

SUPREME COURT OF SEYCHELLES

Reportable

MA 252/2023

(Arising out of DV 100/2021)

In the matter between:

**BERYL AUBREY UDWADIA
NEE BERLOUIS**

Applicant

Of

St Louis, Mahe, Seychelles

(rep. by Mr Frank Elizabeth)

and

VIRAF PERREZ UDWADIA

Respondent

Of

Beau Vallon, Mahe, Seychelles

(rep. by Mr Ryan Laporte)

Neutral Citation: *Udwadia vs Udwadia* (MA 252/2023) (18 January 2024).

Before: Adeline J

Summary: Application for leave to file petition for A Property Adjustment Order/Section 34 (1) read with Section 20 of the Matrimonial Causes Rules

Heard: By submission

Delivered: 17 January 2024

FINAL ORDER

Application for leave to file petition for a Property Adjustment Order out of time – Rules 34(1) read alongside Rule 20 of the Matrimonial Causes Rules – Application by way of notice of motion supported by affidavit – Averments in affidavit in support of application are not substantiated – Affidavit considered to be defective for not being in compliance with the Rules of evidence and the rules under case law – No documentary evidence exhibited to the affidavit in support of application – The application is dismissed with cost awarded to the Respondent.

RULING ON MOTION

Adeline J,

[1] Mrs Beryl Udwardia nee Berlouis, now divorced, (“the Applicant”) of St Louis, Mahe, Seychelles, by way of a notice of motion supported by an affidavit of facts and evidence, applies to this court for leave to proceed with her petition for a matrimonial property adjustment order, or an order for “division of matrimonial property” (as she put it) out of the prescriptive statutory period of two months from the date her conditional order of divorce was made absolute. She makes her application pursuant to Rule 34(1) read alongside Rule 20 of the Matrimonial Cause Rules (“the Rules”).

[2] The Applicant’s ex husband, one Viraf Perrez Udwardia (“the Respondent”) objects to the application, and in pursuing his objection, filed on affidavit in reply by which, inter alia, he prays this court to dismiss the entire application with cost awarded in his favour.

[3] At this juncture, we need to be reminded of the provisions of Rule 34(1) of the Rules which prescribe for the following;

“34 (1) An application for a periodical payment or a lump sum payment in accordance with rule 4(1)(b) or (c) or in relation to property in accordance with 4(1),(h), (i) or (j) where a prayer for the same has not been taken included in the petition for divorce or nullity of marriage, may be made by the Petitioner at any time after expiration of the time for appearance to the petition, but to application shall be made later than two months after order absolute except by leave”. The underlined emphasis is mine.

[4] Furthermore, rule 20 of the Rules, which for the purposes of this ruling is equally relevant, is couched in the following terms;

“20. No pleadings shall be filed out of time without leave. Applications for leave shall be made by motion supported by affidavit”.

[5] It is in evidence, tendered by way of affidavit, that the parties to this application obtained a conditional order of divorce on the 2nd November 2021, and that the same was made absolute on the 4th March 2022. The Applicant filed the motion for leave on the 20th June 2023 when she was already out of time.

- [6] Based on the rules, therefore, to be within time in accordance with rule 34(1) of the Rules, the Applicant ought to have filed her petition for a property adjustment order not later than two months from the date the conditional order of divorce was made absolute on the 4th of March 2022. She did not.
- [7] She commenced proceedings for a property adjustment order when she filed her petition on the 3rd March 2013 as MA 152/2023, which petition was subsequently withdrawn after the Respondent raised a plea in limine litis to the effect that the petition was time barred, and leave of this court had not been sought for prior to commencing proceedings as required by rule 34(1) of the Rules. There is, therefore, no pending ancillary relief proceedings before this court with regard to this matter.
- [8] The fact that the decision whether or not leave should be granted to allow the Applicant to file her petition for a property adjustment order out of time has to be made on account of affidavit evidence laid before this court, I have thoroughly and meticulously examined the evidence laid before this court by way of affidavit. I observed, that to a very significant extent the facts averred by the Applicant are not at all relevant for the purpose of determining whether or not leave should be granted. Paragraphs 7 to 8 (1) – (v) of the Applicant’s affidavit which are replicated hereunder, do not offer much assistance either.

Paragraphs;

“10. I aver that I was in bona fide negotiations with the Respondent to settle the matrimonial properties amicably out of court (copy of correspondences between the Respondent and I are attached herewith and marked collectively as exhibit B U 6).

11. I aver that when all negotiations were exhausted and it became clear to me that the Respondent is not interested in an amicable out of court settlement in respect of our matrimonial properties, I filed an application for division of matrimonial property as MA 152/2023 arising out of DV No 100/2021. (Copy of petition and affidavit is attached herewith and marked collectively as exhibit B47).

12. I aver that the Respondent filed an answer to my petition wherein he alleged that my petition was out of time having been filed over two months after the decree absolute was

granted. (copy of the Respondent's response is attached herewith and marked collectively as exhibit B48).

13. I aver that I have been advised by my attorney, Frank Elizabeth, conceded to the point of law raised by the Respondent and sought leave to withdraw the matter. I say that leave was granted by the Supreme Court to withdraw.

14. I aver that I have been advised by my attorney, Frank Elizabeth, to make this application for division of matrimonial property out of time.

15. I aver that for the reasons stated above, the court should exercise its discretion to grant me leave to file my application for division of matrimonial property out of time.

16. I say that I was genuinely interested in an out of court settlement and I did not want to burden the court with yet another case but unfortunately all negotiations between the Respondent and I to settle our matrimonial properties amicably and out of court, failed to bear fruit".

17. I say that the matrimonial properties are relatively substantial and that it is just and necessary for the court to grant this application as a matter of urgency for us to have closure to our marriage relationship".

[9] In his endeavour to make his preliminary objection and contest application, the Respondent did file an affidavit in reply. In his affidavit, inter alia, the Respondent depones as follows;

"4. That I verily believe and am advised by my attorney that the application, prima facie, has no foundation or substance, and thus does not sustain in law.

5. That I verily believe and am advised by my attorney that the motion and its affidavit in support are defective, in that, the Applicant failed to adduce evidence to support their purported reason for being out of time for a period over two years since the Applicant's divorce petition.

6. That I verily believe, and am advised by my attorney that the application and its affidavit in support are furthermore defective, in that, the purported exhibition of other evidence has been done contrary to the evidential rules for their admission”.

[10] As regards to the merits of the application, the Respondent takes issue over the manner the Plaintiff seeks to exhibit the evidence for consideration to determine the application. In addition, the Respondent denies most of the averments made by the Applicant in her affidavit in support of the application, contending, that the Applicant has failed to tender sufficient affidavit evidence in support of her application that would sway the court’s decision in her favour.

[11] Having given due consideration to the averments in the affidavit in support of the application, I am inclined to agree with learned counsel for the Respondent, as stated in his written submissions, that the basis for the Applicant’s application for leave to commence proceedings for a property settlement out of time is because she was embroiled in an ongoing negotiation with the Respondent that in the end turned out to have been a futile exercise, and that by then, the two months prescriptive period had lapsed.

[12] In fact, this is borne out by the averments at paragraph 10 and 11 of the Applicant’s supporting affidavit to the application, which in reply, the Respondent avers, that the failure of the Applicant to adduce evidence to support these averments makes the affidavit in support of the application defective. The Respondent also contends, that the affidavit in support of the application is also defective for the reason that the necessary documentary evidence to support the averments made by the Applicant are either not exhibited to the affidavit, or has not been exhibited according to the evidential rules for them to be admitted.

[13] It is the submission of learned counsel for the Respondent, that the Applicant’s deposition that she was in a bona fide negotiation with the Respondent to settle the matrimonial property dispute amicably out of court, and that when all negotiations were exhausted, and it became clear to her that the Respondent is not interested in an amicable out of court settlement, that she filed an application for division of matrimonial property. In

learned counsel's opinion, these "are not justified and does not show good cause as to why the prescribed time limit should be extended for her to file a petition for division of matrimonial property".

- [14] In his submission on the law's position, and to persuade the court that the application should not be granted, learned counsel for the Respondent seeks to argue, that since 14 months have lapsed since the decree nisi was made absolute, then clearly, there has been disobedience of the law by the Applicant which the court should not condone. Learned counsel relies on case law authorities to emphasise, that rules are there to be complied with, and that is supported by the case of Nyaro v Zading (YL 124 of 2015) [2016 NG CA 10] (28th July 2016) for example when Onalaja, JCA stated the following;

"The law, no doubt, is that rules of court should be obeyed".

Learned counsel also cites the case of Lablache De Charmoye v Lablache De Charmoye SCA 9 of 2019, SCSC 34 (17th September 2019) in which case the court had said the following;

"Rules cannot be overlooked for the sake of expedience or simplicity because rules are to be followed".

In essence, therefore, it is the submission of learned counsel for the Respondent, that the rules should be strictly followed, and having not followed the rules, the court should not grant the Applicant leave to file its petition for a property adjustment order out of time.

- [15] It is also the submission of learned counsel for the Respondent, that the affidavit upon which the Applicant relies on for the relief being sought for is defective. Learned counsel submits, that affidavits are sworn evidence that have to be in compliance with the law of evidence for the evidence to be admissible. Learned counsel cites several case law authorities in support of such proposition, including the case of Daniella Lablache De Charmoye vs Patrick Lablache De Charmoye (Civil Appeal SCA MA 08/2019, SCSC 35 (17th September 2019) quoting Twomey, CJ (as she then was) as having said the following;

“Affidavits are sworn evidence and the evidential rules for admission cannot be waived”.

[16] To argue that the supporting affidavit to the application is defective because it flouts the law of evidence, learned counsel submits, that the affidavit simply contains averments that are not supported by evidence, and that the evidence, if any, ought to have been exhibited to the affidavit. Learned counsel cites few case law authorities on the proposition to emphasise the legal position of affidavit evidence in this jurisdiction, which proposition was also emphasised by Carolus J in Savoy Development Limited and Davi Todorova and Yuriy Nesterenko MC 112/2020, MA 30/2021 and MA 31/2021 (arising out of MC 11/2020 and MC 20/2021).

[17] To further emphasise the legal position of affidavit evidence in this jurisdiction procedural law, learned counsel for the Respondent cites the case of Lablache De Charmoye (Supra) in particular, the statement made by Robinson JA, who inter alia, stated the following;

“In Re Hinchcliffe, a person of unsound mind, deceased [1895] 1 CH, 1117, the Court of Appeal held that any document to be used in combination with an affidavit must be exhibited to and filed with it. In the same light, any document to be used in combination with an affidavit in support of an application [to stay execution] must be exhibited to and filed with it. Counsel for the Applicant should be mindful that the affidavit stands in lieu of the testimony of the Applicant”.

[18] Therefore, it is the submission of learned counsel, that the averments in the affidavit in support of the application should have been substantiated by the necessary evidence and that to comply with Practice Direction 32 of the White Book, the Applicant producing evidence as exhibits should have stated, “there is now shown to me marked the (description of the exhibit) and the numbering of the exhibit”. In that regard, learned counsel maintains, that the Applicant has not substantiated her averments by exhibits, and as such, these averments are simply “blank averments which do not in themselves demonstrate good cause”.

- [19] It is noted, that it is on record, that although learned counsel for the Applicant was given ample opportunity to make oral or written submissions on the factual and legal issues relevant for the purposes of determining this application, he failed to do so.
- [20] I have put the Applicant's affidavit in support of her application for leave to great scrutiny in the light of the factual and legal issues raised by learned counsel for the Respondent. I note that the crux of the Applicant's case for leave to file her petition for a property adjustment order out of time rests on the averments in her affidavit that she did engage in a negotiation with the Respondent because she wanted that they negotiate a settlement amicably, and that it was after she realised that a settlement cannot be reached that she proceeded to file a petition for a property adjustment order from the court.
- [21] I note, nonetheless, that although learned counsel for the Respondent takes issue with the fact that the averments made by the Applicant in her affidavit in support of the application are not substantiated by real evidence, he seems to put greater emphasis on the affidavit itself, which he argues is defective because it doesn't comply with the rules of evidence. The law governing affidavit evidence, both under statute and common law (case law) has been correctly laid down and discussed by learned counsel for the Respondent in his written submission that I find no room for disagreement, or to venture into a repetition of what the law is in this area.
- [22] As the law stands, I am in agreement with the Respondent, that the affidavit which the Applicant seeks to rely on in support of her application for leave to file her petition for a property adjustment order out of time is defective, in that, it doesn't lay before the court the evidence required in the shape or form that the rules allow to enable this court to grant the relief being sought for. Interestingly, the exhibits which are intended to be used as evidence for consideration are not exhibited to the affidavit in support of the application as averred by the Applicant.
- [23] In the final analysis, for the reasons discussed in the preceding paragraphs of this ruling, this application is dismissed with cost awarded to the Respondent.

Signed, dated and delivered at Ile du Port on 17 January 2024.

Adeline J