

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

MA276/2023/MA260/2022

(Arising in DC127/2020)

In the matter between:

**MARCEL BRIAN QUILINDO**

*(represented by Mr. Joshua Revera/  
Mr. Kalyan Karunakaran)*

**Applicant/Respondent**

and

**LUCIE MATHILDA SICOBO**

*(represented by Ms. Alexandra Benoiton)*

**Respondent/Petitioner**

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**Neutral Citation:** *Quilindo v Sicobo* (MA276/2023/MA260/2022) (2 February 2024)

**Before:** Adeline j

**Summary:** Application to set aside ex parte hearing/No statutory provisions under the SCCP exist for such relief/Inherent jurisdiction of the Court invoked to determine the application.

**Heard:** By way of submission

**Delivered:** 2 February 2024

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**FINAL ORDER**

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The Application does have merits and according the ex parte hearing is set aside. The Court shall hear the petition for a property adjustment order inter parte.

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**RULING ON MOTION**

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**Adeline j**

**INTRODUCTION**

[1] This is a ruling on motion on notice, brought by one Marcel, Brian, Quilindo of Belvedere, Mahe, Seychelles, (“the Applicant”) pursuant to the inherent jurisdiction of

this Court praying the Court to set aside the ex parte decree made against him on the 17<sup>th</sup> May 2023 in MA260/2022, pertaining to a petition for division of matrimonial property filed in Court by one Lucie, Mathilda, Sicobo of North East Point, Mahe, Seychelles (“the Respondent”)

#### PLEADINGS AND AFFIDAVIT EVIDENCE

[2] In support of the motion to set aside the ex parte hearing fixed to hear the petition, there is annexed thereto and affidavit sworn by the Applicant himself, in which affidavit, inter alia, he makes the following averments;

*“3. That I am the Respondent in MA260/2022 arising in DC127/2020 filed by my ex-wife, Lucie, Mathilda, Sicobo for division of matrimonial property before this honourable Court.*

*4. That through Counsel, we filed an affidavit in reply objecting to the averments of my ex-wife.*

*5. That on the last occasion that this case was called before this honourable Court where in my legal Counsel Mr. Khalyaan Karunakaran was absent from the Republic for reasons unknown to me.*

*6. That in the absence of legal representation before the Court, this matter was set for an ex parte hearing on the 24<sup>th</sup> day of July 2023.*

*7. That I desperately searched for other legal representation but I was informed that most Counsel’s diary was fully booked, also considering that the Court of Appeal will be in session this coming August.*

*8. That I was able to obtain legal representation from Counsel, Mr. Joshua Revera who agreed to assist me with the above referred matter.*

*9. That on the basis of the matters aforesaid, it is urgent and necessary, just, fair and in the best interest of justice for full adjudication of all matters in contention that the ex parte hearing be vacated.*

10. That I verily believe, and I am advised by my Counsel that noting to the averments therein, the rule of audit alterum partem relating to the right to be heard, and secondly, nemo index in causa sua are crucial in the consideration hereunder”.

[3] In manifestation of her objection and opposition to the motion, the Respondent, by way of an affidavit in reply filed in Court, inter alia, makes the following averments;

“4. that I object to the granting of the application on the grounds hereunder.

5. That I am advised and verily believe the same to be true, that the matter was called on the 17<sup>th</sup> May 2023, and neither Counsel Karunakaran, and the Respondent was present.

6. That the matter was not set for the 24<sup>th</sup> of July on that occasion, it was further adjourned for the 24<sup>th</sup> of July 2023. On neither of these occasions, did the Applicant or his attorney attended Court.

7. That it is and as a result of the laches of the Respondent and his Counsel that the matter has been set ex parte.

8. That the Respondent has shown no good cause as to why this honourable Court should excuse his reckless behaviour.

9. That the Applicant fails to state when he was made aware of the date of the 24<sup>th</sup> July 2023. Thus leaving the Court and myself to speculate as to his delay.

11. That the statement as he “desperately seeking alternative Counsels or that Counsels were fully booked” are unsubstantiated and baseless.

12. In addition to the statement above, the suppose unavailability of alternative Counsel does not provide a justified reason as to why the Respondent himself did not attend Court to notify the Court that his Counsel was absent.

13. Further and in the alternative to the above, I am informed and verily believe the same to be true that at no point has Counsel Karunakaran attended Court to inform this Court

*that he has withdrawn from this case. In the event that he has done so in writing, that neither myself nor my Counsel has been informed of same.”*

## SUBMISSIONS

- [4] It is submitted by learned Counsel for the Applicant, that the Applicant “seeks to have the hearing set *ex parte* adjourned” and to have it heard *inter parte* under the provisions of Section 66 of the Seychelles Code of Civil Procedure (“the SCCP”, and that good cause for none appearance must be shown for such application to succeed.
- [5] It is the submission of learned Counsel, that the Court should consider the application within the well established principle of law, that justice should not only be done but should manifestly and undoubtedly be seen to be done. Learned Counsel submits, that “this principle underlies the importance of ensuring that both parties have a fair and equitable chance to present their case”.
- [6] It is also submitted by learned Counsel, that although the Applicant and his Lawyer were absent, the Court has to consider the principle of *audi alteram partem*, which is the right to be heard and that is fundamental to the administration of justice. On the facts, it is the submission of learned Counsel, that the Applicant has shown his commitment to find alternative legal representation at the earliest possible opportunity thus indicating that he had no intention to delay the proceedings, but rather, to ensure that his rights are protected and upheld.
- [7] On the issue of legal representation, it is the submission of learned Counsel, that the absence of Counsel so instructed from the jurisdiction, was beyond the Applicant’s control, and further, he was unaware that Counsel was not in the jurisdiction. It is also the submission of learned Counsel, that by the act of securing and instructing new Counsel to represent him, the Applicant acted diligently.
- [8] Learned Counsel submits, that although there is a need for compliance with the procedural law in handling cases of this nature, the Court should not lose sight of the fact, that it is there to do justice, and to do so, it has to look at the bigger picture which is the interest of justice over strict compliance with procedural rules. Learned Counsel also

submits, that in the present case, justice requires that there is a fair hearing and that to ensure a fair hearing, the Applicant should be given the opportunity to be heard over his share of the matrimonial property.

[9] Submitting on behalf of the Respondent, learned Counsel, inter alia, reminds the Court, that when the case was called on the 17<sup>th</sup> May 2023, neither the Applicant, nor his Counsel attended Court, and therefore, in line with the statutory provisions of the SCCP, the Respondent moved the Court for an ex parte hearing of the petition. Learned Counsel submits, that the Court correctly granted the motion for an ex parte hearing which was fixed for the 5<sup>th</sup> June 2023, and on that day, adjourned to the 24<sup>th</sup> July 2023.

[10] It is the submission of learned Counsel, that the Respondent objects to the grant of the motion to set aside the ex parte hearing and to have the petition heard inter parte based on the law. In that regard, learned Counsel submits, that the provisions of the SCCP that is worthy of consideration are Sections 65, 66 and 70 of the SCCP. Learned Counsel goes on as to say, that for an application to have an ex parte hearing already fixed set aside and replaced by an inter parte hearing under Section 66 of the SCCP, it is incumbent on the Applicant to “show good cause for his non appearance” before the Court, and that in the instant case, the Applicant has failed to do that.

[11] It is also the submission of learned Counsel, that although Section 70 of the SCCP allows a party to a cause or matter to appear in person, or by a legal practitioner, there are rules of procedures in place for Counsel to appear and withdraw from cases. It is submitted by learned Counsel, that learned Counsel Mr. Karunakaran who represents the Applicant (Respondent in the main case) had not sought for leave of this Court to withdraw his appearance in the case, and yet, an incidental application arising from the main case has been brought by another Counsel Mr. Revera, when it ought to have been brought by Mr. Karunakaran who had not withdrew his appearance in the case.

[12] Learned Counsel submits, that it is improper to allow Counsel for the Applicant in the instant application to step into the case without the Attorney who is on record withdrawing his appearance from the case. Furthermore, it is the submission of learned Counsel, that the failure of Counsel, Mr. Karunakaran withdrawing his appearance from

the case, means, that the application before the Court made by another Counsel is defective in law and has to be struck off. Learned Counsel also submits, that the Applicant should have attended Court whether or not his Counsel was present, and that his failure to put appearance in Court in person is indicative of the fact, that “the Applicant has shown a lack of intention to defend or pursue the main case.”

[13] It is the submission of learned Counsel, that the Applicant did not produce any medical certificate or report, or other documents, to justify his non- appearance in Court on the 17<sup>th</sup> May 2023 and 5<sup>th</sup> June 2023 for him to be excused. Learned Counsel submits, that the failure of the Applicant to attend Court, means, that there have been lashes on his part which have not allowed him to “preserve his right to a fair hearing”. Learned Counsel concedes, that it is a principle of natural justice for an Applicant or Respondent in a case to be given the opportunity to be heard, and then goes on as to say, that by making such an application, the Applicant is effectively seeking to abuse the Court process and deny the Respondent a judgment that would settle their matrimonial property dispute.

[14] It is submitted by learned Counsel, that the Applicant’s affidavit in support of the motion to set aside the ex parte hearing, contains averments made by the Applicant which are not substantiated by other evidence, and as such, the affidavit does not disclose good cause to justify this failure to put appearance in Court in the main case. Learned Counsel also concedes, that the Applicant does have a right to a just and fair hearing, which right it could have preserved by putting his appearance in Court when the case was called. It is learned Counsel’s expressed opinion, that the right to a fair hearing must be weighed against the need to bring about “finality of judgment”, and that it is in the public interest that there is finality to litigation.

#### DISCUSSION OF THE FACTS AND THE LAW

[15] I have paid particular attention to the pleadings of both parties to this application and given due consideration to the affidavit evidence in support and in opposition to the application as well as the submissions from both sides of the equation. As I strive to

achieve a fast conclusion based on the law, it is clear in my mind, that the crux of the Applicant's case rests on his belief, that given that he has a constitutional right to a fair hearing which is embedded with the right to be heard, in the interest of justice, the Court should grant the application and set aside the ex parte hearing. I note, that in pursuing this application, the Applicant relies on the provisions of Section 66 of the SCCP whilst maintaining, that it has shown "good cause" why Counsel representing him, Mr. Karunakaran, could not attend Court on the day when the case was called, and the Court granted the motion for the petition to be heard ex parte.

[16] The essence of the Respondent's case vehemently opposing the application, is that, the Court should apply the law to the facts and circumstances that led to the Court having had to fix an ex parte hearing to hear the petition proper. Learned Counsel cites the provisions of Sections 65, 66 and 70 of the SCCP as the basis for the opposition, as well as Rules 8, 18 and 7(c) of the Legal Practitioners Act (Professional Conduct) Rules 2013.

[17] Essentially, it is the contention of learned Counsel for the Respondent, that there are ways of doing things which are governed by the Rules in place which in the instant case, the Applicant has fell foul of them, and for that particular reason, the relief prayed for by the Applicant should not be granted by the Court.

[18] It is noted, nonetheless, that the factual issue raised by learned Counsel for the Respondent in her written submissions regarding the failure of the Applicant to comply with the Rules under the Legal Practitioner's Act (Professional Rules) 2013 is not part of the pleadings, and also, not supported by evidence. For this particular reason, therefore, this Court cannot take into account those matters to determine this application.

[19] The Respondent's opposition to the application, also rests on its proposition, that the Applicant has not "shown good cause" to warrant the setting aside of the ex parte hearing. Based on learned Counsel's submissions, that could have been shown, by for example, the Applicant's Counsel tendering a medical report which has not been the case.

[20] It is observed, that in its submissions, inter alia, learned Counsel also addresses the procedure to appear and withdraw from a case before the Court. I am not unclined to

address this point in greater details than is necessary to determine this application. Suffice to say, however, that besides the fact that it is not part of the pleadings, that there are two separate proceedings before this Court pertaining to two separate applications for different reliefs.

[21] The one in which the Applicant (previously the Respondent) is represented by Counsel, Mr. Karunakaran, is filed as MA260/2022, and the relief being sought for is a property adjustment order as ancillary relief after divorce, whereas, in the instant one filed as MA276/2023, the Applicant (previously the Respondent) seeks for an order of this Court to set aside the ex parte hearing fixed to hear the property adjustment order application ex parte.

[22] For the purpose of this ruling, I have had regard to Section 65, 66 and 70 of the SCCP. Furthermore, I have also searched for statutory provisions or rules under the SCCP that governs setting aside ex parte hearing. Unfortunately, I haven't found any because no provisions exist. That explains, therefore, why it is my considered opinion, that the jurisdiction of this Court to entertain this application stems from its inherent jurisdiction.

[23] The provisions under Section 69 of the SCCP governs setting aside ex parte judgment, not ex parte hearing. Therefore, the fact that there is no statutory provisions in the SCCP upon which a party can rely on to apply to the Court to set aside an ex parte hearing, the other option which an aggrieved party can opt for, is to allow the ex parte hearing to proceed and then apply to the Court to set aside the ex parte judgment under the provisions of Section 69 of the SCCP.

[24] Had the Applicant in this case opted to adopt this strategy, that would cause unnecessary delay to have the dispute between the parties resolved subjecting the parties to the application to possible prejudice and injustices. Had such strategy been employed, it would have impacted on the parties right to a fair hearing within a reasonable time afforded to them by the Constitution.

[25] Therefore, this Court having to exercise its inherent jurisdiction to determine this application, has to take into consideration certain fundamental principles in order to



arrive to a fair and just conclusion. These key principles include, for example, fairness and equity that are well embedded within due process of the law, and the upholding of the right to a fair hearing.

[26] In his affidavit in support of the application, inter alia, the Applicant avers, that Counsel representing him in the main case (MA260/2022) was out of the jurisdiction when the case was called and fixed for an ex parte hearing. In my considered opinion, that in itself is a valid excuse, more so, given that it is presumed that learned Counsel must have obtained leave of the Chief Justice to leave the jurisdiction.

[27] I also take notice of the fact, that given that the main case is a petition for ancillary relief following divorce, the matter to be adjudicated upon in the main case strikes at the core of one of the fundamental constitutional right of every person, and that is the right to property under Article 26(1) of the Constitution. That in mind, means, that fairness requires, that both parties be heard in the main case for a just and equitable determination.

[28] Hence, to dismiss the application and allow the ex parte hearing to proceed that would eventually lead to an ex parte judgment likely to be challenged and set aside under Section 69 of the SCCP will cause unnecessary delay in having this matter concluded. Nor would it be fair to either of the parties, who in my view, would like to see that this matter is resolved without further delay given that the petition for such property adjustment order was filed in court since the 9<sup>th</sup> November 2022.

[29] Therefore, for the reasons discussed in the preceding paragraphs of this ruling, I do find merits in this application, and as a consequence thereof, I set aside the ex parte hearing dates fixed, and call on the parties to agree on an inter parte hearing date.

Signed, dated and delivered at Ile du Port on 02<sup>nd</sup> February 2024

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Adeline J