COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] SCCA 51 (25 August 2023)
SCA 32/2021
(Arising in MC 61/2021)

Jonathan Searles — Appellant
(rep. by Ms. Alexandra Benoiton)

and

Winsel Pothin — Respondent
(rep. by Mr. Charles Lucas)

Neutral Citation: *Searles v Pothin* (SCA 32/2021) [2023] SCCA 51 (Arising in MC 61/2021) (25 August 2023)
Before: Twomey-Woods, Robinson**,** Tibatemwa-Ekirikubinza, JJA
Heard: 9 August 2023
Summary: Legal Practitioners Act **—** whether notice of motion is invalid or illegal because it was prepared, signed and filed by Counsel who did not hold a legal practitioner's licence — whether proceedings between the parties are invalidated — *writ habare facias possessionem* — element of urgency — whether the appellant has a serious and *bona fide* defence — The proviso to rule 31 (5) of the Seychelles Court of Appeal Rules, 2005, as amended, exceptionally applies to this case
Delivered: 25 August 2023

ORDER

We make the following orders on the basis of the proviso to rule 35 (1) that no substantial miscarriage of justice will occur —

1. We issue an order compelling the appellant to vacate the land comprised in title number T477 (Parcel T477).

2. We hold that Counsel for the respondent is not entitled to an order for costs in respect of anything done by him in the course of so acting.

3. We also make an order that the appellant shall bear his own costs.

4. We order that the Registrar of the Supreme Court enquires into the breach of section 21 of the Legal Practitioners Act by Mr Charles Lucas and for the imposition of sanctions as and if required.

JUDGMENT

Robinson JA
(Dr. M. Twomey-Woods, Prof. L. Tibatemwa-Ekirikubinza JJA concurring)

1. This is an appeal from a ruling of a learned Judge of the Supreme Court delivered on 26 July 2021. The learned Judge directed that a writ *habere facias possessionem* be issued compelling the appellant to vacate parcel T477.

2. The learned Judge dismissed the application because the appellant had not shown that he had a serious and *bona fide* defence to the application.

3. There are three grounds of appeal, which are reproduced verbatim hereunder —

> *"2.1. The Learned Trial Judge erred in law in failing to hold that the notice of motion was not in accordance with the law in that, at the time of its institution, the notice of motion had been signed by an attorney-at-law who did not hold a legal practitioner's license.*
>
> *2.2 The Learned Trial Judge erred in law in failing to address that the Respondent failed to satisfy the court of the need for urgency in the circumstances of the case.*
>
> *2.3 The Learned Trial Judge erred in law and on the facts in holding that the Appellant has no bona fide defence and no claim or right to T477 and in ordering the Appellant to vacate his property within one month of the date of the Ruling."*

4. By way of relief, the appellant has asked this Court to *(i)* allow the appeal, *(ii)* to dismiss the decision, and *(iii)* grant the appellant costs in the Supreme Court and this Court.

GROUND 2.1 OF THE GROUNDS OF APPEAL

5. In this case, it is not in dispute that the notice of motion was signed by the respondent's Counsel of record on 26 July 2021. It is also not in dispute that the respondent's Counsel of record did not hold a legal practitioner's licence at the time of signing the notice of motion.

6. Counsel for the appellant contended in her skeleton heads of argument that the learned Judge erred in failing to hold that the notice of motion (the application) was not in compliance with the law. Consequently, the respondent's pleadings were a nullity and had no legal effect.

7. Counsel for the respondent submitted that the application complied with the law. This is because he deleted his *"name"* on the notice of motion and *"the Respondent had also signed the motion and sworn the Affidavit in support before the Assistant Registrar."* Regardless of the explanation of Counsel for the respondent, it is a fact that the respondent's Counsel of record did not hold a legal practitioner's licence at the time of preparing, signing and filing the notice of motion.

Questions at issue

8. The ground 2.1 raises two questions at issue for determination —

   (i) whether the notice of motion (application for a writ *habare facias possessionem*) is invalid or illegal because it was prepared, signed and filed by Counsel for the respondent who did not hold a legal practitioner's licence at the time.

   (ii) if the answer to question *(i)* is that the application is invalid or illegal, the main concern is whether the proceedings between the respondent and the appellant are invalidated.

9. In the course of hearing the appeal, we received further submissions on the questions at issue from both Counsel. We are grateful for their help.

Law applicable

10. In order to resolve the questions at issue, we have considered the relevant provisions of the Legal Practitioners Act.

11. First, we consider the jurisprudence obtained in various other jurisdictions on the questions at issue, which we mention are of persuasive authority.

12. The learned authors of Halsbury's Laws of England, in their commentary on the effect of a solicitor practicing without a valid practicing certificate state in **44 Halsbury's Laws of England 94th Edition)** at paragraphs 353 and 354 —

> *"**353. Unqualified persons acting as solicitors in litigious matters. Subject to certain exceptions no person is qualified to act as a solicitor unless he has been admitted as a solicitor, his name is on the roll of solicitor and he has in force a practicing certificate authorising him to practice as a solicitor. "Unqualified person" means a person who is not so qualified to act as a solicitor.** A body corporate cannot be qualified to act as a solicitor and may be prosecuted for pretending to be qualified.*
>
> ***Proceedings are not invalidated between one litigant and the opposite party merely by reason of the litigant's solicitor being unqualified, for example by his not having a proper practicing certificate in force [Sparling vs. Brereton (1866) L.R. 2 Eq 64; Richards v Bostock (1914) 31 TLR 70]**.*
>
> *354. Unauthorised acts of unqualified persons. Subject to certain exceptions, no unqualified person may act as a solicitor, or as such issue any writ or process, or commence, prosecute or defend any action, suit or other proceedings in his own name or in the name of any other person in any court of civil or criminal jurisdiction, or act as solicitor in any cause or matter, civil or criminal, to be heard or determined before any justice or justices or any commissioners of Her Majesty's revenue.*
>
> *Any person who contravenes this provision is guilty of an offence and liable on conviction on indictment to imprisonment for not more than two years or to a fine or to both and is guilty of contempt of the court in which the proceeding is taken and may be punished accordingly. An offender is also incapable of maintaining any action for costs in respect of anything done by him in the course of so acting, and in addition to any other penalty or forfeiture and any disability to which he may be subject, is liable to a penalty of £50, to be recovered, with the full costs of the action, by an action brought by The Law Society with the consent of the Attorney General in the High Court or any county court and to be applied to the use of the Crown. He may also be liable for negligence and to the summary jurisdiction of the court.*

Returning an acknowledgement of service in an action is acting as a solicitor within the foregoing prohibition, but the doing of purely ministerial acts on behalf of a solicitor is not." [Emphasis is mine]

13. In **Sparling** the plaintiff sought to set aside the appearance entered for the defendant, and all subsequent proceedings in the cause by Mr Long, on the ground that, at the time the appearance was entered, Mr Long had not taken out an annual certificate entitling him to practice as a solicitor of the court.

14. In **Sparling** Sir W. Page Wood, V.C., made his ruling in the following words **(**at page 67) —

> *"The cases at common law seem to show that although great difficulties are thrown in the way of any recovery of his costs by a Solicitor who acts for a client without being duly qualified, the proceedings themselves are not void. It would be most mischievous, indeed, if persons, without any power of informing themselves on the subject, should be held liable for the consequences of any irregularity in the qualification of their Solicitor.*
>
> *As against third parties the acts of such a person acting as a Solicitor are valid and binding upon the client on whose behalf they are done. A client who might ascertain by inquiry that his Solicitor was on the roll, would have no means of finding out if his certificate was taken out and stamped at the proper time. I do not, therefore, think myself justified in interfering, because, at the time when the appearance which it is sought to vacate was entered, the Solicitor had no certificate. (Emphasis mine)*
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> *The result of the authorities is thus stated by Erle, J., in Holgate vs. Slight 21 L.J. (Q.B.) 74 :— "It seems to me, therefore, that an attorney, though uncertificated, may do acts in his capacity of attorney, but that the result will be that he will, in such case, lose his fees."*

The learned Vice-Chancellor concluded —

> *"I should be injuring both plaintiffs and defendants if I were to hold that the absence of a certificate had the effect of invalidating all proceedings taken in the suit."*

15. In **Richards** it was revealed during the trial that the solicitor held a country certificate only, although his address on the writ was given as Lombard Street, E.C. Although the Judge held that the solicitor had committed an offence, he did not dismiss the case. Instead, the Judge ordered the case to stand over so that the plaintiff would have the opportunity to

consult with another solicitor. **Richards** applied the decision in **Sparling**, where Vice-Chancellor Wood refused to invalidate the proceedings.

16. In *National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR* (the Supreme Court of Kenya), the issue was whether a document or instrument of conveyance was null for all purposes, on the ground that it was prepared, attested and executed by an advocate who did not hold a current practicing certificate, within the meaning of section 34 (1) (a) of the Advocates Act.

17. The Supreme Court of Kenya made the following findings in **National Bank of Kenya Limited** on the issue —

> *"[66] The Court's obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010, Article 48), and in that regard, requires the fulfilment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution: "justice shall be administered without undue regard to procedural technicalities". http://www.kenyalaw.org - Page 29/31 National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR*
>
> *[67] To invalidate an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person's property of any description), 20 (3) (a) and (b) (interpretation that favours the development and enforcement of fundamental rights and freedoms) and 10 of the same.*
>
> *[68] **The facts of this case, and its clear merits, lead us to a finding and the proper direction in law that no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate.** The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.*

> *[69] While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practicing certificate, we would clarify that such advocate's obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject."* [Emphasis is mine]

18. In *Prof. Syed Huq v Islamic University in Kampala (Supreme Court Civil Appeal No. 47 of 1995) [1997]*, 6 November 1997, the Supreme Court of Uganda, by majority judgments, held that documents prepared or filed by an unauthorised advocate were invalid, and of no legal effect, as the Court would not condone illegalities. The majority judgments considered that an advocate who practices without a valid practicing certificate (after February of any year) commits an offence and is liable to both criminal and disciplinary proceedings (sections 14 and 18 of the Advocates Act).

19. The principal issue arising in *Henry Nuertey Korboe vs. Francis Amosa Civil Appeal No. J4/56/2014 (21 April 2015)* (Supreme Court of Ghana), was whether the failure of a solicitor to take out a solicitor's licence under section 8 of the Legal Profession Act 1960 (Act 32) vitiates legal processes undertaken by the solicitor.

20. The majority judgments of the Supreme Court of Ghana held that if a solicitor violates section 8 (1) of the Legal Profession Act 1960, he or she will lose his licence to practice as a solicitor. As a result, he or she will no longer have the authority to prepare an originating process in any court or legal document on behalf of any client or represent any such client in his or her capacity as a lawyer. The majority judgments also observed that a litigant who fails to verify the legal capacity of his solicitor cannot claim miscarriage of justice because the writ endorsed by an unlicensed practitioner is without legal effect. The writ of summons filed by the solicitor for the respondent initiating the suit in the High Court was struck out as having been filed without authority or licence.

21. In his judgment, Dotse JSC (in **Henry Nuertey Korboe***)* expressed the following view while allowing the appeal —

"RATIONALE FOR CIVIL SANCTIONS

It has been strongly urged that, because of difficulties which may be encountered by clients for whom an unlicensed lawyer has acted for, the processes prepared by the said lawyer should not be invalidated. I do not subscribe to these views, because,

1. […]. *If a lawyer has failed to obtain his practicing license as provided for under the law, then a fortiori, he loses his qualification at that material time. Strict compliance with the law as is stated in section 8 (1) of Act 32 is what will ensure that unqualified persons do not practice law when they are not permitted to. There should be a mechanism by which all such defaulting lawyers will be publicly identified.*

2. *The licensing regime, which requires that persons who do not obtain valid Solicitor's licences for a given year should not be permitted to practice law is a self-regulatory mechanism of the legal profession that needs to be strictly adhered to. What will be the future of the legal profession, if persons who voluntarily refuse to obtain and or renew their practicing licences have the stamp of validity ascribed to their work irrespective of their breach? Chaos and confusion will be the order of the day.*

3. *There is the need to maintain high ethical and professional standards in the legal profession by ensuring strict compliance with the requirements of licensing of persons as lawyers under Act 32. This will in addition maintain the integrity of the legal profession.*

[…]

The Courts of law, such as this apex court, must lend support to the General Legal Council in their bid to enforce laws on maintenance of professional rules on ethics and integrity.

It is in pursuit of the above that I am of the firm view that a Lawyer who defaults in renewing his practicing license should not have the honour of validity ascribed to processes of any kind and or description prepared, signed and originating from such a defaulting lawyer."

22. In his judgment, Anin Yeboah JSC (in **Henry Nuertey Korboe)** allowed the appeal to enforce the clear provisions of the statutes. He provided the following explanation.—

"This court will be granting clear immunity to solicitors who are prohibited by mandatory provisions of a statute to freely engage in the practice of the law if we dismiss this appeal. In the more recent case of NETWORK COMPUTER SYSTEMS LTD.v INTEL SAT GLOBAL SALES & MARKETING LTD [2012] 1 SC GLR 218 at 230, the worthy President of this court had this to say:

"A court cannot shut its eyes to the violation of a statute as that would be very contrary to its raison d'etre. If a court can suo motu take up the question of illegality even on mere public policy grounds, I do not see how it can fail to take up illegality arising from statutory infraction which has duly come to its notice […]*".*

Breach of section 8 of Act 32 is clearly an illegality which should not be endorsed by this court. In the case of BELVOIR FINANCE CO LTD v HAROLD G COLE & CO [1969] 2 ALL ER 904, Donaldson J (as he then was) had this to say at page 908 as follows on illegality:

"Illegality, once brought to the attention of the court, overrides all questions of pleadings […]*."*

What the respondent is inviting this court to do in this appeal is for this court to shut its eyes when the very statute passed to regulate the profession of which we are part is violated with impunity by the very people who are on oath to uphold it. In the judgment of the Court of Appeal, the court said as follows:

> *"We find no reason to import into this enactment the invalidation of processes issued and filed by an unlicensed lawyer. Any importation may be at odds with the whole scheme of the statute and in so far as it will result in injustice to parties before the court should be avoided as not the intended by the legislature."*

I have great respect for the panel of the Court of Appeal who sat on the appeal, but this portion of the ruling with due respect, overlooks the basic principle of law that justice should be administered within the law. The law is as it is. In FRIMPONG v NYARKO [1998-99] SC GLR 734 this very court was confronted with a problem whereby applying the law would have severe consequences on the party but Wiredu JSC (as he then was) said at page 742:

"The notice of appeal also contravenes the mandatory provision of rule 6(1) of CI 16, thereby shutting appellants from receiving a hearing in this court. This raises an issue of jurisdiction and puts the desire to do justice in this case out of consideration by this court. The justice to be dispensed is justice within the law and not one of sympathy. Judicial sympathy, however plausible can never be elevated to become a principle of law. The appellants are out of court, and their case would deservedly be put out of court in accordance with law."

As a solicitor who is not qualified to practice within a time frame is prohibited by section 8 of the Legal Profession Act, Act 32 to practice, any process that he has filed without a license to practice should not be given any effect in law." [Emphasis is mine]

23. We consider the relevant provisions of the Seychelles Legal Practitioners Act that apply to the questions at issue.

24. An attorney-at-law is a person admitted under section 3 of the Legal Practitioners Act.

25. Section 4 of the Legal Practitioners Act stipulates that the Registrar shall: (a) keep a roll of all attorneys-at-law admitted by the Supreme Court; (b) upon the Supreme Court making an order admitting a person as an attorney-at-law, enter the name and other prescribed particulars of that person on the roll; (c) issue to the person admitted as an attorney-at-law a certificate under the seal of the Supreme Court certifying the admission and enrolment of the person as an attorney-at-law.

26. An attorney-at-law whose name has been entered on the roll is required by section 6 of the Legal Practitioners Act to hold a legal practitioner's licence before he practices. Section 6 of the Legal Practitioners Act stipulates —

> *"6* ***Subject to this Act, a person shall not practice*** *or hold himself out as, represent himself to be, use such term in describing himself so as to suggest that he is or is qualified to perform any of the function of or permit his name to be used so as to suggest that he is or is qualified to perform any of the function of, an attorney-at-law* ***unless***—
>
> ***(a) his name is entered on the roll;***
>
> *(b)* ***he has not been suspended from practice under this Act;***
>
> *(c) he has not been disbarred, removed from the roll or register referred to under section 5 or suspended from practice, in any country or jurisdiction outside Seychelles by reason of any misconduct, malpractice or crime;*
>
> *(d)* ***he or she holds a legal practitioner's licence***. [Emphasis is mine]

27. Section 6A of the Legal Practitioners Act stipulates that an application for a legal practitioner's licence or for the renewal of a legal practitioner's licence shall be made to the Registrar of the Supreme Court in the prescribed form and shall be accompanied by the prescribed fee.

28. Section 8 of the Legal Practitioners Act stipulates the acts which an attorney-at-law may perform as follows —

"8 Subject to section 5 (4), (5) and (6) and section 6, an attorney-at-law is entitled to—

(a) assist and advise clients;

(b) appear, plead or represent a person in every court, tribunal or other institution established by law for the administration of justice where the person has a right to be heard and be represented by a legal practitioner; or

(c) appear and represent a person who has a right to be heard and be represented by a legal practitioner before any other person or tribunal exercising quasi-judicial functions."

29. Section 6A (6) stipulates that —

"6A […].

(6) If an attorney-at-law —

(a) contravenes this Act or any regulations made thereunder or any directions issued by the Registrar or the Supreme Court;

(b) breaches the code of conduct, and despite written warning from the Registrar, fails to remedy such breach to the satisfaction of the Registrar;

(c) is unable to meet his or her debts and liabilities;

(d) carries on business in a manner that is prejudicial to the public interest or to the interests of his or her clients;

(e) contravenes any conditions of his or her licence;

(f) ceases to carry on business;

(g) furnishes false or misleading information or documents to the Registrar or to the Chief Justice; or

(h) is convicted of an offence punishable by a term of imprisonment of at least 2 years,

the Registrar may suspend his or her licence for such period as the Registrar may determine or revoke or refuse to renew his or her licence.

(7) Where the Registrar suspends, revokes or refuses to renew a legal practitioner's licence, the Registrar shall immediately notify the holder of the licence in writing.

(8) An attorney-at-law whose licence has been suspended or revoked or whose application for renewal of licence has been refused may appeal to the Supreme Court within 30 days of notification of the decision of the Registrar.

(9) A person whose licence has been suspended or revoked shall immediately cease to provide legal services."

30. Section 21 of the Legal Practitioners Act stipulates the following offences for contravention of certain provisions of the Legal Practitioners Act—

"21(1) An attorney-at-law who contravenes section 9 (1) or section 9 (4) is guilty of an offence and liable to a fine of R25,000 or to imprisonment for five years.

(2) A person who contravenes section 6 is guilty of an offence and liable to a fine of R 25,000 and to imprisonment for five years.

(3) A person who holds himself out or represents himself to be, or uses such terms in describing himself so as to suggest that he is or is qualified to perform any of the functions of, or permits his name to be used so as to suggest that he is or is qualified to perform the functions of a person who has been allowed to practice under section 12 or to be a pupil or clerk when—

(a) he has not been allowed to practice under section 12 or is not a pupil or clerk, or

(b) his permission to practice under section 12 has been revoked by the Supreme Court, or he has been prohibited from continuing to serve as a pupil or clerk by the Supreme Court is guilty of an offence and liable to a fine of R25,000 and to imprisonment for 5 years.

(4) A person who has been allowed to practice under section 12 and who fails to comply with a condition imposed by the Supreme Court under that section is guilty of an offence and liable to a fine of R15,000 and to imprisonment for 3 years.

(5) A person who—

(a) does not have an authorisation under section 13A (1) and who provides or offers to provide legal advice or assistance for a fee; or

(b) is the holder of an authorisation under section 13A (1) and who contravenes section 13A (2) or section 13A (3), is guilty of an offence and liable to a fine of R25,000 and to imprisonment for 5 years."

Determination of the questions at issue

31. Under section 6 of the Legal Practitioners Act, a person shall not practice as an attorney-at-law unless he or she has been admitted as an attorney-at-law, his or her name is on the roll, and he or she holds a legal practitioner's licence.

32. Counsel for the respondent acknowledged that he did not hold a legal practitioner's licence at the time he performed acts under section 8 of the Legal Practitioners Act. Therefore, Counsel for the respondent acknowledged that he could not practice as an attorney-at-law when he prepared, signed and filed the notice of motion.

33. Hence, we have to decide whether the notice of motion is invalid or illegal. To the best of our knowledge, neither the Legal Practitioners Act nor any other written law stipulates the effect of such failure. The purpose of the Legal Practitioners Act is to regulate and promote discipline in the practice of the legal profession. The licensing regime is in place to ensure proper regulation of the legal profession. In the context of the present case, laws are also aimed at ensuring the validity or legality of acts performed by an attorney-at-law. Hence, we cannot overlook the violation of the Legal Practitioners Act as a mere technicality. We observe that under the Legal Practitioners Act, an attorney-at-law who performs acts without holding a legal practitioner's licence may face criminal and disciplinary sanctions.

34. We are persuaded by the finding in **Prof Syed Huq** and **Henry Nuertey Korboe**, which states that acts performed by an unqualified person are invalid or illegal (in the present case, an attorney-at-law who performs acts without holding a legal practitioner's licence).

35. The statement made by the President of the Supreme Court of Ghana in *Network Computer Systems Ltd v Intel Sat Global Sales & Marketing Ltd [2012] 1 SC GLR 218 at 230,* is relevant to this case —

> *"**A court cannot shut its eyes to the violation of a statute as that would be very contrary to its raison d'etre. If a court can suo motu take up the question of illegality even on mere public policy grounds, I do not see how it can fail to take up illegality arising from statutory infraction which has duly come to its notice…**"*. [Emphasis is mine]

36. For the reasons stated above, we hold that the notice of motion (the application) prepared, signed and filed by Counsel for the respondent at the time when he did not hold a legal practitioner's licence is invalid or illegal.

37. We now have to decide whether the proceedings between the respondent and the appellant are invalidated. For instance, in **Sparling**, the learned Vice Chancellor did not invalidate the proceedings. We understand the points he has made in his judgment, but we are not persuaded by them.

38. Instead, we hold the view that the application should not be given any effect in law as it is invalid or illegal. Hence, we strike out the application and declare the proceedings between the respondent and the appellant null.

39. For the reasons stated above, we allow ground 2.1 of the grounds of appeal.

GROUNDS 2.2 AND 2.3 OF THE GROUNDS OF APPEAL

40. Even though we have made an order striking out the application, we found it necessary to consider grounds 2.2 and 2.3 of the grounds of appeal. This is because it is blatantly clear on the evidence presented that the appellant does not have a *bona fide* and serious defence in this case. We would like to emphasise that we have adopted this approach in this exceptional circumstance.

41. Ground 2.2 contended that the learned Judge failed to take into consideration that the application showed no element of urgency.

42. Ground 2.3 challenged the learned Judge's conclusion that the appellant had not established a serious and *bona fide* defence.

43. The learned Judge considered the following documentary evidence in this case.

44. Mr Audrey Kirth Monthy transferred his bare ownership in the land comprised in title number T477 to the respondent. We reproduce in part the transfer instrument registered on 2 May 1997 —

"THE LAND REGISTRATION ACT

TRANSFER OF LAND

TITLE No. T477 – (BARE OWNERSHIP)

I, Mr. Audrey Kirth Monthy of Bel eau, Mahe, Seychelles, hereinafter referred to as the "Transferor", in consideration of the price of Seychelles Rupees Forty thousand, (which sum has been paid), hereby transfer to Winsel Dominica Pothin of Anse Faure, Mahe, Seychelles, hereinafter referred to as the "Transferee", the bare owner-ship comprised in the above-mentioned title.

The old buildings standing on the abovementioned title are to be demolished and a new house is to be built.

Dated this 25th day of April 1997.

[…]".

45. Mrs Drixelle Monthy transferred her usufructuary interest in the land comprised in title number T477 to the appellant. I reproduce in part the transfer instrument registered on 2 May 1997, granting the appellant the usufructuary interest —

"THE LAND REGISTRATION ACT

TRANSFER OF LAND

TITLE NO. T.477 – (USUFRUCTUARY INTEREST)

I, Mrs. Drixelle Monthy of Bel Eau, Mahe, Seychelles, hereinafter referred to as the "Transferor", in consideration of the price of Seychelles Rupees Twenty Thousand (which sum has been paid), hereby transfer to Jonathan Searles of Anse Talbot, Mahe, Seychelles, hereinafter referred to as the "Transferee", the usufructuary interest comprised in the above-mentioned title.

Date this 25th day of April 1997.

[…]".

46. Mr Audrey Kirth Monthy granted Mrs Drixelle Monthy the usufructuary interest in the land comprised in title number T477, which was registered on 11 August 1993. I reproduce in part the transfer instrument granting Mrs Drixelle Monthy the usufructuary interest —

"THE LAND REGISTRATION ACT

USUFRUCTUARY INTEREST

Title No. T.477 (Four seven seven)

I, Mr Audrey Kirth Monthy of Bougainville, Mahe, Seychelles, hereby grant to Mrs Drixelle Monthy of Bougainville Mahe, Seychelles, a usufructuary interest in the land comprised in the above-mentioned title, for her lifetime.

Dated this 5th day of August 1993. […]."

47. I consider the grounds of appeal in light of the principles which apply in this case.

48. In *Delphinius Turistica Maritima S.A. v Villbrod [1978] SLR 121,* Sauzier J, as he was then, stated, *"*[…]. [a] *writ habere facias possessionem may be issued on the application of an owner, the lessor of the property, when the court is satisfied that the respondent to the application has no serious defence to make thereto".* In *Faiz Mubarak Ali v Hairu Investment Management Services SCA 25/2018,* (10 May 2019), the Court of Appeal accepted the pronouncement made by Sauzier J in **Delphinius Turistica Maritima S.A** and stated that **—**

> *"9. The remedy sought is essentially one derived from the French law of "Les Référés", which provides a remedy to an owner of a property with a clear title. In applying that law, the Seychellois courts have repeatedly held that an applicant for a writ habere facias possessionem has first to establish a clear title to the possession of the property concerned and that, if he succeeds, his application will be granted, unless the respondent shows that he has a serious and bona fide defence."*

49. It is correct to state that for historical reasons the jurisdiction of a trial Judge of the Supreme Court to grant a *writ habere facias possessionem* is rooted in his or her jurisdiction as *juge des référés - arts. 806 - 811 C. Pr. c.* - dealing with matters of urgency*:* see, for example, *Hetimier v Constance & Anor SCA 64/2018 (13 August 2021) and* **Delphinus Turistica Maritima S.A**.

50. In the case of *Gujadhur v Reunion Ltd and Gujadhur & Sons Ltd [1960] MR 208* at page 212, it was held that —

> *"*[a]*lthough the name of the writ has been borrowed from the English Practice, yet the remedy sought is essentially one derived from the French law of "référés", which provides a summary remedy to an owner of property with a clear title. In applying that law, this court has repeatedly held that an applicant who has*

established his right to the property should be granted the writ unless the respondent has raised a bona fide and serious defence."

51. In our view there is no merit in any of the two grounds of appeal (2.2 and 2.3) for the following reasons —

(i) in respect of ground 2.2, the finding of the learned Judge that the appellant had failed to establish a serious and *bona fide* defence was fully justified since —

(a) after the passing of Drixelle Monthy on 12 June 2021, the usufructuary interest that had been granted to her and subsequently sold to the appellant ceased to exist. As a result, the respondent now has absolute ownership of the land comprised in title number T477;

(b) as correctly found by the learned Judge, there was no evidence to support the claim of the appellant that he [the appellant] and Mrs Drixelle Monthy intended to transfer the usufructuary interest to him for his lifetime, with the usufructuary interest for parcel T477 ending upon his death, as argued by his Counsel.

(ii) Ground 2.3 is also devoid of merit, inasmuch as the respondent could not be said to have made her application dated 26 July 2021 with such undue delay as to make it incumbent on the learned Judge to decline jurisdiction.

52. For the reasons stated above, we dismiss grounds 2.2 and 2.3 of the grounds of appeal**.**

THE DECISION

53. Having carefully considered the outcome of this appeal, we have determined that we ought to apply the proviso to rule 31 (5) of the Seychelles Court of Appeal Rules 2005, as amended, as we have considered that no substantial miscarriage of justice has occurred. The proviso to rules 31 (5) stipulates —

"31 […].

(5) *In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised:*

Provided that the Court may, notwithstanding that it is of opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred." [Emphasis is mine]

54. Based on the proviso to rule 35 (1) of the Seychelles Court of Appeal Rules 2005, as amended, we dismiss the appeal.

ORDERS

55. We make the following orders on the basis of the proviso to rule 35 (1) that no substantial miscarriage of justice will occur —

1. We issue an order compelling the appellant to vacate the land comprised in title number T477 (Parcel T477).

2. We hold that Counsel for the respondent is not entitled to an order for costs in respect of anything done by him in the course of so acting.

3. We also make an order that the appellant shall bear his own costs.

4. We order that the Registrar of the Supreme Court enquires into the breach of section 21 of the Legal Practitioners Act by Mr Charles Lucas and for the imposition of sanctions as and if required.

F. Robinson JA

I concur:-

Dr. M. Twomey-Woods JA

I concur:-

Dr. L. Tibatemwa-Ekirikubinza JA

Signed, dated and delivered at Ile du Port on 25 August 2023.