

**Amina Khatib, ex parte
(2002) SLR 113**

Melchior VIDOT for the Applicant
Philippe BOULLE for Michel Hoareau (Party noticed by Court).

Ruling on plea In limine litis delivered on 3 October 2002 by:

PERERA J: This is an application for appointment of guardian pursuant to Article 402 of the civil Code.

The Applicant is the maternal aunt of Nelson Jules Hoareau, a minor, born in Seychelles on 10 December 1992. The natural mother of the child, one Georgette Andrade died in Kenya on 18 September 2000. The father, who has acknowledged the child, is resident in Seychelles.

It is averred that when the mother passed away, the minor child, who was also in Kenya remained in the care and custody of one Michelle Van Togeren, a half-sister of the said deceased, who was also residing in Kenya. It is further averred that in November 2000, the child was handed over to the Applicant who is presently resident and domiciled in Dubai, and that the child is still in her care and custody. The Applicant avers that the father of the child has never shown any interest in the child nor maintained him. It is also averred that he is an alcoholic and often displays aggressiveness and hence was not person who could make a sound judgment in the interest of the child. The Applicant also avers that he, by an affidavit dated 28 September 2000 granted guardianship of the child to the said Michelle Van Togeren.

Michel Hoareau, the father of the minor child on whom notice of this application was issued at the instance of Court, has raised two points in limine litis. They are –

- (1) The applications discloses no cause of action
- (2) The application is incompetent as it should have commenced by plaint and not by ex-parte application.

Ex-Parte Applications – Procedural Regularity

I shall first consider the second ground which is based on procedure. In the case of *Ex parte Margitta Bonte* (CS 111/97) the Applicant sought a declaration that she was the owner of a property by virtue of a judgment of the Seychelles Court of Appeal. The Court granting the declaration ex parte held that she was the rightful owner of the property “to the exclusion of the world”. However two persons who were claiming rights to the property were not made parties to the application. The Court of Appeal (SCA 36 of 98 – judgment delivered 15 April 1999) held inter alia thus –

The procedure adopted by the Respondent to invoke the jurisdiction of the

Supreme Court to grant a declaratory relief is not only unknown to the law, but also contrary to the clear provisions of Section 23 of the (Code of Civil Procedure). Besides it is clear that such proceedings which may affect the rights and interests of others should not have been conducted ex-parte. It is not enough to say that others have no title, rights or interests or that they may have no reasonable defence to the action It is for the Court and not for the Plaintiff or Applicant to determine whether or not the other parties have any reasonable defence.

Section 23 of the Code of Civil Procedure provides that every "suit" shall be instituted by filing a plaint. Section 2 defines, a suit or action as a civil proceeding commenced by a plaint. A "cause" includes an action, suit or other original proceedings between a Plaintiff and a Defendant "matter" includes every proceeding in Court not in a cause. Therefore in the Code of Civil Procedure, any reference to "suit", "action" or "cause" would involve proceedings inter partes, as they are proceedings for the prevention, or redress, of a wrong. Hence in such proceedings there being a lis between the parties, the suit, action or cause should have a Plaintiff and Defendant But when can a person invoke the jurisdiction of the Court ex parte? Obviously, it is when there is a "matter" which does not involve a dispute between two parties which requires adjudication by Court. It has been the practice of this Court to entertain ex-parte applications, and to register them under the category of "Chamber side" as distinct from "civil side". Such applications have been mainly for purposes of appointing an executor under Article 1026 of the Civil Code, confirming the appointment of an executor in a will under Article 1025, the appointment of a guardian in different situations set out in Chapter II of the Civil Code, or the opening of a holograph will under Article 1007. In all these matters the Applicants do not seek a remedy to any grievance, but merely an exercise of the inherent or equitable powers of Court which can be done in Chambers on a consideration of the averments or evidence of one party without violating the fundamental right to a fair and public hearing as guaranteed in Article 19(1) of the Constitution. But where even in such matters, the rights and interests of others are affected or likely to be affected in a way that the Court would be called upon to adjudicate any disputed issue, then it would become a "suit" or "action" which should commence by a plaint as provided in the Code of Civil Procedure. This was done in a similar application under Article 402, before this Court in *Gilberte Morel v Jeanine Morel* (CS 172/90). In that case the maternal grandmother of the minor child sought guardianship over the natural mother, who was her own daughter. It was averred that the Respondent, the natural mother abandoned the child in her care since he was 4½ months old. The natural mother was a semi cripple who could not properly look after the child. However she resisted the application and claimed that she could look after the child with the help of her husband. The Court considered the interest of the child and granted guardianship to the Applicant grandmother. In that case, the Applicant in anticipation of the contest chose, and correctly so, to file an application inter partes. On the other hand, there may be circumstances when an ex-parte application may be entertained despite the rights and interests of others being affected. In the case of *Ex parte Rohomon* (1992) MR 122 consequent to a decree of divorce being granted, the Court granted custody of a minor child to the mother. She took the child overseas and

did not return. The father applied *ex-parte* for the variation of the custody order. The Court followed with approval the decision in the case of *In Re D (A minor)* [1992] 1 All ER 892, which dealt with an *ex parte* application in similar circumstances. In that case Balcombe LJ stated:

The other matter is that this application is made ex-parte. It would have been, I suppose, theoretically possible for the father to have applied for leave to serve the application on the mother out of jurisdiction, and then, I suppose, one anticipates the mother would not have turned up on the hearing. ... It seems to me that the mother's position can be quite properly protected by this Court making the order and giving the mother leave to apply to discharge it upon 48 hours written notice to the father.

In the *Rohomon* case (supra), the Court posed the question as to whether the filing, of an *ex-parte* application when notice can be served on the mother out of Jurisdiction “debars the Applicant from obtaining the order prayed for because of what appears to be a procedural defect in the proceedings?” and then answered it by relying on the above authority and holding that an *ex-parte* application was not a bar. The Court however, on the facts of that case revoked the custody order without reserving the right of the mother to apply for its discharge, as was done in the English case.

Ex parte applications are particularly appropriate when invoking the equitable jurisdiction of this Court under Section 6 of the Courts Act (Cap 52). That section provides that:

The Supreme Court shall continue to be a Court of equity and is hereby vested with powers, authority, and jurisdiction to administer justice and to do all Acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by law.

If therefore an *ex parte* application is made on any matter for which the law has provided a specific procedure, equitable jurisdiction cannot be sought by way of such an application. In Mauritius, Section 16 of the Courts Act (which corresponds to Section 6 of our Act) has been strictly applied in such cases. In the case of *Ex parte de Labauve d'Arifat* (1944) MR12 the agents of a testator, as well as of the universal legatee, filed an application under the Curatelle Act for payment of special legacies in the will on the ground that if they remain unpaid the universal legatee would be liable to pay interest and eventually the testamentary will would be reduced *pro tanto*. The Court held that equitable powers could not be exercised where an order would in effect supplement the powers of the Applicant and the universal legatee. So also in the case of *Ex parte MTG Citta* (1998) MR 347 [?], an *ex parte* application was made to appoint a provisional administrator to a person, who due to illness, could not speak and was incapable of administering his own affairs. The Court held that equitable powers vested in the Court under Section 16 of the Courts Act could not be used as there was another remedy for interdiction. That procedure required that the person whose interdiction is sought, be made a Respondent and that the Attorney-General be noticed.

Section 2 of the Seychelles Code of Civil Procedure defines "Court" as meaning "the Chief Justice or the Puisne Judge sitting in Court or Chambers". Hence the practice of the Court to entertain ex-parte applications on the "Chamber side" appears to have originated to deal with purely uncontested or uncontestable matters which do not fall within any specific procedure laid down in the Code of Civil Procedure, and where the granting of relief does not affect the rights and interests of others.

However in practice, the Court has ex mero motu issued notice on persons likely to be affected by ex-parte applications or whose presence is required for a proper determination of the matter. Hence in the case of *Marie-Alise Quilindo v Jude Monnaie* (CS 149 of 1992) the Plaintiff sued the Defendant for legal guardianship of their natural child who was a minor, and for maintenance. Although the matter had commenced as a Civil Suit or Action, the Registrar, following practice of Court, issued notice on the Attorney General and Director of Social Services. Objection was raised by the Counsel for Plaintiff as regards the locus standi of the two persons noticed. As Presiding Judge I ruled that since the Court had power to refer such matters to the Ministère Public under Section 150 of the Code of Civil Procedure, the practice to notify the Attorney-General and his presence at the hearing were proper, and also as the Court in such matters is required to have regard to the welfare of a child, and could call for a Social Inquiry Report, the presence of the Director was also proper. In the present matter too, a judge in Chambers has directed that notice be issued on the father of the minor child who has now filed an answer as a "Respondent", and also on the Attorney General. Hence there is no danger that the Court would make any order without hearing the matter inter partes. Although ground 2 of the plea has merit, procedurally, the filing of an ex parte application alone is not fatal, as by practice of Court, the necessary parties needed for a proper determination of the matter canvassed therein are now before Court. Hence no useful purpose will be served by insistence on form, other than to delay on the vital issue of guardianship of a child presently living in a foreign country.

Does this application disclose a cause of action?

In the present matter, Article 402 of the Civil Code, under which the application has been made, provides that "when no guardian is appointed to a minor by his parents or the survivor of them, the guardian shall be appointed by the Court". Article 392 provides that "a person entitled to appoint a guardian of minor children may do so, first by a last will, or second, by a declaration made before a Judge or before a notary". In paragraph 2 of the application it is averred, inter alia that the father of the minor child has acknowledged the child and is resident and domiciled in Seychelles. In paragraph 5 of the application it is averred that he, by an affidavit dated 28 September 2000, granted guardianship of the child to Michelle Van Togeran, the half-sister of the child's natural mother.

Article 390 is as follows:

After the dissolution of marriage caused by the death of either of the spouses, the guardianship of minor children who have not been

emancipated shall belong as of right to the surviving spouse.

Article 394 provides that:

Illegitimate children shall have a guardian in the same manner as legitimate children...

Hence where the mother dies, the father of a legitimate or illegitimate child shall have guardianship, as of right. If the affidavit dated 28 September 2000 has been executed in compliance with Article 392, the appointment may be valid, as Article 397, provides that "a guardian appointed by the parents or the survivor of them may be a relative or a stranger". Article 401 provides that "if the guardian who is appointed does not wish to act, the Court shall have authority either to compel him to act or to appoint another.

A judicial appointment under Article 402 arises when the parents had not appointed a guardian. As both parents have guardianship as of right whether the child is legitimate or illegitimate, such an appointment is made when both parents are dead. In the present case, whatever may be the character or conduct of the father he retains guardianship as of right. However, the Court has wide powers to act in the interest of the child. In the *Morel* case (supra) the grandmother was granted guardianship over the right of the natural mother of the child.

However in the case of *Ex parte Helene Hoareau* (Chamber Side no. 11 of 1990) the Applicant was the paternal grandmother of a minor child. It was averred that the natural mother left the child who was 1 year old in the custody of the Applicant and left for the United Kingdom. Six years later, the Applicant sought guardianship of the child as the mother had not returned.

Upon notice being served on the NCC, the mother was traced in UK. She had married and settled down there. She disclosed that the child was left with her own mother and not with the Applicant. The child was with the Applicant for schooling convenience. The child's mother and her sister were joined as intervenors to the application. The mother averred that she could give the child a better life and a good education in the United Kingdom. The Court held that by virtue of Article 394(2) the natural mother was the guardian as of right, and as there was nothing to show that she was unable to look after the child properly, the application was dismissed.

In an affidavit dated 16 August 2001, the Applicant in the present case has averred inter alia that she requires the guardianship to be granted so that she may make a decision in connection with his residence with her in Dubai. Hence, it could not be said that the Applicant per se has no cause of action, as the issue of guardianship remains to be decided by Court with the interest of the child being given paramount consideration. In such enquiry, the issue as to whether the father is a fit and proper person to have guardianship would arise for consideration.

Hence the application shall proceed to hearing on merits.

Ruling made accordingly.

Record: Civil Side No 158 of 2001