

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable/ Redact
[2023] SCSC 187
MA 34/2022
(Arising in DS136/2017)

In the matter between:

**JEFFREY WILSON VINTIGADOO
GANGADOO**
(rep. by Mr. Rajasundaram)

Applicant

and

**INOCENTE ALPHA VINTIGADOO
GANGADOO**
(rep. by Ms. Domingue)

Respondent

Neutral Citation: *Vintigadoo Gangadoo v Vintigadoo Gangadoo* (MA34/2022) [2023] SCSC 187
(10 March 2023).

Before: E. Carolus J

Summary: Application for leave to file application for property order out of time

Delivered: 10th March 2023

ORDER

Leave is granted to the applicant to file application for property order out of time.

RULING

CAROLUS J

Pleadings & Affidavit Evidence

[1] The parties in this matter were married on 28th December 2001. The conditional order of divorce dated 20th October 2017 dissolving their marriage was made absolute on 24th November 2017. The petitioner has now filed a Notice of Motion for an order “*for leave to file an application for a share in the matrimonial property (C4795) of the parties, out of time*”.

In his affidavit in support of the petition, the petitioner avers that from July 2016 the parties were attempting to reach an amicable settlement in regards to their matrimonial property as a result of which no case was filed before the case for the same. He avers that on or about 21st July 2017 the parties agreed that the respondent would transfer her undivided half share of parcel C4755 to the petitioner and that the respondent would also pay to the petitioner half of what was awarded to her as damages in SCA14/2015. Exhibited to the affidavit is an unregistered transfer document dated 21st July 2017 and signed by the parties before attorney-at-law S.Rajasundaram in terms of which the respondent purported to transfer her undivided half share in Tile C4755 to the petitioner for a consideration of Seychelles Rupee One only. Also exhibited is a document dated 13th July 2017 entitled “UNDERTAKING – CONFIRMATION – ACKNOWLEDGEMENT” in which the respondent undertakes to pay to the petitioner half any sum awarded to her by the Court of Appeal in SCA14/15 in the event of her succeeding in that case. In terms of that document she also confirms that she would not cause any inconvenience or disturbance to the petitioner in his use and enjoyment of parcel C4755.

- [2] The petitioner avers that the respondent left the matrimonial home prior to the divorce, that she re-married after the divorce and has two children from that marriage, and that she now lives with her husband. He avers that he lives in the house on C4755 with the three children of the parties aged 11, 18 and 22 respectively, who with the exception of the eldest, are still at school, and he is maintaining all three children.
- [3] The petitioner avers that the respondent has now withdrawn the agreement dated 13th July 2017 as well as the signed transfer of the half share in C4755 and has neglected and/or refused to honour the terms of their agreement.
- [4] He avers that an application for leave to file out of time can be made at any time during the proceedings which I assume means the divorce proceedings, or up to five years after the last agreement between the parties is made, or five years after the divorce is granted.
- [5] The petitioner expresses the belief that the agreement dated 13th July 2017, and the subsequent withdrawal of the same by the respondent which caused the delay in filing an application for the settlement of matrimonial property, are genuine reasons amongst others, for leave to be

granted to file his application for the same out of time, and that it would be in the interests of justice to do so.

- [6] The respondent opposes the motion and has filed an affidavit in reply. She denies that there was any attempt by the parties to reach an amicable settlement in regards to their matrimonial property which resulted in no case being filed for the same. She admits that the transfer of her undivided share in C4755 to the petitioner was signed but avers that it was never registered. She also admits to agreeing to pay the petitioner a half share of any sum awarded in SCA14/2015 and avers that this is because he had paid the legal fees for SCA14/2015, but further avers that to date she has not obtained any such award.
- [7] The respondent admits that she has remarried and lives with her spouse and two children and that the petitioner lives with their three children but avers that she had to leave the petitioner because he was violent, and that furthermore he is only maintaining the minor child whom she is also contributing to maintain.
- [8] The respondent denies having any agreement with the petitioner to give him lawful interest, right and title over the matrimonial property as averred by the petitioner. She states that she only promised to sell her interest in title C1670 of which she is a co-owner and which has now been subdivided, in exchange for the transfer of a vehicle to her by the promisee, which the petitioner used and eventually sold for SCR5,000 which he kept. She exhibited a Certificate of Official Search dated 23rd March 2022 which showed that the respondent owned an undivided 1/10th in Title 1670, that a promise of sale in favour of France Bonte for her share was registered as an encumbrance against that parcel and that the parcel had been subdivided into parcels C7258, C7259 and C7260. Also exhibited is another Certificate of Official Search dated 20th May 2022 in respect of Title C7258 showing the respondent as the proprietor thereof and an encumbrance in the form of a promise of sale in favour of France Bonte registered against the parcel.
- [9] She expressed her objection to leave being granted to the petitioner to file matrimonial proceedings, and avers that he was at liberty to file the same within the statutory period and has advanced no reasonable or justifiable grounds for the court to grant him such leave. Consequently she prays the Court not to grant leave to the petitioner.

Submissions

[10] Counsels for both parties were given the opportunity to file written submissions which only counsel for the petitioner has done, and on the basis of which together with the affidavit evidence of the parties, this Court makes the present ruling. This Court has stated many times, but it still bears repeating, that factual matters not dealt with in the affidavit of a party cannot be introduced in the submissions. Any such matters will not be taken into account by this Court.

The Law

[11] Prior to the repeal of the Civil Code of Seychelles Act 1976, and its replacement by the Civil Code of Seychelles Act 2020 (Civil Code 2020), matrimonial matters including those involving matrimonial property were dealt with under the Matrimonial Causes Act, 1992, and the Matrimonial Causes Rules, 1993. With the enactment of the Civil Code 2020, which came into operation 1st July 2021, the Matrimonial Causes Act was repealed and certain of its provisions were imported into the Civil Code 2020 with some changes to such provisions. Hence matrimonial causes and matters involving matrimonial property which were filed as from 1st July 2021 are now dealt with under the Civil Code 2020. Section 9 (2) of the Civil Code of Seychelles (Consequence of Enactment) Act 2021, further provides that “[s]ubsidiary 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 and en menage causes.”. Hence the Matrimonial Causes Rules, 1993, are still applicable to matters relating to property of the parties or one of the parties to a marriage, after the dissolution of such marriage unless the rules are inconsistent with any provision of the Code as provided for in Article 4 of the Civil Code 2020 which provides that “*Unless otherwise provided expressly or by necessary implication, where there is an inconsistency between a provision of the Code and a provision in any other enactment, the provision in the Code prevails*”. The import of Article 4 is that where a substantive provision of the Matrimonial Causes Rules has not been imported into and has been omitted from the Civil Code 2020, any rule or rules in the Matrimonial Causes Rules, made pursuant to that substantive provision will be of no effect, and cannot be acted upon.

[12] Rule 34(1) of the Matrimonial Causes Rules provides as follows:

34. (1) *An application ... 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 ... 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. Underlining is mine.*

[13] Rule 4(1) (h), (i) or (j) which are referred to in rule 34(1) do not apply to the circumstances of the present case but rule 4(1) (f) provides as follows:

4. (1) *Every application in a matrimonial cause for ancillary relief where a claim for such relief has not been made in the original petition, shall be by notice in accordance with Form 2 issued out of the Registry, that is to say every application for:-*
[...]

(f) an order 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; Emphasis added.

[14] I note that section 20(1)(g) of the Matrimonial Causes Act which is the enabling provision for rule 4(1)(f) was not imported into the Civil Code 2020 when it was enacted, and that the remedy under that section and consequently rule 4(1)(f) is no longer available. However the Civil Code 2020, does provide for property orders in section 259. I therefore find that rule 34(1) which sets a time limit of two months after order absolute for filing of applications in relation to property would apply to such property orders.

[15] Rule 20 of the Matrimonial Causes Rules further provides that:

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

Analysis

[16] The conditional order of divorce in respect of the marriage of the parties was made absolute on 24th November 2017. The deadline for filing of proceedings in relation to the matrimonial property of the parties as prescribed by rule 34(1) of the Matrimonial Causes Rules is not “later than two months after order absolute”, in the present case 24th January 2018. The present application for leave was filed on 21st February 2022, a little over four years after the deadline.

The filing of any application made after the deadline prescribed under rule 34(1) requires leave of the Court.

- [17] Having carefully considered the evidence of the parties, it is my view that there is merit in the applicant's contention that he delayed in filing the present application because there was an attempt at settlement of the matrimonial property. The respondent's explanation that she only agreed to pay the applicant half of the award in SCA14/15 because he paid the legal fees does, not sound plausible. She has further not brought any evidence that it was he who paid such fees or even of the amount of such fees paid or the sum she expected to be awarded if judgment was given in her favour, which would have assisted the Court in determining the explanation she gave was true. The transfer document, although it is not registered, is even stronger proof of the parties' intention to settle. I find it difficult to understand why she would transfer her half share of their property to the applicant otherwise. I believe that the applicant filed the present application when he realised that there would be no settlement when the respondent reneged on her undertakings.
- [18] I note that the parties are each the registered proprietors of an undivided half share in Title C4755 on which their matrimonial home stands. Given that they are now divorced, it is necessary that there is finality concerning the distribution of property co-owned by them.
- [19] I also take into account that the applicant is occupying the matrimonial home with the three children of the parties although only one of them is still a minor whereas the respondent is no longer living there and lives with her current spouse and their children.
- [20] On the basis of the above, I find that it would be in the interests of justice for the Court to exercise its discretion to grant leave to the applicant to file an application for a property order out of time. This must be done within two weeks of this Ruling.

Signed, dated and delivered at Ile du Port on 10th March 2023



E. Carolus J