

In the matter between:

Jemmy Laure
(rep by Mr. J. Camille)

Appellant

and

Ian Laporte
(rep by Mr. S. Freminot)

Respondent

Neutral Citation: *Laure v Laporte* (MC 58/2020) [2022] SCSC 391 (17 May 2022)
Before: Andre JA – Sitting as a Judge of the Supreme Court
Summary: Appeal from Magistrate’s Court–setting aside ex parte Judgment–section 69 of the Seychelles Code of Civil Procedure (Cap 213)
Heard: 2 February 2022
Delivered: 17 May 2022

ORDER

The following orders are made:

- (i) The appeal is dismissed.
 - (ii) Both parties shall bear their costs.
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JUDGMENT

ANDRE JA – Sitting as a Judge of the Supreme Court

Introduction

[1] This Judgement arises out of an appeal filed by Jemmy Laure (appellant) of 13 August 2020 wherein the appellant seeks reversal of the Magistrate’s decision of the 2 March 2020 (impugned ruling) dismissing application to set aside ex parte Magistrate’s

Judgment of 30 September 2013, and this on the grounds as set out in the Memorandum of Appeal and set out below.

- [2] Ian Laporte (Respondent) objects to the grounds of appeal as per reply to the appeal of the 8 September 2020 in the gist that the Learned Magistrate did not err in law but was simply relying on the facts presented to him; and that his appeal is way out of time and hence ought to be dismissed.
- [3] It is to be noted now that leave to appeal out of time was considered as preliminary issue and, as per the Ruling of this Court on 27 July 2021, leave was allowed to the appellant to proceed with the appeal out of time.
- [4] Both Learned counsels moved the Court to consider submissions filed and of which contents have been duly noted for this Judgment.

Background

- [5] The background is well detailed in the impugned Ruling. In gist, the appellant, then Plaintiff Mr. Laure filed a case against the Respondent, Mr. Laporte, in 2010. In 2012, Mr Laporte filed a counterclaim against Mr Laure. After pleadings were completed, the hearing was fixed for 11 February 2013. Counsel for Mr. Laure stated he could not get in touch with Mr. Laure and the hearing was adjourned twice. Mr. Laure's counsel eventually asked for a withdrawal from the matter; and the Respondent asked for dismissal if Mr. Laure does not appear next time, which he did not. Thereafter, fresh notice was issued twice and Mr. Laure was present in Court on 26th June 2013 where the matter was posted for 4th July 2013 to schedule a hearing, and on that date, the hearing was fixed for 22 August 2013.
- [6] The appellant and his Counsel were absent on 22 August. Mr. Laure's Plaintiff was dismissed for want of appearance where the Court noted that no plausible reasons were given for their absence. The Court proceeded on the counterclaim ex-parte and ex-parte Judgment was fixed for 30 September 2013 and was delivered on that date.

- [7] According to the impugned ruling, Counsel for Mr. Laure sent letters to seek his leave of absence twice. Before the 22 August 2013 hearing, Counsel sent a letter on 15 July 2013 asking for the case to be moved from 22 August to earlier dates – 16 or 17 July 2013. The Learned Magistrate noted he was not sure whether the said letter was on file on the date of the hearing and whether the concerned Magistrate considered that letter.
- [8] On 30 November 2017, around 4 years after the Judgment Mr. Laporte applied for summons to show cause against Judgement Debtor, Mr. Laure.
- [9] The application was listed for service on 26 January 2018 and 23 February 2018. The appellant was eventually served on La Digue on 9 March 2018 and his attorney appeared on his behalf to request a copy of proceedings on the 16th March 2018. The matter was eventually listed on 3rd May 2018, 17 May 2018, 13 June 2018, 20 and 22 July 2018. On 17 May 2018, the appellant was absent before the Court, hence warrant of arrest was issued against him. Thereafter, on 23 July 2018, Counsel for the appellant applied to set aside the ex parte Judgment dated 30 September 2013 (the counterclaim Judgment, not dismissal of his plaint Judgment). The application was dismissed.

Grounds of appeal

- [10] The Appellant submitted three grounds of appeal in the Memorandum of Appeal of the 13 August 2020 and Submissions about grounds 2 and 3 only on the 31 January 2021:

***Ground 1** – The Learned magistrate erred in law in holding that the appellant had one month to apply for setting aside the ex parte Judgment against him;*

***Ground 2** – The Learned trial Magistrate erred in law and on the facts, in holding that the appellant has failed to provide sufficient reasons in making the application to set aside the Judgment against him;*

***Ground 3** – The Learned trial Magistrate erred in law in wrongly applying the law relating to the setting aside of an ex parte Judgment, in the circumstances of the case before him.*

[11] After perusal of the submissions, two main issues can be identified: firstly, whether the appellant provided sufficient reasons for absence in Court; and secondly, whether his application was within the time prescribed under section 69 of the Seychelles Code of Civil Procedure (“SCCP”).

The Law

[12] Section 69 of the SCCP provides that: -

69. *If in any case where one party does not appear on the day fixed in the summons, Judgment has been given by the Court, the party against whom Judgment has been given may apply to the Court to set it aside by motion made within one month after the date of the Judgment if the case has been dismissed, or within one month after execution has been effected if a Judgment has been given against the Defendant, and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall set aside the Judgment upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side.*

[13] The Learned Magistrate interpreted the section to apply to two scenarios, the second one applying to the appellant’s case, namely: *“within one month after execution has been effected if a Judgment has been given against the Defendant and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing”*.

[14] It was held in *Biancardi v Electronic Alarm (1975) SLR 193* that section 69 of the SCCP can only apply to cases where the party invoking it has not appeared on the day fixed in the summons for appearance under section 63¹ of the SCCP; and where a party appeared before the Court on the day fixed in the summons, section 69 has no application and cannot be relied upon by the Defendant; and that the only procedure, apart from an appeal in such a situation would be to apply for a new trial under section 194 of the SCCP.

¹ Parties appear on date fixed in summons

63. On the day fixed in the summons for the Defendant to appear and answer to the claim, the parties shall be in attendance at the Court House in person or by their respective attorneys or agents.

[15] In *Bouchereau v Camille* (1996) SLR 29 it was further held that a Judgment may be set aside under section 69 where a summons has not been served on a Defendant, or where a Defendant was prevented by any sufficient cause from appearing in Court; and that the forgetfulness of a party to proceedings is not sufficient to cause for setting aside an ex parte Judgment.

[16] The Court of Appeal in *Petit v Bonte* SCA 9/1999, LC 164 held that section 69 does not apply to non-appearance at an adjourned hearing and is limited to non-appearance of a party on the day fixed in the summons served after a plaint is filed. The said decision was considered in *Katerina Khvedelidze v Dell Olivio* (CS 41/1999) [2003] SCSC 2 (10 February 2003) about a new trial:

“Mr Ally cited the case of Cedric Petit v Marghita Bonte (SCA no 9 of 1999) where an action was dismissed when both the Plaintiff and her Counsel were absent. The trial Judge entertained an application under Section 69 of the Code of Civil Procedure and set aside the order of dismissal. However, in, Appeal, the Court of Appeal held that in these circumstances, an application under Section 69 was improper and that, the proper course was the filing of an application under Section 194(4) of the Code of Civil Procedure”.

[17] The decision in *Biancardi v Electronic Alarm SA* (supra) was considered in *Galt International v Krishna Mart & Co (Pty) Ltd* (CS 318/2004) [2005] SCSC 70 (21 November 2005) and *Muller v Benoiton Construction* (MA 59/2020 (arising in CC 04/2017)) [2020] SCSC 647 (10 September 2020). It was stated in *Galt International v Krishna Mart*:

“In the case of Biancardi v Electronic Alarm SA (1975) SLR 193, the circumstances were somewhat similar. In an application under Section 69 of the Code of Civil Procedure to set aside an ex parte Judgment, the Court held that:

Section 69 can only apply to cases where the party invoking it has not appeared on the day fixed in the summons for appearance before Court under Section 63. As the Defendant had duly appeared before the Court through the Curator of Vacate Estates on that day, Section 69 had no application and could not be relied upon by the Defendant, and the only procedure – apart from appeal – upon to it was an application for a new trial under Section 193.

The Defendant thereupon made an application for a new trial under Section 193, but the Court on a consideration of the circumstances in which the default occurred, refused the application.

In the present case, the proceedings had passed the stage envisaged in Section 63. Defendant had appeared in Court through Counsel and obtained adjournments to file a statement of defence. They never failed to appear on any of those adjourned dates. After the case was fixed for ex-parte hearing on 5 October 2005, the Defendant was represented by Counsel who filed a statement of defence the same day. As the case had been fixed for ex parte hearing, the Defendant ought to have first sought to have that order set aside and thereafter sought leave to file the defence. The proceedings of that day show that Mr. Lucas came ready to file the defence as he had not been properly briefed about the order for an ex parte hearing made by the Court on 29 September 2005. Although the Court had directed that notice of that order be served on the Defendant, the Registry had failed to do so. There were therefore ample reasons for the Court to either order the Defendant to file a proper motion to set aside the order fixing the case for ex parte hearing as a Defendant should not be deprived of his right to defend, merely because the Plaintiff was insisting on Judgment being entered ex parte.”

- [18] In *Muller v Benoiton Construction* it was also held that section 69 does not apply when the Defendant has appeared on the day fixed for summons but did not in subsequent proceedings:

*[9] However, in order to invoke section 69, the party against whom Judgment is given must not have appeared in Court on the date fixed in the summons. We are here dealing with a different situation; the Applicant did not fail to appear on the date fixed in the summons. He failed to appear only after the case had been fixed for hearing and that was not the first hearing date. There were previous hearing dates that were aborted and the reason for such adjournment had been the ill health of the Applicant which was supported by wit medical report. In *Biancardi v Electronic Alarm* [1975] SLR 31, a case being relied upon by Counsel for the Respondent also, the following was observed:*

“The final question is whether the Defendant is entitled to invoke section 69. Reading section 69, it is clear that to satisfy its provision one of the essential requirements is that the party invoking the same must not have appeared on the date fixed in the summons for appearance before Court. In order words, section 69 applies only in the case where the party, against whom Judgment has been given ex-parte, has not appeared on the date fixed in the summons for appearance under section 63. ”

Section 63 deals with the requirement that on the date fixed in the summons for the Defendant to appear and answer the claim that the parties are in attendance at the Court in person or by the respective attorney or agent. As pointed out by

Counsel for the Respondent one has to also look at section 65 SCCP. Section 65 provides for the procedure when the Defendant does not appear on the date fixed in the summons. In such case, after due proof of service of the summons, the Court may proceed to hear the suit and give Judgment or may adjourn the case for hearing of the suit ex-parte.

[10] It all these instances, one notes that they deal with circumstances where the Defendant does not appear in answer to the summons. In the present case the Applicant (Defendant) did appear in answer to the summons but failed to appear on subsequent dates set for hearing. Therefore, section 69 has no application to the Applicant's situation as he did appear on the day fixed in the summons. That translates that the basis for the Application is non-existent.”

[19] In the present case, the appellant seems to have missed several Court dates for appearances and fresh notices were issued, and eventually the appellant has appeared. The Judgment that the appellant is seeking to set aside was given on the 30 September 2013 and that Judgment date was set during hearing on 22 August 2013 where the appellant has failed to appear, his plaint was dismissed and the Court proceeded on the claim in the counterclaim ex parte. Following the abovementioned decisions, section 69 does not apply to the appellant’s case as he appeared in answer to a summons but failed to appear in subsequent hearing. Therefore, if the appellant applied to set aside ex parte Judgment before the Learned Magistrate under section 69, the Learned Magistrate should have dismissed the application as “*the basis for the Application is non-existent*”.

Legal analysis of the issues arising from the background

[20] Following decisions in *Biancardi v Electronic Alarm* (1975) SLR 193; *Bouchereau v Camille* (1996) SLR 29; *Petit v Bonte* SCA 9/1999, LC 164; *Katerina Khvedelidze v Dell Olivio* (CS 41/1999) [2003] SCSC 2 (10 February 2003); *Galt International v Krishna Mart & Co (Pty) Ltd* (CS 318/2004) [2005] SCSC 70 (21 November 2005); and *Muller v Benoiton Construction* (MA 59/2020 (arising in CC 04/2017)) [2020] SCSC 647 (10 September 2020), section 69 of the SCCP applies to cases where the Defendant did not appear on the day fixed by the summons for appearance and does not apply to cases where the Defendant has attended summons date but failed to appear on dates of subsequent hearings. The appellant in the present case missed several Court dates but eventually appeared on the date fixed in summons but failed to appear on a later date

when the case was fixed for hearing and the hearing proceeded ex parte. Since the appellant applied to the Magistrate's Court to set aside ex parte Judgment under section 69 and this is clearly illustrated in paragraph [3] page 2 of the impugned ruling, the Learned Magistrate should have dismissed the application.

[21] It follows thus that the whole appeal is untenable, given the circumstances, and is dismissed accordingly. Grounds of appeal remain on file.

Conclusion

[22] As the result, the following Orders are made:

- (i) The appeal is dismissed.
- (ii) Both parties shall bear their own costs.

Signed, dated, and delivered at Ile du Port on 17 May 2022.

ANDRE JA – Sitting as a Judge of the Supreme Court