

## COURT OF APPEAL OF SEYCHELLES

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### **Reportable**

[2023] (18 December 2023)

SCA 7/2023

(Arising in CS 29/2021)

In the matter between

**Patricia Mathiot**

*(rep. by Mr Bernard Georges)*

**Appellant**

And

**Judette Maria**

*(rep. by Mr France Bonte)*

**Respondent**

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**Neutral Citation:** *Mathiot v Maria* (SCA 07/2023) [2023] (Arising in CS 29/2021)

(18 December 2023)

**Before:** Twomey-Woods, Robinson, De Silva JJA

**Summary:** power to make binding declaration of right — exercise of discretion to declare a will null — relief should be claimed — challenge of appointment of executor

**Heard:** 5 December 2023

**Delivered:** 18 December 2023

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### **ORDER**

1. I quash the decision of the trial Court setting aside the Order of Adeline Master in the case of Patricia Sheila Mathiot, born Mellon, with case reference No. XP104/2020, dated 5 October 2020, appointing the Appellant as executrix.
2. I make an order reinstating the Appellant as executrix of the estate of the late Mr. Mellon.
3. I make no order as to cost.

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### **JUDGMENT**

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**Robinson JA (Twomey-Woods, De Silva JJA concurring)**

## **THE BACKGROUND**

- [1] On the 6 April 2021, the Respondent filed a plaint seeking; first, the annulment of the Appellant's appointment as executrix of the estate of her father, the late Mr. Donald Mellon; second, the removal of the Appellant as executrix; third, the annulment of all acts performed by the Appellant as executrix, and fourth, the appointment of the Respondent as executrix in lieu of the Appellant.
- [2] The trial Court granted the first two prayers and removed the Appellant as executrix. However, the trial Court did not annul the acts performed by the Appellant since her appointment as executrix. The trial Court also made an order to postpone the appointment of the Respondent as executrix until she presented a number of required documents.
- [3] The Appellant, being dissatisfied with the decision of the trial Court that she is no longer the executrix of the estate of the late Mr. Mellon, has challenged it on five grounds reproduced verbatim at paragraph [41] hereof. The Appellant prayed for an order quashing the decision of the trial Court, and reinstating her as executrix of the estate of the late Mr. Mellon.
- [4] Before discussing the contentions of the parties in this appeal, it is necessary to state the following matters leading to the appeal.

### **The Pleadings of the Parties**

- [5] The Respondent stated at paragraph [1] of the plaint that she had cohabited with the late Mr. Mellon for over twelve years until his passing on the 29 January 2020. It is also averred at the same paragraph that the late Mr. Mellon died testate.
- [6] It is averred at paragraph [2] of the plaint that Oliver Dean Mellon, Jonathan Micky Mellon, and the Appellant, who is the eldest of the three, are the three adult children of the late Mr. Mellon, by Marie-Paule Rosette.
- [7] It is averred, at paragraph [3] of the plaint, that the late Mr. Mellon had executed a document entitled "*My Last Will and Testament*" on the 11 January 2020. This document

declared his intention to leave all his movable and immovable properties to the Respondent, in the event of his death.

- [8] On the 8 July 2020, the Respondent presented the document entitled "*My Last Will and Testament*" to a Judge of the Supreme Court. The Judge validated the said document by endorsing it with "*Ne Varietur*" and ordered it to be registered, at paragraph [5] of the plaint. The said document was transcribed, stamped and registered on the 28 August in Register B.35 No. 2056 at the Land Registry, at paragraph [6] of the plaint.
- [9] It is averred at paragraph [7] of the plaint that the will bequeathed parcels V4525 and V4311, located in St Louis, as well as business account numbered 01201008692004 with Nouvobanq, and a Tata Nexon vehicle with registration number S33160, to the Respondent.
- [10] The Respondent claimed at paragraph 8 of the plaint that, "*[s]ubsequent to the judicial validation of "Ne Varietur" and registration of the said document, the Defendant, without Plaintiff's knowledge stealthily and unlawfully applied to Court for her appointment as executrix to the estate of the deceased falsely stating in her application that the deceased had died intestate.*"
- [11] It is averred at paragraph [9] of the plaint that on the 5 October 2020, the Supreme Court granted an order appointing the Appellant as executrix based on a falsified petition.
- [12] The Appellant admitted paragraph [9] of the plaint to the extent that, as executrix, she carried out her duties, which included registering two immovable properties, a local business account, and a motor vehicle under her name as executrix of the estate. She denied that the order in question was an "*impugned order*".
- [13] The Respondent averred that the order appointing the Appellant as executrix of the estate of the late Mr. Mellon on the 5 October 2020, was made *per incuriam* and was inconsistent with the order granting the registration of the said document. Hence, paragraph [13] of the plaint alleged that the order appointing the Appellant as executrix was unlawful and null due to the reasons stated at paragraphs [8] and [9] of the plaint.

[14] Paragraph [14] of the plaint averred that the document entitled "My Last Will and Testament" was valid, subject to "*disposable portion, deduction and remainder in law in favour of the children of the deceased*". The Respondent averred that she is willing and prepared to give the three children of the late Mr. Mellon their rightful share of the estate of the late Mr. Mellon as required by law.

[15] The Respondent prayed the trial Court to enter judgment in her favour and make the following orders:—

- "(a) *Declaring that the order of the Court dated 5 October 2020 appointing the Defendant as Executrix to the estate is null and void;*
- (b) *Ordering cancellation or setting aside of the appointment of the Defendant as Executrix to the estate of the Deceased;*
- (c) *Declaring that all acts and registration caused by the Defendant in her capacity as Executrix to the estate of the Deceased are null and void;*
- (d) *Ordering the appointment of the Plaintiff as Executrix to the estate of the Deceased to manage the estate and distribute the remainder to the children of the Deceased according to law;*
- (e) *Any other order as the Court deems fit; and,*
- (f) *The whole with costs."*

[16] Save for the admitted facts, the Appellant filed a defence denying the claims of the Respondent and raised three pleas in *limine litis*. The pleas in *limine litis* are reproduced verbatim below:—

- "(a) *The Plaint discloses no cause of action;*
- (b) *The laws of Seychelles do not recognise "declarations of intention"; and,*
- (c) *The Court has no power to make the order sought in the plaintiff's prayer*  
(d) *as the Plaintiff ought to make an application to the Court for her appointment in that respect."*

[17] As for the defence on the merits, it is averred that the law of Seychelles does not recognise "*declarations of testamentary intention*". Moreover, the defence averred that the document purported to be a so-called "*declaration of intention*" has been endorsed by a Judge, but that in itself does not speak to its validity.

- [18] It is averred at paragraph [9] of the defence that the Appellant has been appointed as executrix of the estate of the late Mr. Mellon in terms of her truthful, solemn, unopposed application to be appointed as such and with the consent of the other heirs. She claimed that she has begun to carry out her duties as executrix of the estate of the late Mr. Mellon, which has been vested in her by the Court and includes the administration of the property belonging to the estate.
- [19] The Appellant denied the claim of the Respondent that she had blocked the bank accounts at Nouvobanq. According to the Appellant, she has been unable to access these accounts in her attempt to discharge her duties as executrix. The reason for this is the Respondent's litigiousness.
- [20] The Appellant averred that the order dated 8 July 2020 has no legal bearing on her application to be appointed as executrix nor on the Court order dated 5 November 2020 appointing her as such.
- [21] Paragraph 17 of the defence averred that the Appellant seeks declarations from the Court on the legality of the Respondent's actions.
- [22] The Appellant prayed the Court to dismiss the plaint with costs.

### **The Evidence of the Parties**

- [23] The evidence of the Respondent. The Respondent testified that she met the late Mr. Mellon on the 4 May 2007. They began living together until his passing. They did not have any children together. The Respondent was unaware of the late Mr. Mellon's will and only discovered it while searching through papers for welfare purposes. A document dated 11 January 2020, entitled "*My Last Will and Testament*", was admitted as exhibit P5.
- [24] Proceedings concerning the presentation and opening of the last will and testament of the late Mr. Mellon dated 8 July 2020 in case reference *ex-parte* 35/2020 were admitted as exhibit P6.
- [25] According to exhibit P5, the late Mr. Mellon left his entire estate to the Respondent. She testified that when she began living with the late Mr. Mellon, the house was already built.

They made some modifications to the house by adding a veranda and performing some maintenance work upstairs. The late Mr. Mellon owned the land on which the house is situated. They also built a rental property together on the land, and the vehicle they purchased in 2019 is now in the possession of the Appellant.

[26] The Respondent was aware that the Appellant had initiated legal proceedings to become the executrix of the estate of the late Mr. Mellon. The Respondent was unwilling and unprepared to give the three children their share under the law. She claimed that she was entitled to everything as she and the late Mr. Mellon were the only ones who worked. The Respondent expressed disagreement with the Appellant's appointment, stating that she was not aware of any reason for the Appellant to be involved in their affairs. She also testified that the late Mr. Mellon's children were not involved in their lives — the following extract from the testimony of the Respondent in examination-in-chief refers:—

*"MR BONTE CONTINUES*

*Q: Now there is an executor appointed. Do you know the name of the executor*

*A: No.*

*Q: You don't know who went to Court and got appointed as executor and came to you and took everything away?*

*A: It was Madame Mathiot.*

*Q: Madame Mathiot?*

*A: Yes.*

*Q: She was the one who was appointed executrix?*

*A: Yes.*

*Q: Now, since there is this Will that was authenticated by the Court and in line of this Will and executrix appointed, do you agree that with this executrix that is appointed?*

*A: No.*

*Q: Do you ask the Court to render this appointment null and void?*

A: Yes, because I was with Donald all the time. I cannot see what the executrix has to do with what Donald and I had.

Q: And are you asking the Court to nullify everything that these executrix had done with regard to the estate since she came.

A: Yes.

[...]". (Underlining is mine)

[27] She prayed that the acts of the executrix regarding the estate of the late Mr. Mellon since her appointment be invalidated.

[28] During cross-examination, the Respondent testified that she did not get married to the late Mr. Mellon. After the passing of the late Mr. Mellon, she was invited by his children to discuss his will with a lawyer. She attended the meeting to find out what the children had to say.

[29] With reference to exhibit P5, she testified that the will was typed, witnessed by one person, not made before a notary, and contained a stamp duty. She testified that she remembered that an application was filed, but she did not pay attention.

[30] In re-examination, the Respondent claimed that she was not served with any summons to attend court with respect to the proceedings for the appointment of the Appellant as executrix.

[31] The evidence of the Appellant. The Appellant testified that she sought the advice of her Counsel of record in the appeal, Mr. Georges, on the procedures for her siblings and herself to be appointed as executors of their late father's estate. During the meeting at Mr. Georges' office, her siblings were present, including the Respondent and an assistant of Mr. Georges.

[32] During her testimony, she confirmed that she was aware of the document purporting to be the will of the late Mr. Mellon, which she was informed was invalid due to legal deficiencies. Mr. Georges said that he would provide them with further advice on the said document. Therefore, she proceeded with the procedures to be appointed as executrix of the estate of the late Mr. Mellon. She stated that she believed the late Mr. Mellon died

without leaving a will and acted accordingly. She did not file an application to challenge the document purporting to be a will, as she was advised that it was not valid.

[33] The Appellant's siblings consented to her being appointed as executrix, and there were no objections to her application. The Respondent disapproved of her making the application and did not attend another scheduled meeting. She stated that the Respondent's consent was not necessary for her appointment as executrix, as the Respondent is not an heir. She was unaware of the Respondent's Court procedures for endorsing the will. She only found out after receiving the order appointing her as executrix.

[34] In re-examination, she testified that the Respondent was not served with a summons to attend the Court proceedings because she was not an heir and, therefore, not a party to the proceedings.

### **The Findings of the Trial Court**

#### The pleas in *limine litis*

[35] In a ruling dated 28 December 2021, the trial Court made a decision regarding the pleas in *limine litis*. Concerning pleas (a) and (b), the trial Court found that the document entitled "*My Last Will and Testament*" met all the requirements of a valid holographic will, as it was entitled as such and had been accepted and validated by a Judge of the Supreme Court. Therefore, the trial Court dismissed the Appellant's argument that the plaint disclosed no cause of action.

[36] As for the plea that the trial Court has no power to make the order sought in the Respondent's prayer (d), the trial Court decided that it was necessary to hear the evidence to decide the said plea.

#### The action on the merits

[37] With respect to the action on the merits, the trial Court first determined whether or not "*the form of a Will drafted satisfies the conditions for validity*", at paragraph [8] of the judgment. On this issue, the trial Court determined *inter alia* that, "*the mere fact of the Will being*

*judicially validated and subsequently registered is an acknowledgement of its acceptance by the Court and is therefore enforceable" (at paragraph [8] of the judgment).*

[38] After resolving the first issue, the trial Court considered whether the Appellant's appointment as executrix of the estate of the late Mr. Mellon was illegal and, therefore, null. The trial judge analysed the evidence and considered several provisions of the Civil Code of Seychelles, as well as numerous authorities related to the question at issue. Based on these, the trial Court made an order to set aside the appointment of the Appellant as executrix of the estate of the late Mr. Mellon.

[39] The trial Court's reasoning is reproduced verbatim below:—

*"[30] [...]. The defendant approached the Court knowing that the deceased left a Will judiciously titled "My Last Will and Testament", not to mention the contents thereof, or the fact that they, as the deceased's children, were estranged from their father, and that the plaintiff was deceased's life partner for many years. Instead, the defendant opted not to apprise the Court of the above critical information, which the Court would have taken cognisance of, resulting in the order made on the basis that the deceased died intestate. The aforesaid undoubtedly would have shed more light on the issues at play. Additionally, the defendant failed to disclose and/or to notify the plaintiff of the proceedings culminating in her appointment, thus depriving the plaintiff, clearly a party with "lawful interest" an opportunity to plead her case before the Court. These were material omissions. Defendant's conduct can rightly be interpreted as being deceptive to the Court, and her appointment is worthy to be set aside."*

[40] Hence, the trial Court concluded as follows:—

*"[45] Noting the analysis of the evidence on the issues which fall to be determined in the present case, this Court finds allows the plaint and makes the following orders:*

- (1) The order of the Court Burhan J(sic) dated 5 October 2020 appointing the defendant as executrix to the estate of the deceased Donald Mellon is set aside. Hence as of the date of this judgment, the defendant Patricia Sheila Mathiot is no longer the executrix of the estate of the deceased.*
- (2) This court declines to accede to the prayer to nullify all acts caused by the defendant in her capacity as executrix to the estate of the deceased for the reasons given.*
- (3) The plaintiff's prayer that she be appointed executrix will be granted upon the filing of the following documents namely, the death certificate of the*

*deceased; the conveyance, deed of title, or other document showing the entitlement of the deceased to ownership of the immovable property; the bank statement, savings book or certificate of deposit showing ownership of any movable assets of the deceased, consisting of money, cash or securities; the marriage certificate of any surviving spouse of the deceased; the death certificate of the deceased's spouse, if any; birth certificates of all heirs; and affidavits of alias where necessary to explain or reconcile any differences or discrepancies in names which appear in the supporting documents (as per Practice Direction 1/1989).*

- (4) *Upon appointment subject to the criteria above (to be fulfilled by the plaintiff), the plaintiff will have to ensure that as executrix to the estate of the deceased is managed and distributed according to law.*
- (5) *Costs awarded in favour of the plaintiff."*

## **THE APPEAL**

[41] As mentioned at paragraph [3] hereof, the Appellant, being dissatisfied with the decision of the trial Court that she is no longer the executrix of the estate of the late Mr. Mellon, has challenged it on the following grounds reproduced verbatim below:—

### **"2. Grounds of Appeal:**

1. *The Learned Judge erred in making her decision by failing to fully apprise of the evidence and by quoting incorrect facts to support her findings, which include, inter alia, that the Appellant and her siblings were estranged from their father for years and that the Appellant in her capacity as executrix transferred the deceased's property to her name.*
2. *The Learned Judge, in making her judgment, erred in concluding that the document purporting to be a will was indeed a valid will solely by virtue of the endorsement and registration of the document and by refusing to "rehash this issue".*
3. *The Learned Judge erroneously determined that the Respondent, the concubine of the deceased, had a lawful interest and, as such, erred in finding that the Appellant was "deceptive" by failing to notify the Respondent of her application for appointment of executor.*
4. *The learned Judge erred in deducing that the Appellant's appointment as the executrix of her father's estate was tainted with irregularities due to her failure to disclose documents that would have undermined her application.*

5. *The Learned Judge failed to take into consideration any form of evidence pertaining to the relationship of the respondent and the deceased prior to his death."*

### **Analysis of the Contentions of the Appellant and Respondent**

*Grounds one, two, three, four and five of the grounds of appeal*

[42] Counsel for the Appellant in his skeleton heads of argument has subsumed grounds one, three and five in grounds two and four, which he has argued together.

[43] Having thoroughly examined the record of appeal, the skeleton heads of argument of both Counsel and the discussions at the hearing of the appeal, I have identified two interrelated issues that require determination as follows:—

- (i) first, whether the trial Court was correct in determining whether the document entitled "My Last Will and Testament" was valid. This issue involves determining whether the trial Court has the discretion to declare the will invalid without any pleadings claiming such a declaration.
- (ii) second, whether the order of the trial Court setting aside the order of Adeline Master in the case of Patricia Sheila Mathiot, born Mellon, with case reference No. XP104/2020, dated 5 October 2020, appointing the Appellant as executrix, should be quashed.

- (i) **whether the trial Court was correct in determining whether the document entitled "My Last Will and Testament" was valid**

[44] Counsel for the Appellant submitted in his skeleton heads of argument that the second ground of appeal is essentially the main ground, which challenges the trial Court's decision that the document entitled "My Last Will and Testament" was a valid will. Concerning this ground of appeal, he submitted that the main determination for the trial Court — and this Court on appeal — was, and is, to decide whether the document purporting to be a will is a valid will.

[45] Before the Appellant can challenge the trial Court's finding that the will is valid, it is necessary for me to determine whether the trial Court has the discretion to declare the will invalid without any pleadings claiming such a declaration.

[46] At the hearing of the appeal, the Court asked Counsel for the Appellant if the pleadings should seek a declaration regarding the invalidity of the will. The submission made by Counsel for the Appellant in response was lacking in detail. I hold the view that the Seychellois Court may only exercise its discretion to declare a will invalid if a declaration is sought on the pleadings. Hence, I find the submission of Counsel for the Appellant to be flawed. I provide some clarification with respect to this holding.

[47] The finding<sup>1</sup> that the submission of Counsel for the Appellant is flawed is based on the explanation about the scope of Order XXV., r. 16 of the Supreme Court Practice 1970 Volume 1, which stipulates the power to grant a declaration. Order XXV., r. 16 of the same stipulates:—

*"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." (Underlining is mine)*

[48] With respect to the scope of the Rule at 15/16/1 of the Supreme Court Practice 1970 Volume 1, it is stated that:—

*"[t]he action for a declaration has recently been given considerable impetus and importance as a procedural device for ascertaining and determining the rights of parties or for the determination of a point of law, and as a parallel method of attacking the order or decision of an inferior Court or tribunal by the prerogative order of certiorari, especially where the time for doing so has expired [...]." (Underlining is mine)*

[49] At 15/16/2 of the same it is stated that, "*the power to make binding declaration of right is a discretionary power (Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, [1921] 2. A.C. 2 A.C. 438; and see Guaranty Trust Co. v Hannay, [1915]2*

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<sup>1</sup> The Seychellois Court refers to the Supreme Court Practice (Rules of the Supreme Court), where the Seychellois law is silent on a matter. See, for instance, *Morin v Pool (2012) SLR 109* and *Lablache De Charmoy v Lablache De Charmoy (SCA 8 of 2019) [2019] SCCA 35* (16 September 2019).

*K. B. 536; per Cozens-Hardy, M.R., in Dyson v. Att.-Gen., [1911] 1 K. B. p. 417; and see Ibeneweka v. Egbuna, [1964] 1 W.L.R. 219. P. C.)". In **Russian Commercial and Industrial Bank** [supra], the House of Lords held that this is a very wide power, and it is obvious that it is one that should be exercised with the utmost caution.*

[50] Having found that the submission of Counsel for the Appellant is flawed, I conclude that the contention arising from the second ground of appeal, which asserts that the main determination for the trial Court — and this Court on appeal — was, and is, to decide whether the document purporting to be a will is a valid will, is misconceived and, hence, does not require any further consideration.

[51] Hence, I quash the following findings of the trial Court on the plea in *limine litis* that, "*the document left by the deceased was a will, as it was entitled as such. More so, the Will was accepted and judicially validated by a Judge of this Court, and consequently, considered as having complied with all the requirements of a holographic will*" (the ruling delivered on the 28 July 2021).

[52] I also conclude that the trial Court erred in concluding that, "*the mere fact of the Will being judicially validated and subsequently registered is an acknowledgement of its acceptance by the Court and is therefore enforceable*" (at paragraph 8 of the judgment). Consequently, I quash the said findings of the trial Court.

[53] I also find that the trial Judge erred in concluding that, "*the Court has already made a declaration on the issue of the validity of the Will, there is no need to rehash the issue*". Consequently, I quash the said findings of the trial Court.

[54] For these reasons, ground two stands dismissed.

(ii) **second, whether the order of the trial Court setting aside the order of Adeline Master in the case of Patricia Sheila Mathiot, born Mellon, with case reference No. XP104/2020, dated 5 October 2020, appointing the Appellant as executrix, should be quashed.**

[55] The legal provision of the Civil Code of Seychelles insofar as it concerns the issue to be determined is article 1026, which stipulates:—

*"Article 1026*

*If the succession consists of immovable property, or both immovable and movable property, and if the testator has not appointed a testamentary executor or if an executor so appointed has died or if the deceased has left no will, the Court shall appoint such an executor, at the instance of any person or persons having a lawful interest. A legal person may be appointed to act as an executor. But a person who is subject to some legal incapacity may not be so appointed".*

[56] In the Court of Appeal case of *Suttie and Anor v David SCA 25/2015* (7 December 2017), a notice of appeal was filed against a judgment of the Supreme Court in Civil Side MC 26/2013. The judgment had dismissed the applicants' (appellants in the appeal) application dated 31 May 2013 under article 1026 of the Civil Code of Seychelles. The applicants submitted an application to the Supreme Court seeking an order to remove the respondent as the executrix of the estate of the deceased. The deceased passed away without leaving a will on the 25 March 2010. The applicants also sought an order to be appointed as co-executors of the estate of the deceased.

[57] In the case of **Suttie and Anor** [supra], the applicants sought to remove the respondent as executrix on the basis that the official birth certificate of the deceased did not show that the respondent was the daughter of the deceased.

[58] The trial Judge had dismissed the application on these grounds:—

*"[t]herefore, it is clear from the above that the plea of abus de droit can be raised independent of the concept of res judicata in circumstances where parties indulge upon purposeless litigation where such issues could have been resolved in previous litigation. The petitioners had two opportunities in the minimum to resolve the matter and the issue has come before this court in more than two instances. Therefore based on the above I uphold the plea of abuse of process raised by the respondent and dismiss the petitioners' application." (at paragraph [3] of the judgment).*

[59] The Supreme Court had appointed the respondent as executrix by an earlier *ex parte* order dated 24 June 2011. In **Suttie and Anor** [supra], the Court of Appeal noted that the applicants had previously submitted an application in the Supreme Court case reference

No. 82/2011, challenging the appointment of the respondent as executrix, which application had been subsequently withdrawn.

[60] In his separate judgment, Fernando then JA (now President of the Court of Appeal) concluded that, "[...]. *Even if the appointment of the executrix in Civil Side No. 82 of 2011 is made on inaccurate information as sought to be argued by the Appellants; the fact that the appointment has been made, makes it effective. The court's order was based on the information that was available before it, and there is no argument that it was perverse.*" (at paragraph [8] of the judgment).

[61] In her separate judgment, Twomey JA concluded that, "[...] [t]he court's order was not perverse based as it were on the information available to it." (at paragraph [20] of the judgment). She found that the order of the Supreme Court was *"therefore not void from the outset and continues to be effective"* (at paragraph [20] of his judgment).

[62] Twomey JA concluded that, *"should she fail to carry out these duties the Appellant or any person with an interest in the succession may then ask for her to account for her refusal to do so or to have her removed by the Court."* (at paragraph [17] of his judgment).

[63] Renaud JA in his separate judgment concluded that there must be finality to the case, and that there was no reason to replace the respondent, at paragraphs [2] and [3] of his judgment.

[64] According to the judgment of Fernando then JA and that of Twomey JA, the appointment of an executor of the estate of a deceased person based on inaccurate information is still effective unless it can be argued that the order of the Court is perverse. I have carefully considered the judgment of Fernando then JA and that of Twomey JA, and hold the view that Fernando and Twomey JJA did not intend for an executor to be removed at the appointment stage only if the order of the Court appointing the executor is considered to be perverse. I hold the view that an executor may also be removed if the order issued by the Court appointing the executor is unlawful and contrary to law. I hold the view that an executor may also be removed if the Court would not have appointed the executor had it been provided with all the relevant documents and information.

- [65] In the case of *Davison v Davison MC 19/2020* (8 October 2021), Carolus J found that an order of Allear then CJ appointing the respondent as executrix of the estate of the deceased was contrary to the provisions of articles 1025 and 1026 of the Civil Code of Seychelles and set aside the order of Allear then CJ. In **Davison** [supra], the deceased left a will in which he appointed three testamentary executors. Allear then CJ appointed the respondent as executrix of the estate of the deceased on the basis that the deceased had died intestate and in the absence of a will, without appointing testamentary executors.
- [66] I analyse the second issue raised in the appeal by applying the aforementioned test(s) stated at paragraph [64] hereof.
- [67] In the present appeal, the main reason for the trial Court's decision to set aside the order of Adeline Master in the case of Patricia Sheila Mathiot, born Mellon, with case reference No. XP104/2020, dated 5 October 2020, appointing the Appellant as executrix is found at paragraph [30] of the judgment (rehearsed verbatim at paragraph [39] hereof).
- [68] According to the trial Court's findings, the Appellant was aware of the late Mr. Mellon's will. The Appellant also knew that Mr. Mellon's children were estranged from him, and that the Respondent had been his partner for many years. The trial Court held the view that the Appellant chose not to inform Adeline Master of these crucial items of information, which would have been significant in the case. Additionally, the trial Court found that the Appellant failed to notify the Respondent of the proceedings that led to her appointment, depriving the Respondent of an opportunity to present her case before the trial Court. The trial Court concluded that these were significant material omissions, and that the Appellant's behaviour could be considered deceitful towards the trial Court.
- [69] Upon review of the evidence, it is observed that there is no evidence presented before the trial Court to support its findings that the Appellant had sought to deceive the Court, as argued by Counsel for the Appellant. It is also observed that the Respondent did not give any evidence before the trial Court that the Appellant stealthily filed a petition to be appointed as executrix, and that the application contained false information, claiming that the late Mr. Mellon had died intestate. (Underlining is mine).

- [70] It is noted that the Respondent stated during cross-examination that she was aware of an application made by the Appellant but paid no attention to it. The plaint in this case was filed six months after the Appellant had been appointed as executrix of the estate of the late Mr Mellon. It appears that the Respondent had filed the plaint after the Appellant had "[come] to [her] and took everything away.". It is noted that the Respondent's evidence expressed her disagreement with the Appellant's appointment and stated that she was not aware of any reason for the Appellant to be involved in their affairs.
- [71] In her testimony the Appellant revealed that she did not disclose the will of the late Mr. Mellon in her application before Adeline Master. Counsel for the Appellant submitted *inter alia* that the Appellant was not obliged to reveal an invalid document to the trial Court that appointed her as executrix of the estate of the late Mr. Mellon. I do not find this submission relevant to my determination of this second issue. On the other hand, Counsel for the Respondent accepted the trial Court's findings without more.
- [72] In the present case, the late Mr. Mellon did not appoint any testamentary executor as per article 1025<sup>2</sup> of the Civil Code of Seychelles [exhibit P5 refers]. Hence, as per article 1026 of the same, the Court shall appoint an executor "*at the instance of any person or persons having a lawful interest*".
- [73] Counsel for the Respondent failed to present a valid argument that could support the order of the trial Court setting aside the order of Adeline Master appointing the Appellant as executrix. I hold the view that the order of Adeline Master was not unlawful and contrary to law as per articles 1025 and 1026 of the Civil Code of Seychelles. Adeline Master made the order appointing the Appellant as executrix based on the information and documents presented before him. There is no indication that if the will had been presented to Adeline

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<sup>2</sup> "Article 1025

*The testator may appoint not more than three testamentary executors. Any executors appointed shall act as fiduciaries with regard to the rights of the persons entitled under the will, as provided by this Code, and also with regard to the distribution of the inheritance. The appointment of such executors shall be confirmed by the Court."*  
(Underlining is mine)

Master, it would have prevented the Appellant from being appointed as executrix of the estate of her father, the late Mr. Mellon.

[74] For these reasons, I accept the submission of Counsel for the Appellant that the trial Judge erred in setting aside the order of Adeline Master in the case of Patricia Sheila Mathiot, born Mellon, with case reference No. XP104/2020, dated 5 October 2020, and, consequently, removing the Appellant as executrix of the estate of the late Mr. Mellon.

[75] Moreover, after reviewing the record of appeal, I have found that the Respondent did not claim that the Appellant had breached any of her duties as executrix.

[76] Hence, grounds one and four are allowed.

[77] This is enough to dispose of this appeal.

[78] The appeal is allowed partly on grounds one and four.

#### **DECISION**

[79] For these reasons, I quash the decision of the trial Court setting aside the order of Adeline Master in the case of Patricia Sheila Mathiot, born Mellon, with case reference No. XP104/2020, dated 5 October 2020, appointing the Appellant as executrix.

[80] I make an order reinstating the Appellant as executrix of the estate of the late Mr. Mellon.

[81] I make no order as to cost.



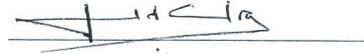
F. Robinson, JA

I concur



Dr. M. Twomey-Woods, JA

I concur

A handwritten signature in black ink, appearing to read 'J. De Silva', is written over a horizontal line. The signature is stylized and somewhat cursive.

J. De Silva, JA

Signed, dated and delivered at Ile du Port on 18 December 2023.