a point of law within Article 90 of the Seychelles

Code of Civil Procedure, which would have been the case, had the Applicant/Petitioner proceeded with her application for a matrimonial property adjustment order, or ancillary relief, without seeking for leave of this Court given the existence of the provisions of Rule 34(1) and Rule 20 of the Matrimonial Causes Rules.

[16] The Respondent's objection is grounded on his contention, that the Applicant/Petitioner "has not shown good cause as to why to extend the prescribed time limit". Although the motion is not about an application to extend the prescribed time limit, which this Court is not empowered to do anyway, but rather, an application for leave of this Court to file the application outside the prescribed time limit, the Respondent ought to have filed an affidavit of facts and evidence to support his pleadings as a matter of procedural law and also, because clearly, learned Counsel's written submission raises several issues based on disputed facts.

[17] In the circumstances, I do concur with the submission of learned Counsel for the Applicant/Petitioner, that to consider the content of learned Counsel for the Respondent's submission for the purpose of determining this application, would be tantamount to giving evidence from the bar which is against the rule of evidence. In essence, therefore, the disputed facts which learned Counsel for the Respondent brings to light in her written submission, ought to have been translated into averments in an affidavit to be made admissible and considered as evidence.

[18] Section 2(1) of the Evidence Act, Cap 74, states that;

"evidence includes testimony upon oath or solemn affirmation viva voce or by affidavit in writing and unsworn personal answers of parties".

Therefore, the averments in the affidavit in support of the Applicant/ Petitioner's application for leave, made by way of notice of motion is evidence for consideration by this Court in the instant case.

[19] There are few Articles in the Seychelles Code of Civil Procedure (“SCCP”) prescribing the law on affidavit. Most relevant for the purpose of the current discussion are, Articles 169 and 170. Article 169 of the SCCP reads;

“169 upon any motion, petition or application evidence may be given by affidavit, but the Court may, on application of either party, order the attendance for cross-examination of the person making any such affidavit”.

[20] Article 170 of the SCCP reads;

“Affidavit shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof, may be admitted.”

[21] In *Daniella Lablache De Charmoye vs Patrick Lablache De Charmoye* (Civil Appeal SCA MA08/2019, SCSC 35 17 September 2019, Twomey CJ (as she then was) had this to say about affidavit;

“Affidavits are sworn evidence and evidential Rules for admission cannot be waived”.

[22] I observe, that in her written submissions, learned Counsel for the Respondent makes certain references to certain documents she had annexed to her written submission marked as exhibits. As much as the written submissions itself cannot be considered as evidence, the documents attached to it cannot be considered as documentary evidence either because to be admissible in evidence, the documents ought to have been exhibited to an affidavit. (see *Daniella Lablache De Charmoye* (Supra) and *Laurette & Ors v Savy & Ors* SCA MA13/2019 [22 October 2019] which are case law authorities as to the legal requirement that documentary evidence must be exhibited to the affidavit)

[23] In my considered opinion, the Respondent ought to have filed an affidavit in reply to the application. Having not done so, and instead makes several statements in her written submission purportedly to be facts, accords with Carolus J’s observation in MA45/2020 (Arising in DS144/2017) in which case, at paragraph [7], she comments as follows;

“I note that submissions of Counsel for the Applicant contains several factual averments which was communicated to her by the applicant which should have properly been made by way of affidavit evidence of the applicant who had personal knowledge thereof. The Court disregards these averments”.

[24] I am perplexed by the objection of learned Counsel for the Respondent to the Applicant’s application based on her contention that “the Applicant is seeking for an equitable remedy from the Court and has not come before the court with clean hands”. I say so, because there is no indication that the Applicant/ Petitioner has sought to invoke this Court’s equitable jurisdiction under Section 6 of the Court’s Act to obtain the remedy being sought for, rightly so, because the equitable jurisdiction of this Court can only be invokes where no sufficient legal remedy is provided for by the laws of Seychelles. The mere fact that it exists the regulatory Rules under Rule 34(1) and Rule 20 of the Matrimonial Causes Rules under which the remedy being sought for can be obtained, is evidence that the legal remedy being sought for is available in law.

[25] On merit, I have, amongst other things, given thought to the possible repercussions or implications, should the court deny the Applicant/Petitioner the remedy being sought for, given the right to property which is afforded to every individual under Article 26(1) of the charter of Human Rights in our constitution. Therefore, I am of the view, that in order to uphold that right, and in the interest of justice, the remedy being sought for should be granted to allow proceedings to proceed for a just determination of the property issues between the parties.

[26] In essence, therefore, for reason of the matters discussed in the preceding paragraphs of this ruling in the light of the relevant case law authorities cited, it is the finding of this Court that, the Respondent has tendered no evidence at all before this Court to support the allegations raised in her pleadings. As such, it is on account of the uncontroverted affidavit evidence of the Applicant/Petitioner tendered before this Court, that on merit, this Court grants the application and accordingly, grants the Applicant/Petitioner leave to

proceed with proceedings for ancillary relief for a property adjustment order out of the prescriptive limitation period of two months from the date the decree nisi was made absolute. In effect, the objection raised by learned Counsel for the Respondent in answer to the application by way of her pleadings is hereby dismissed.

[27] Each party shall bear their own cost.

Signed, dated and delivered at Ile du Port on 15th December 2022

Adeline J