IN THE SUPREME COURT OF SEYCHELLES

Allen Jude Medine **Plaintiff**

vs

The Estate of the late Jean-Claude Vidot

Herein represented by its Executor Melchior Vidot
C/O Supreme Court, Victoria **Defendant**

Civil Side No: 293 of 2007

Mr. C. Lucas for the plaintiff
Mr. A. Lablache for the defendant

D. Karunakaran, J

RULING

The plaintiff *Allen Jude Medine* has filed this action seeking a declaration from this Court to establish his paternal descent *under Article 340 (1) (b) of the Civil Code of Seychelles as amended by the 4th Schedule of the Children's Act*. The defendant resists this action. In his statement of defence, the defendant has denied the plaintiff's claim on the merits as well as has raised ***a plea in limine litis*** on a point of law based on prescription and hence this ruling.

Before examining the merits of the motion, it is pertinent to revisit Article 340 of the Civil Code in its entirety, which reads thus:

"*It shall not be allowed to prove paternal descent, except:*

1. *(a) In cases of rape or abduction, provided that the time when the rape or abduction took place coincides with that of the conception.*

(b) When an illegitimate child is in possession of status with regard to his natural father or mother as provided in article 321.

(c) In cases of seduction, provided that the seduction was brought about by fraudulent

means, by abuse of authority or promise of marriage.

(d) When there exist letters or other writings emanating from the alleged father containing an unequivocal admission of paternity.

(e) When the alleged father and the mother have notoriously lived together as husband and wife, during the period of conception.

(f) When the alleged father has provided for or contributed to the maintenance and education of the child in the capacity of father.

2. The right to prove paternal descent under this Article is for the benefit of the child alone, even if born of an incestuous or adulterous relationship.

*3. **An action** (underline mine) under this Article may be brought -*

(a) by the child's mother, even if she is under age, or by his guardian, at any time during the child's minority; or

(b) if action has not been brought under sub-paragraph (a), by the child within 5 years of his coming of age or within 1 year of the death of the alleged father whichever is the later.

4. A child whose paternal descent has been proved under this Article is entitled to bear his father's name (in addition to a share in his father's succession under the title Succession).

Article 321referred to, in the above article reads as follows:

1. Possession of status may be established when there is a sufficient coincidence of facts indicating the relationship of descent and parenthood between a person and the family to which he claims to belong.

The principal facts are:

That that person has always borne the name of the father

whose child he claims to be;

That the father has been treating him as his child and that, in his capacity as father, he has provided for his education, maintenance and start in life;

That he has always been recognised as a child of that father in society;

That he has been recognised as such by the family.

2. *Natural descent may also be established by the possession of status, both as regards the father and the mother in the same manner as legitimate descent.*

Be that as it may, in the instant action, the plaintiff, who is a natural child, claims that he is the child of one late Jean Claude Guy Vidot, hereinafter referred to as the "deceased", who died testate in Seychelles on 26th October 2004. According to the plaintiff, he is in possession of status as the child of the said deceased. Hence, in the present action, the plaintiff intends to prove his paternal decent in terms of Article 340 (1) (b) of the Civil Code with regard to his alleged natural father.

The plaintiff has averred in his plaint that he was born on the 18th day of November 1982, and the deceased was his father. In his birth register, only his mother's name has been registered as "Marie Lourdes Medine", who is still alive, whereas his father's name has not been recorded. According to the plaintiff, since his childhood he had known the deceased as his father, who had also been providing maintenance during the former's childhood. Furthermore, it is averred in the plaint that the deceased had throughout his life, referred to the plaintiff as his son. In the circumstances, the plaintiff claims his paternal decent through the deceased and hence, prays this Court for the declaration.

On the other hand, the defendant in his statement of defence, having completely denied the claim of the plaintiff on the merits, has also raised *the plea in limine on the issue of*

prescription, which cannot be determined unless the background facts of this action are put in proper perspective. The facts are these:-

The plaintiff herein previously- on the 1st December 2004 - came before this Court by filing an application in C. S 266 of 2004, hereinafter called the "first case", seeking therein for an identical declaration on paternal decent claiming through the same deceased. Although the application in the first case was initially sought to be heard ex parte, since the legal heirs to the estate of the deceased had an interest in this matter, the Court *sue motu* had issued a notice to one Mr. Melchior Vidot, who was admittedly a legal heir as well as a joint-executor to the estate of the deceased. Following that notice, Mr. Melchior Vidot put up appearance and intervened in the proceedings of the first case, wherein his counsel Mr. C. Lablache raised ***a preliminary objection*** to that application based on points of procedural law contending in essence, as follows:

1. The procedure adopted by the applicant in that application (the first case) was improper, as such declaration could only be sought through proceedings instituted by way of a plaint, not by way of an application. Moreover, a remedy of this nature could not be sought through an *ex parte* proceeding but should be heard *inter parte* joining all the heirs to the estate of the deceased as parties to the proceeding; and

2. The affidavit filed in support of that application was improper and incompetent since counsel himself having acted as a notary, has administered oath to the plaintiff for deponing the affidavit filed in support of the said application.

On the other hand, Mr. C. Lucas, learned counsel for the applicant therein (in the first case) contended that the procedure adopted by the applicant in that application was proper. Moreover, notice of that application had also been served on Mr. Melchior Vidot, a co-executor to the estate of the deceased. Therefore, Mr. Lucas submitted that the preliminary objection raised by Mr. Melchior Vidot on procedural issues, were baseless and so urged the court to dismiss the objections and proceed to hear that application on the merits.

Having heard both sides on the preliminary objections relating to those procedural issues, the Court in its Ruling dated 28th March 2007 dismissed the first case namely, the ex parte application in C. S 266 of 2004, holding inter alia, thus:

> "*a party seeking a declaratory relief in respect of paternal descent under Article 340 of the Civil Code, should commence an action or suit by way of a plaint. ... This is the proper procedure, which must be adopted in all cases of this nature, and failure to follow this procedure meant that the court has no jurisdiction to try the matter"*

Consequent upon the said ruling and dismissal of the "first case", the applicant therein has now commenced the present action before this Court by way of a plaint registered on the 15th October 2007. That is, nearly 6 months after the dismissal of the "first case" and undisputedly, nearly 2 years after the death of the deceased.

The defendant in this action being the estate of the deceased - represented by its executor - has now raised ***a plea in limine litis*** challenging the maintainability of this action, raising a point of law on prescription. In this regard, Mr. Lablache, learned counsel for the defendant contended that article 340 (3) (b) of the Civil Code - rehearsed *supra* - stipulates that an action under this article should be brought *within 1 year of the death of the alleged father.* However, the present action has been brought *nearly 2 years after the death of the deceased*. Therefore, it is time barred and not tenable in law. In the circumstances, Mr. Lablache submitted that the instant action is liable to be dismissed *in limine*.

Besides, Mr. Lablache contended that although the plaintiff had instituted the proceeding in the "first case" on 4th March 2004 - prior to the present action - that proceeding cannot constitute a valid legal interruption of prescription since no ***writ or summons or seizure*** emanating from that case was ever served on the defendant to appear before the Court, as contemplated under article 2244 and article 2246 of the Civil Code, which respectively read thus:

Article 2244

"*A writ or summons or seizure served upon a person in the process of acquiring by prescription shall have the effect of a legal interruption of such prescription"*

Article 2246

"*A writ or summons to appear before a Court, even if that Court has no jurisdiction, shall interrupt the prescription"*

It is the contention of Mr. Lablache that the document served on Melchior Vidot in the "first case" was simply a ***notice*** informing him of the ex-parte proceeding in Civil Side 266 of 2004. This ***notice,*** *according to him,* cannot be equated to a ***writ or summons or seizure*** as required under article 2244 or 2246 of the Civil Code. Hence, Mr. Lablache argued that the application filed in Court on the 1st December 2004 by the applicant in the first case, cannot in law, interrupt the prescriptive period of one year stipulated under Article 340 (3) (b) of the Civil Code. Therefore, he submitted that the "first case" cannot constitute in law, a valid legal interruption of the said prescription. For these reasons, Mr. Lablache sought a dismissal of the present action in Civil Side No: 293 of 2007.

On the other side, Mr. C. Lucas, learned counsel for the plaintiff submitted that although there had been a delay exceeding the said prescriptive period of 1 year, such delay was caused not due to any fault or negligence on the part of the plaintiff, who took all reasonable steps within the prescriptive period to obtain the said declaration from the Court. According to Mr. Lucas, the plaintiff filed the "first case" after 35 days from the death of the deceased. This obviously, falls well within the prescriptive period of 1 year as required in law. The first case was subsequently - on the 27th March 2007 - dismissed by the Court. After a delay of 6 months and 18 days from the said date of the dismissal, the plaintiff has filed the present action before the Court. Therefore, according to Mr. Lucas the delay in this case in aggregate constitute only 7 months and 23 days. In the circumstances, counsel urged the Court to eschew the strict principles of statutory limitations for equity and condone the delay in the interest of justice. Hence, Mr. Lucas moved the Court to dismiss the plea in limine litis raised by the defendant and proceed to hear the suit on the merits.

I meticulously analyzed the arguments advanced by both counsel for and against the *plea in limine litis*. I carefully perused the relevant provisions of law pertaining to the declaration of *paternal descent* and the *legal interruption* of prescription in this respect. In fact, the submission of both counsel raises two issues: (1) based on equity and (2) based on a point of law.

First, I will proceed to examine the issue of equity. In fact, the principles of prescription are the fiction of law. They are created and governed by statutes. They form part of the body of substantive law and provide for the acquisition or loss of real rights due to efflux of time. These legal fictions in effect, intrude into the rights of the individuals and deprive the owners of their valuable rights such as "right to property", "right to legal action" etc. for the simple reason that those owners had failed to act within the time limit prescribed by law. Hence, when the Courts adjudicate on matters involving prescription, they ought to apply the law that governs prescription, not equity as sought by Mr. Lucas. Strictly speaking, equity is the antithesis of law. Indeed, equity begins only when and where law ends and vice versa. They cannot coexist as they are two distinct and opposite entities. The Courts cannot and should not exercise its equitable powers and invoke equity to condone the legal delay. That would defeat or counteract the expressed provision of the statutory law, which itself has provided a specific legal sanction for those delays. This Court or any Court of Equity for that matter will be able to exercise its equitable jurisdiction for the administration of justice, if and only if, there is no provision in the laws of Seychelles to provide a sufficient legal remedy to the aggrieved *vide Section 6 of the Courts Act*. In any event, those who come before the Court for equity should come with clean hands, not with the seeming fault of having slept on their rights lethargically, beyond the period stipulated by law. In the circumstances, the argument of Mr. Lucas invoking equity does not appeal to me in the least. Hence, I decline to grant any relief on his plea invoking equity in this respect.

I will now turn to the main issue that is based on a point of law. It is not in dispute that the plaintiff instituted the "first case" - the application in Civil Side No. 226 of 2004 - within the prescriptive period of one year from the date of the death of the alleged father. It is also not in dispute that the defendant was served with ***a notice*** of the said application. Admittedly, the defendant retained counsel, put up appearance in Court and did intervene in the proceedings of the "first case". Obviously, the law in terms of article 2244 of the Civil

Code states that "*a writ or summons or a seizure served upon the defendant shall have the effect of a legal interruption of such prescription"*. Besides, *article 2246 states that "even if that Court had no jurisdiction, such a writ or summons to appear before it, shall interrupt the prescription"*. Therefore, the fundamental legal question that now arises for determination in this matter is this:

> "*Is the notice of the application, which was served on the defendant in the "first case" tantamount to a process, contemplated under articles 2244 and 2246 of our Civil Code in order to have the effect of a legal interruption of such prescription?*

Certainly, the answer to this question depends on the interpretation one gives to the term "notice" vis-à-vis the terms namely, "*writ or summons or seizure"* used in the said articles to denote the "process". Herein, I use the term "process", which means and refers to *"a document that serves as a means used to bring a person or thing into court for litigation*". Incidentally, I should mention here that the authorities cited by counsel in this matter, are in my view, not relevant to the issue on hand. Be that as it may, although the terms or words: ***"writ", "summons", "seizure" and "notice"*** have been widely used in the Code of Civil Procedure (CCP) and the Civil Code, specific meaning of those terms have not been defined anywhere in the statutes. In the absence of any such statutory definition, the literal meaning of those terms cannot and should not be construed simply by reading those words in isolation or by going to any dictionary for lexical meanings of those terms. I decline therefore, to ask myself: *What do the words mean to a grammarian*? I prefer to ask: *What did the legislature intend to mean by using those words of the same genus?* In such situations, it is the duty of the Courts to embark on the task of discovering the contextual meaning, which the legislature had intended to convey by using those terms in sequence in the said articles. And, the Courts should adopt such a construction as will "promote the general legislative purpose" underlying the provision.

Generally, a judicial summons is addressed to a defendant in a legal proceeding. It will announce to the person to whom it is directed that a legal proceeding has been started against that person, and that a file has been started in the court records. The summons thus, announces a date by which the defendant must either appear in court, or respond in writing to the court or the opposing party. In fact, the summons is the descendant of the writ of the common law. In a

sense, summons is also a "Notice to appear" served on a person informing him of the legal proceeding. Hence, it is evident that the terms namely, the "Summons", "Writs", "Notices" and "Seizures" although each on its own as a *species,* has a specific meaning and purpose to serve in legal proceedings, they all despite nuances, belong to one and the same *"genus"* namely, the "process", which I have defined supra, as *a document, which serves as a means used to bring a person or thing into court for litigation*. Especially, in matters of prescription, what constitutes a valid "legal interruption" is the *"citation en justice" See, Dalloz Repertoire Pratique, Vol IX Prescription Civile, Paragraph 216 et seq*. or the "institution of the legal proceeding" and the "service of its process" on the person - so that he can have the knowledge of the proceeding - in whose favour such prescription applies. To my mind, that is "*the general legislative purpose*" underlying the provision in article 2244 and 2246 of the Civil Code. Although the legislature has attempted in the said articles, to list and specify the *species* such as Summons, Writs, and Seizure, it appears to me, the listing therein is not exhaustive. As I see it, the intention of the legislature in listing those *species* in sequence - *ejesdem generis* - was to mean the *genus, namely,* the "process" issued by the Courts, which serves as a means to bring a person or thing into court for litigation or to bring at least to his knowledge of the litigation in question, that is the *"citation en justice"*. Obviously, the genus namely, the ***"process"*** includes any ***notice*** issued by the Court on a person informing him of the litigation. Hence, I hold that the **"notice",** which was served on the defendant in the "first case", is also a **"process"** in the broader and generic sense of the term and belongs to the same ***"genus"*** intended by the legislature. However, the specific term ***"notice"*** is noticeably missing from the items listed in the said two articles or to say the least, they are silent about the "notice" or there is a gap in the provision in this respect. This "silence" or "gap" or "ambiguity" has given rise to different interpretations and arguments by counsel. In this situation, the duty of the Court is to work on the constructive task of finding the intention of the legislature and interpret the law to accord with reasoning and justice. At this juncture, I would like to restate what I have stated earlier in my previous ruling in the "first case" in this matter.

Whenever a statute comes up for consideration it must be remembered as Lord Denning once mentioned, that it is not within human power to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms of free from all ambiguity. In such situations, a judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the statute has not provided for

this or that or complaints that it is silent or defective of some or other ambiguity. It would certainly save the judges trouble, if statutes were drafted with divine prescience and perfect clarity providing for all contingencies. In the absence of it, when an ambiguity or silence or defect appears in a statute a judge cannot simply blame the draftsman or the lawmaker. He must set to work on the constructive task of finding the intention of the legislature, and he must do this, not only from the language of the statute, but also from a consideration of the fact that what if the makers of the statute had themselves come across this ambiguity, how they would have cleared it out. The judge must do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases in the structure of the statute. Approaching this case on hand in that way, I cannot help feeling that if the legislature had known that someone might in future misinterpret the silence or ambiguity or gap as the learned counsel Mr. Lablache is attempting to do in this case, the legislature would have certainly, expressly included the term ***"notice"*** as well in the list of documents (the process) contemplated in the said articles. The Court, having discovered the intention of the legislature, must proceed to fill in the gap and iron out the creases in the structure of the statute ***vide Seaford Court Estates Ltd v. Asher [1949] 2KB 481***. In my judgment, the notice of litigation issued by the Court served *upon a person in the process of acquiring by prescription shall have the effect of a legal interruption of such prescription in terms of* Article 2244 of the Civil Code. Having said that, I find the answer to the fundamental question above, in the affirmative thus:

> *Yes; the notice of the application served on the defendant in the "first case" - Civil Side No. 266 of 2004 - is tantamount to a process, contemplated under articles 2244 and 2246 of our Civil Code in order to have the effect of a legal interruption of such prescription. Hence, I hold that the plaintiff's action in this matter is not time barred as its prescriptive period has been interrupted by the institution of the first case within the statutory time limit of one year from the date of death of the alleged father.*

For these reasons, I have to dismiss the *plea in limine litis* raised by the defendant on prescription in this action. I do so accordingly. The case therefore, shall proceed to be heard on the merits.

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D. KARUNAKARAN

JUDGE

Dated this 16th Day of October 2008