IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA No. 247/2011

(Arising from DC:141/2009)

[2014] SCSC 35

JOSETTE SABADIN
Petitioner

versus

ROBERT SABADIN
Respondent

Heard: 11 November 2013

Counsel: Basil Hoareau for petitioner

Joel Camille for respondent

Delivered: 31 January 2014

RULING

Egonda-Ntende CJ

1. The petition is in relation to the settlement of matrimonial property. The petitioner is seeking an order of this court declaring her the sole owner of parcel V9936. She further seeks an additional order directing the Registrar of Lands to register her as the sole owner of the said property. The grounds of this application were not stated on the application and are presumably set out in the supporting affidavit. The supporting affidavit was

sworn before Mr Elvis Chetty, a partner of Mr Basil Hoareau, learned counsel for the applicant who drew and filed the current application and acted for the petitioner during the currency of these proceedings. This is not permitted in this jurisdiction and such affidavits are liable to be struck out as incompetent and bad in law. See Ex-Parte, In Re Medine v Vidot (C S 266 of 2004) [2007]SCSC 4; Church v Boniface (Civil Side No. 204 of 2010) [2011 SCSC 56.

2. That is not the only anomaly with these proceedings. The order of divorce was made absolute by this court on 10 June 2010. This petition was not filed until 4 May 2011, a lapse of almost more than 10 months from the time the order was made absolute. No leave was sought to file this petition out of time, as is required under rule 33(1) of The Matrimonial Causes Rules, for any petitions filed outside of two months from the date the order for divorce was made absolute. Rules 33(1) provides,

> '33.(1) An application for a periodical payment or lump sum payment in accordance with rule 4(1) (b) or (c) **or 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 or nullity of marriage, 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 2 months after the order absolute except by leave**.' [Emphasis is mine.]

3. The delay of well over 8 months prior to the presentation of this petition has not been explained. Much as I had initially been inclined to ignore these lapses it appears to me that to do so would set a very bad precedent with regard to these matters that ought to be managed with expedition and in accordance with the procedural law which provides the framework for the enforcement of substantive rights and interests.

4. The question of compliance of parties and their legal advisors to the rules of court was discussed by the Court of Appeal in Algae v Attorney General SCA No. 35 of 2010 [unreported] and cited with approval the words below of the Privy Council in Ratnam v Curmarasamy [1964] All ER 933,

> 'The Rules of Court must prima facie, be obeyed, and in order

> to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law requires otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.'

5. In an English case**,** Revici v. Prentice Hall Incorporated, [1969] 1 All E.R. 772 Lord Denning M.R. made the same point when he said at p.774:

> 'Counsel for the plaintiff referred us to the old cases in the last century of Eaton v. Storer (1) and Atwood v. Chichester (2)**,** and urged that time does not matter as long as the costs are paid. Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed.'

6. And Edmund Davies, L.J., similarly opined at p.774:

> 'On the contrary, the rules are there to be observed; and if there is non compliance (other than of a minimal kind), that is something which has to be explained away. *Prima facie*, if no excuse is offered, no indulgence should be granted.'

7. The petitioner has not sought leave of this court to pursue this matter so clearly filed out of time. This would ordinarily be fatal to the petition. Parties and their legal advisors must understand that this court will enforce the time standards established by the rules. However no objection was taken by the adverse party at or prior to the hearing of this petition. I will reluctantly exercise some indulgence in this matter in order to help to bring the parties' dispute to a close on its merits and hopefully save further public resources from continuing engagement with this dispute. I must warn the parties and their legal advisors that lapses of the kind I have noted above will henceforth not be tolerated by this court.

8. The respondent objects to this petition and in his affidavit in reply has instead prayed to this court that this court should award full ownership of the property in question to him with such orders for the compensation of the respondent for any contribution she may have made.

9. The property in question is registered in the names of both the petitioner and the respondent. Initially they were both tenants but later the property was offered to them for purchase. The rental initially paid was computed as part of the purchase price. The parties took out a loan from Barclays Bank to pay the balance of the purchase price which was slightly over SR90,000.00. The loan has substantially be repaid by the respondent.

10. There was a dispute as to who paid for the rental of the house. The petitioner claimed she paid rent from her income. The respondent testified that he was earning a much higher salary and gave his wife/partner SR1500.00 per month for rent and other expenses.

11. I am satisfied that the petitioner did make the payments for rent but with money provided to her by her husband, the respondent. As is usual in most homes both parties did contribute both financially and in kind to meet the needs of their household. This household or home was no exception. Even though I do find that the respondent was ultimately responsible for paying for the house in question in terms of rentals as well as the loan taken it is clear that the petitioner made a valuable contribution to the family both financially and in kind.

12. What principles is this court to apply in resolving this dispute before it? Case law from this jurisdiction provides sufficient guidance. In Marie Charles v Jason Charles SCA 1/2003 the Court of Appeal held that where the parties own a house jointly, they are presumed to have intended to own the house in equal shares. Secondly that the Court has discretion to make orders to settle matrimonial property. This discretion must be exercised judicially taking in consideration of all relevant factors. The starting point is one of equal shares.

13. 'All the circumstances' a court must take into account were discussed in Senville Esparon v Beryl Esparon SCA 12 of 1997. The Court of Appeal decided that the following factors ought to be considered in dealing with applications of this kind.

> '(a) Standard of living before the breakdown of the marriage.
> (b) Age of the Parties;
> (c) Duration of the Marriage;
> (d) Physical and mental disability of either party;
> (e) Contributions made by each party to the welfare of the family,

> including housework and care roles; and
> (f) Any benefit which a party loses a result of the divorce.'
>
> 'Ability and financial means' would cover factors such as income, earning capacity, property, financial resources that each party has or is likely to have in the foreseeable future and the financial needs, and obligations each party has or is likely to have in the foreseeable future.

14. The Court of Appeal pointed out in Freddy Chetty v Carole Emile SCA No. 11 of 2008 that the court may make an order for the benefit of a party to the marriage even if that party had not contributed financially. It opined that the acquisition and holding of property acquired during the marriage must be viewed with regard to the love, affection and sanctity that goes with marriage and that is not solely a consideration of the monetary contribution that goes into the acquisition of such property.

15. The foregoing guidelines will direct my approach to the resolution of the matter now before me.

16. Mr Basil Hoareau, learned counsel for the petitioner, submitted that in event I did not grant the petitioner's prayer, I had only one option and that was to dismiss the petition rather than make any other order, as the respondent had not made a cross petition. If this was an ordinary action under the Seychelles Code of Civil Procedure, Mr Hoareau would have been right. Matrimonial Proceedings have their own separate rules of procedure, the Matrimonial Causes Rules. On a petition under section 20(1) (g) of the Matrimonial Causes Act I take the view that the wording of the provisions allows the court to make a final decision in relation to the property in question on the basis of an application by one party and after hearing both parties. It states,

> '20 (1) Subject to section 24 on the granting of a conditional order of divorce or nullity or an order of separation, or any time thereafter, the court may, after making such inquiries as the court thinks fit and having regard to all the circumstances of the case, including the ability and financial means of the parties to the marriage –

> (g) make such order as the court thinks fit 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.'

17. The court is empowered to make such order as it thinks fit in light of the inquires it will have held. The decision is not restricted to only particular orders that the petitioner applied for. The court's hands are not tied in this regard. The court is granted a broad discretion to settle the issues at stake. However in this particular case the respondent had in his response by affidavit indicated his interest in retaining the entire property in issue, and thus put the other party on notice, with regard to the issues in dispute between the two of them.

18. Parcel V9936 is jointly registered in the names of both parties. The starting point must be the presumption that each party is entitled to 50% of the same. Thereafter it is important to determine the contribution both financial and otherwise of both parties to the family enterprise and apportion ownership accordingly. I am satisfied that the purchase price for the house was ultimately paid by the respondent in terms of the rentals and loan taken to pay off the purchase price. The petitioner contributed to the family enterprise both financially and in kind. As did the respondent. However it is not possible to provide an exact account the monetary or 'in kind' contribution of each party. No books of accounts or other records were kept to reflect the contribution of either party. It is not possible to reduce the relationship of the parties to sets of accounts. None were kept while the enterprise was in progress.

19. Both parties have contributed to looking after their children. Both parties have contributed to household requirements. The minor child still lives with the parties in the former matrimonial home though it is possible that time and again he is in the care of one or the other of the parties. The petitioner spends some time away from the matrimonial home with her boyfriend. Both parties are gainfully employed and to that extent may live independently without reliance on the other.

20. The major asset of both parties is Parcel V9936. It was substantially paid for by the respondent. Taking into account both the monetary contribution and contribution in kind of either party I find that the petitioner is entitled to 40% of the value of the matrimonial home. The home has been valued at SR500,000.00. Counsel for the Petitioner accepted this sum as reflecting the value of the house.

21. The petitioner has prayed that she be declared the sole owner of parcel V9936. I am unable to do so. It is co owned by both parties and was paid for by the respondent. I am inclined to order that she be paid the sum of SR200,000.00 representing her over all contribution to the family enterprise and that the house be registered in the sole names of the respondent thereafter. The respondent is given 6 months within which to pay the said amount. In event that he fails to do so, the petitioner shall pay him SR300,000.00 within the succeeding six months upon which the property can be transferred to her sole ownership. In event that neither party is able to comply with the foregoing the property shall be sold and the proceeds shared 40:60 between the petitioner and respondent.

22. Each party shall bear her or his costs of these proceedings.

Signed, dated and delivered at Ile du Port on 31st day of January 2014

F M S Egonda-Ntende
Chief Justice