

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC ...
MA 140/2022
(Arising in 48/2022)

LEONARD GILL
(rep. by Aldrick Govinden)

Plaintiff

and

CHRISTOPHER GILL
(rep. by Alexia Amesbury)

1st Defendant

DANBY GILL
(represented by Alexia Amesbury)

2nd Respondent

And

In the Matter of:-

CHRISTOPHER GILL
(rep. by Alexia Amesbury)

1st Applicant

DANBY GILL
(represented by Alexia Amesbury)

2nd Applicant

And

LEONARD GILL
(rep. by Aldrick Govinden)

1st Respondent

Neutral Citation: *Leonard Gill v Christopher Gill & Anor* (MA 140/2022) [2023] SCSC..... (2023).

Before: Vidot J

Summary: Security for cost pursuant to section 219 and 220 of the Civil Code of Seychelles; Respondent having considerable immovable assets in Seychelles

Heard: Counsels filed written submission

Delivered: 27 January 2023

ORDER

Application denied

RULING

VIDOT J

Background

- [1] This is an application for security for cost. The Applicants, Mr. Christopher Gill and Mrs. Danby Gill seeks such Order following the filing of a Plaintiff by the Respondent, Mr. Leonard Gill in Court Case No. CS 48 of 2022. The Applicants pray the Court pursuant to sections 219 and 220 of the Seychelles Code of Civil Procedure (“SCCP”) orders the Respondent to pay security for cost. The primary dispute between the parties which is found in CS 48 of 2022 concerns parcel PR5617 which used to belong to the Respondent. On 2nd June 1992, the Respondent gave a General Power of Attorney (“POA”) to the first Applicant to act as his agent and which POA was registered on 09th January 1995.
- [2] It is alleged that by virtue of a purported agreement dated 14th June 2018 and registered on 30th June 2021, the first Applicant purportedly sold and transferred parcel PR5617 into his name and that of the second Applicant, who is his wife, by using the POA. The Respondent states that the second Applicant was aware that the first Applicant was not under the POA authorised to sell and transfer the said land title. The Respondent and the first Applicant are brothers.
- [3] The purported sale consideration for the transfer of the aforesaid land parcel was SR300,000.00 which it is alleged was never paid. It is averred that the sale was unlawful in that;
- (i) The Respondent has never given the first Applicant any written authorization or otherwise to that Applicant to sell and transfer parcel PR5617 or any share therein;

- (ii) The POA is couched in general terms only and only covers acts of administration, and;
- (iii) The POA does not expressly grant any power relating to the sale or any other act in respect of the ownership of parcel PR5617.

[4] In CS48/2022, the Respondent has prayed to Court for the following Orders;

- (a) An Order declaring the Agreement between the parties dated 14th June 2018 and registered on 30th August 2021 as null and void
- (b) An Order declaring that the first and second Applicants are not owners of parcel P5617 nor do they have any propriety interest therein;
- (c) An Order declaring that he is the sole owner of parcel PR5617;
- (d) An Order notifying the Registrar General to rectify the land register accordingly and record the Respondent as the sole owner of parcel PR5617 and that the Applicants do not hold any interest in the said land parcel; and
- (e) To order costs of this action against the Applicants in favour of the Petitioner.

The Grounds for the Application

[5] In supporting affidavits attached to the Application, the Applicants enumerate the reasons for their Application. The main affidavit is from the first Applicant whilst second Applicant in her affidavit states that she was adopting averment made in the first Applicant's affidavit. The grounds for the Application are as follows;

- (a) That the Respondent does not reside nor domiciled in Seychelles supported by the fact that his affidavit was sworn and apostilled in the Philippines;
- (b) The Respondent was declared insolvent and bankrupt under the US Bankruptcy Code filed by *Cyfred* a company whose chairman and Chief Executive is the Respondent;

(c) That land theft and attempted land theft was perpetrated by Respondent in the territory of Guam for which he was convicted and that the Respondent attempted the same thing in Seychelles and that several documents have been given to the Police by Registrar General;

Therefore, the Applicants pray that Court Orders that the Respondent pays ten million rupees (SR10,000,000.00) as security.

Affidavit in Response

[6] The Respondent refutes most of the averments of the Applicants. In particular, he notes that the first Applicant was a shareholder and director of Cyfred and admits that the company applied for bankruptcy as it was faced with unusual or expected substantial business expenses but reorganised itself and is now a successful business and that its current assets exceed US\$10 million with total debt of less than US\$1 million. He further states that he was never personally declared insolvent. He further declares that he has no debts in the Seychelles. He avers that he owns immovable properties in the Seychelles that exceeds US\$25 million in value and in support of that he produced as exhibits valuation of various properties effected by Realty Seychelles (an Estate Agent based in Seychelles). These immovable properties are situated on Praslin described as parcels PR2856, PR1402 and PR4661.

[7] The Respondent further denies that he was ever arrested nor convicted for any crimes in Guam. He produced as annex 4 a Criminal History Record from the Guam Police Department which attest that the Respondent has no record of criminal convictions in the Guam Police Department file.

[8] The Respondent also notes that it is the Applicant who initiated a complaint to the Seychelles Police and that such complaint is false and fraudulent and that such complaint was motivated by malice. The complaint was not filed in good faith

[9] Finally, he disputes the amount claimed for security for cost and states that such sum is exaggerated and that it bears no relationship to actual anticipated actual cost. Therefore, he prays to Court to dismiss the Application.

The Law

[10] Whether or not to grant such an application is discretionary. However, the Court needs to assess the Application and decide whether or not the Applicants have provided good reasons for granting the Application. The Civil Code of Seychelles 2022 (as amended), which came into force in 2022, has repealed the former Article 6 of that Code, dealing with Security for cost and moved in to Section 219 of the Seychelles Code of Civil Procedure (“the SCCP”). Nonetheless, a look at that former Article 6 gives clear indication of what the Court needs to consider when addressing an application for security for cost. That former Article 6 provides that;

“When one of the parties to a civil action is non-resident, the court may, at the request of the other party, and for good reason, make an order requiring such non-resident to give security for costs and any damages that may be awarded against him”

Section 219 of the SCCP provides that considerations for security for costs are non-residency and for good reason and insolvency of the party against whom the application is made. Insolvency is an additional tenet of an application for security for cost.

[11] It is non-contentious that the Respondent is not resident within this jurisdiction. He clearly states in his affidavit that he lives in Manila, Philippines. The fact that a party is non-resident in Seychelles is one of the primary consideration for granting the Application. However, it is not a rigid rule. Residency is therefore a persuasive or primary but not determinant factor for granting security for cost.

[12] It was held in **Sidney King-Fuk v Takaland Company Limited & Ors MA11 of 2009** that;

“Article 6 of the Seychelles Civil Code has two tenets: the first tenet of non-residency was addressed above and the second tenet is the requirement of “good reason” being shown by the party requesting for the order for security for costs and damages. This court ruled further on that point that, “for the purpose of the sought Order, to my mind it shall encompass insufficient assets in Seychelles to meet the Order for costs and damages” to fulfil the requirement of good reason. It is to be considered that the

Plaintiff's assertion that he has assets in Seychelles that made an adverse judgment against him enforceable as "unsubstantiated". As such it was held that "in the absence of uncontroverted evidence to the contrary, the Defendant's / Applicant's averment and claim that the Plaintiff / Respondent is not known to have assets in Seychelles valuable enough to satisfy a judgment against him plausible, reasonable and uncontroverted."

[12] In **Barton & Anor v Lafontaine SLR [1986] 84** provides that considerations for an application for security for cost are the following;

- i. The Plaintiff's claim is bona fide and not a sham;
- ii. The admissions or denial on the pleadings or elsewhere that the money is due;
- iii. There is reasonable good prospect of success or collapse of the case;
- iv. Whether or not the application for security for cost is being used oppressively so as to stifle a genuine claim;
- v. The sum claimed as security is reasonable and not prohibitive;
- vi. It is no longer a rigid rule that a plaintiff resident abroad should provide security for cost; and
- vii. Security will not be required from a person residing out of jurisdiction; if he has sufficient property within it.

Observations

[13] Before dealing with the merit of this Application, I wish to make some observations. It is clear that there is bad blood between the first Applicant and the Respondent. However, the affidavits, especially that of the first Applicant should not have been used as a medium to spew a litany of attacks and frustrations against one another. The affidavit (particularly that of the first Applicant) should have limited itself to matters relevant to the Application and I remind Counsels not to be distracted and get embroiled in these schemes.

Counsels are the ones who should draft the affidavit and not allow themselves to be pushed by their clients. It is their professional reputation that is at stake.

[14] I note that the Applicant has filed two submissions in this matter. One is dated 07th September 2022 whilst the other 19th October 2022. The Respondent's submission is dated 22nd September 2022. Therefore, I am assuming that the submission of 19th October 2022 was in reply to the submission filed by Counsel for the Respondent. However, I find the submission of the 07th September 2022 convoluted.

[15] I also note that the Applicants rely on several documents as exhibits. Some of these documents are newspaper clippings from foreign jurisdiction, alleged Court judgements from foreign jurisdiction and other documents not emanating from this jurisdiction, some of which amount to double hearsay. These documents have not been certified by anyone with capacity to do so and nor have they been apostilled. That being the case, this Court cannot rely on them and therefore will be disregarded.

Discussions

[16] As stated above, it is non-contentious that the Respondent resides outside jurisdiction. However, I note that that in itself does not mean that security for cost has to be granted. In the case of **Barton** the Defendant had made an application for security for cost and damages and had filed a defence and counter-claim. In this case no such defence has been filed and there is no counter-claim on records. Therefore, this Court considers that in the circumstances the sum of SR10,000,000.00 (SR6,000,000.00 and SR4,000,000.00 from the first and second Applicant respectively) is exaggerated and highly oppressive. This is because the claim as it stands is just for cost. In their sworn affidavits, the Applicants did not substantiate such claims to the satisfaction of this Court. In **JFA Holdings v Latitudes Consulting [2011] SLR 34**, it was held that security for cost is usually an estimate of costs (party to party) that would be incurred by a party by the close of the proceedings. The application for security for cost was granted in that case as the respondent was non-resident and did not have assets within the jurisdiction. In that case, the Applicant had filed a counter claim before making the application. Therefore, if this Court was to allow this Application the sum imposed will be far less than that sum.

- [17] I find that ex-facie the Respondent's Plaintiff is not a sham and I consider it to have been brought in good faith. The Applicants have not in their affidavits establish to me otherwise. This more so, since this Court has decided not to admit documents produced as exhibits from reasons given above. The Applicants made a barrage of insults and attacks against the Respondent some of which are not relevant to this Application. The Applicants failed to substantiate their Application with anything tangible that would incite this Court to consider allowing their Application. Furthermore, the Applicant has not even filed defence to the main case.
- [18] The issue of theft of land by the Respondent in outside jurisdiction is not substantiated by the Applicants. They are mere allegations not supported in any way whatsoever since I have rejected documents produced by the Applicants and in any case such would not have been a persuasive factor in an application for security for cost.
- [19] The Applicants also argues that the Respondent is insolvent. That is a factor for consideration. The Applicants refer to proceedings filed pursuant to the US Bankruptcy Code to have *Cyfred* a company whose chairman and Chief Executive is the Respondent declared bankrupt. That is not denied by the Respondent but he declares that the company has reorganised itself and the company is now profitable. Be that as it may it is trite that a company is a legal entity separate from its shareholders. Therefore, that is not a justifiable reason to grant the application. It is not the Respondent who was declared bankrupt, if at all.
- [20] The Respondent has proven to Court that he has property in Seychelles that can meet costs of the Applicants should he not succeed in CS48/2022. I believe that this will be sufficient security should judgment in C.S 48/2022 be decided in favour of the Applicants.

Signed, dated and delivered at Ile du Port on 27 January 2023

Vidot J