IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] Civil Appeal SCA 35/2020 SCCA 77 (16 December 2022)
(Appeal from CS 253/2008 SCSC 366)

In the matter between

PRISCILLE CHETTY — **First Appellants**

ELVIS CHETTY — **Second Appellant**
(rep. by Mr. B. Hoareau)

and

MERSIA CHETTY — **Respondent**
(rep. by Mr. C. Andre)

Neutral Citation:	*Chetty & Anor v Chetty* (Civil Appeal SCA 35/2020) [2022] SCCA 77 (16 December 2022) (Appeal from CS 253/2008 SCSC 366)
Before:	Andre, Twomey-Woods, Dr. L. Tibatemwa-Ekirikubinza JJA
Summary:	Appeal against a decision of the Supreme Court – Succession – *quotite disponible* – plea *in limine litis* commencement of proceedings against incorrect defendants – failure to disclose a cause of action – determination of *quotite disponible* in the absence of the proven value of the estate – relief sought cannot be claimed against the respondents - insufficient evidence to determine the value of the *quotite disponible*
Heard:	5 December 2022
Delivered:	16 December 2022

ORDERS

The Court makes the following Orders:

(i) The appeal succeeds on Ground 1. The decision of the learned Judge in respect of the conditions set on dismissing the plaint, namely *(i) six months period to file a new suit; and (ii) non-execution of Will until the expiration of a period of six months within which no fresh proceedings have been initiated and if proceedings have been initiated until the conclusion of such proceedings, in the impugned judgment,* are set aside.

(ii) No order is made as to costs.

JUDGMENT

ANDRE, JA

INTRODUCTION

[1] This is an appeal arising out of the notice of appeal filed on the 10 August 2020 by Priscille and Elvis Chetty (together referred to as Appellant) against Mersia Chetty (Respondent), being dissatisfied with the decision of Judge G. Dodin given at the Supreme Court on the 2 July 2020 in Civil Side No. CS No. 253 of 2008 dismissing the plaint of the respondent but with the following conditions; namely, *"(i) the plaintiff shall not be prescribed from filing fresh proceedings against the proper defendants within a period of 6 months from the date of this Ruling; and (ii) The defendants in their capacities executors shall not execute the Will until the expiration of a period of 6 months within no fresh proceedings have been initiated and if proceedings have been initiated until the conclusion of such proceedings"*.

[2] The Appellant as per cited notice of appeal, appeals against the part of the decision upon the grounds of appeal set out in paragraph 2 of the notice of appeal and to be considered in detail below. The Appellant further seeks the relief set out in paragraph 3 of its notice of appeal namely, the quashing of the impugned judgment and consequently hold that the Plaint is dismissed.

BACKGROUND

[3] The main issues which were canvassed by the Respondent (Plaintiff in the lower court) was that as the child of the deceased, she was entitled to a reserved portion and the extent of the same in the deceased's estate. The Appellant (Defendants in the lower court) raised a plea in limine litis to the effect that the parties who ought to have been sued by the Respondent were the heirs who will in fact suffer reduction and not the executors of the deceased's estate. The parties pleaded and submitted on both the plea *in limine litis* and the merits of the case.

[4] The plea *in limine litis* was upheld and the plaint was dismissed with two conditions. The first condition was in respect of prescription, in that the Respondent would not be prescribed from filing a new suit against the proper defendants within a period of 6

months. The second condition halted the execution of the deceased's Will until the 6 months stipulated in the first condition expired and no fresh pleadings had been filled.

[5] It is against this background that this appeal arises.

GROUNDS OF APPEAL

[6] The Appellant has approached this Court with two grounds of appeal which read as follows:

> "*Grounds of Appeal*
>
> 1. *The learned trial judge having dismissed the Plaint on the plea in limine litis that the Plaint had been instituted against the wrong defendants, erred in law in granting the Respondents six months from the date of the judgment to institute fresh proceeding against the proper defendants and in ordering the Appellants in their capacities as executors not to execute the Will until the expiration of a period of 6 months from the date of judgment and if proceedings have been initiated until the conclusion of such proceedings (hereinafter the contested decision) in view that-*
>
> *i. the cause of action of the Respondent was already prescribed on the date of judgment;*
> *ii. the contested decision was ultra petita; and*
> *iii. the contested decision was made in breach of the right to fair hearing of the Appellants as the learned trial judge never granted the Appellants the opportunity to address the court in respect of the contested decision.*
>
> 2. *The learned trial judge having heard the case on the merits and having determined that, the Respondent had failed to lead evidence on the total value of the estate of the late Mariapen Srinivasan Chetty, and that there was no evidence for the court to grant reliefs sought by the Respondent, erred in law in failing to also dismiss the plaint on the merits."*

[7] The Appellant seeks the quashing of the conditions set by the trial judge and for this court to simultaneously hold that the Plaint is dismissed.

SUBMISSIONS OF PARTIES

Appellant's Submission

[8] By way of submissions of 23 November 2022, the Appellant in a gist submits as follows.

[9] With regards to the first ground of appeal, the Appellant submits that the cause of action instituted by the Respondent was one of reduction, of an alleged excessive disposition, on the basis that the late Mr Mariapen Srinivassen Chetty had, by Will, exceeded the disposable portion he was entitled to and to gratuitously dispose of. Reference is made in the above regards to Articles 920, 2271; and 2219 of the Civil Code of Seychelles Act, 1976 (Cap 33) (which articles are applicable to the present case). It is thus submitted that the right to institute a cause of action on the basis of the reduction comes into existence from the opening of the succession.

[10] Further, that in the present case the succession of the late Mariapen Srinivassen Chetty opened upon his death on 12 July 2007, as averred at paragraph 7 of the Plaint. That therefore, any possible cause of action for reduction, on the basis that the late Mariapen Srinivassen Chetty had gratuitously disposed in excess of the disposable portion, came into existence on 12 July 2007. Consequently, it is submitted by the Appellant that the right of the respondent to institute any action on the basis of reduction became prescribed by 12 December 2012.

[11] It is also submitted that extinctive prescription as provided by article 2219 of the Civil Code means a person has lost his rights due to lapse of time. As such, the court has no power or right whatsoever to revive a right which has been lost by way of prescription. It is therefore submitted that the learned Judge erred in law when he ordered that *"the plaintiff shall not be prescribed from filing fresh proceedings against the proper defendants within a period of 6 months from the date of this Ruling"*.

[12] It is further submitted by the Appellant, that the order of the learned trial Judge granting the respondent the opportunity to institute a fresh plaint was *ultra petita*. The court was referred to the case of *D'offay v/s Attorney General [1978-1982] SCAR 81*, wherein this court, in its majority judgement, made the following observations-

> *"[C]ould then damages have been or be awarded (on the assumption that there was evidence-which there is not-of the damages suffered by the Appellant)?*
>
> *By a curious coincidence, the same situation arises here which arose in the case above referred to, reported in D.P. 1910.1.517. In note 3 to the judgment the Arretiste observes:*
>
> > *"La cour n'ayant pas ete saisie de conclusions tendant a l'allocation de dommages-interests pour le cas ou la convention des parties ne recevrait pas son execution ne pouvait prononcer une condamnation de ce chef sans que son arret tombant sous l'application de l'art. 480-3 C.Pr Civ. L'allocation de dommages-interests auxquels il n'a pas ete conclu constitue, en effet, une cuase de requete civile".*
>
> *An award for damages by the trial Court would for the same reason have been ultra petita".*

[13] It is submitted that in accordance with *D'offay* the court could not have awarded damages.

[14] In the same light, reference is made to the case of *Tex Charlie v/s Marguerite Francoise- Civil Appeal No. 12/1994-* which is also relevant. In that case, the respondent had sued the appellant on the basis that she had a proprietary right in the matrimonial home. However, the trial judge awarded damages to the respondent on the basis of unjust enrichment (action *de in rem verso*). In essence, the trial judge awarded judgment in favour of the respondent on the basis of a cause of action, which had not been pleaded.

[15] In *Charlie v/s Francoise* the court of appeal held thus:

> "*the system of civil justice in this country does not permit the court to formulate a case for the parties after listening to the e evidence and to grant a relief not sought by the parties that such evidence may sustain without amending the plaint. In the adversarial procedure the parties must state their respective cases on their pleadings …."*.

[16] It is additionally submitted, that the Charlie case was quoted with approval by the court of appeal in the case of *Vel v/s Knowles, Civil Appeal No. 41 and 44 of 1998*. The Court of Appeal held thus-

> *"It has recently been held in the as yet unreported case of Charlie v. Francoise [1995] SCAR that civil justice does not entitle a court to formulate a case for a party after listening to the evidence and to grant relief not sought in the pleadings. He was of course at pains to find an equitable solution as to*

do justice to the respondent but it was not open to him to adjudicate on issues, in particular the re-conveyance which had not been raised in the pleadings".

[17] Reference is also made to the most recent case of *Lesperance v/s Larue SCA 15/15,* wherein the Court of Appeal reiterated the fact that a court cannot formulate the case for a party. It is thus submitted that in making the order, granting the respondent the opportunity to institute a fresh suit, the court granted the respondent a relief which had not been prayed for.

[18] It is also submitted that the learned judge made the orders despite the fact that the appellants were not granted the opportunity to address the learned trial judge in respect of the issue of allowing the respondent to institute a fresh suit. This matter was not a live issue during the hearing and the making of the order was a breach of the right to a fair hearing of the appellants. Reference is made to the case of *Marie-Claire Lesperance v/s Jeffrey Larue* wherein this Court observed-

> *"21. [T]he learned Trial Judge by deciding the case in favour of the Respodent on the basis that he "may have acquired a right as a statutory tenant", when such was not pleaded by the respondent and when it was not a live issue before the Court; had certainly breached the Appellant's right to a fair hearing enshrined and entrenched in article 19 (7) of the Constitution, as she was not given an opportunity to address the Court on that issue"*.

[19] With respect to the second ground of appeal, it is submitted that after reviewing a number of authorities, the learned trial judge came to the following findings-

> *"[31] [T]he question therefore is whether the Court has enough facts before it to grant the prayers sought by the Plaintiff. On a review of the pleadings, evidence and submissions that answer is in the negative"*.

[20] It is thus submitted that the learned trial judge ought to have dismissed the plaint on the merits having clearly come to the findings that the plaintiff had not sufficiently pleaded, nor adduced sufficient evidence, in respect of the value of the assets of the late Mariapen Srinivassen Chetty to prove her case.

[21] The appellants thus pray for the quashing of the contested decision and to consequently dismiss the plaint.

Respondent's Submissions

[22] By way of submissions of 22 November 2022, the Respondent in a gist submits as follows.

[23] With respect to the first ground of appeal, the respondent submits that the learned judge was correct in granting the respondent time to file fresh proceeding against the proper defendants and to order the appellants in their capacities as executors not to execute the Will until the expiration of the period of 6 months from the date of the judgment and if proceedings have been initiated until the conclusion of such proceedings.

[24] It is submitted in support of the above argument that this is clear from the plaint in praying for orders of the court:

> *"vi. To make any such orders as the court may think fit in adjustment of the succession to incorporate the Plaintiff into the class of lawful heirs of the deceased in order to realise her entitlement to the estate."*

[25] It is submitted that the plaint had been filed before it was prescribed and this is confirmed in ground 1 (i) of this appeal when the appellants confirmed that the action of the respondent was already prescribed on the date of the judgment and not at the time of filing the case. So it is clear that the prescription was interrupted by the filing of the case.

[26] It is further submitted that the contested decision is not *ultra petita* as it is clear that the court has power to make any decision as pleaded for in the prayer. That it would have been *ultra petita* if it was not pleaded for.

[27] It is additionally submitted that the appellants had a fair hearing as the case was heard and evidence lead by all parties as well as documents produced to the satisfaction of the court for it to make the contested decision.

[28] In answer to the second ground of appeal, the respondent submits that the court was indeed right in not dismissing the plaint on merit as it had ordered the respondent to file a case against the appellant within 6 months. Therefore if it had dismissed the plaint on the merits it would not have been able to make the order which it rightly did and it is therefore legal in all the circumstances.

[29] In oral submissions, counsel for the Respondent asked the Court to rely on the case of *Essack v Morel (10 of 2020) [2022] SCCA 49 (19 August 2022)* which according to him, is illuminating on the *ultra petita* principle. This Court does not consider *Essack v Morel* relevant to the present case because the latter is a company law case in which the appellant was arguing that lifting the corporate veil must be petitioned for and therefore where a court does so without a petition, it is *ultra petita*. This Court disagreed with the appellant because one does not need to petition for lifting the corporate veil, but simply plead the facts that would lead the court to do so. The case does not illustrate the principle of *ultra petita* as submitted by counsel.

[30] The respondent prays for the dismissal of the appeal with costs and to allow the respondent to perform the decision of the Supreme Court.

ANALYSIS OF THE GROUNDS OF APPEAL

[31] The grounds of appeal shall be considered in the order as they appear on the notice of appeal and addressed in the submissions.

GROUND 1

[32] The essence of ground 1 is that while the plaint was dismissed, the conditions set thereafter are an error in the law in three ways. First, the action of the Respondent was prescribed on the day of the judgment and essentially, to have a condition that extends the prescription period by 6 months is wrong. Second, it is the contention of the Appellant that the Respondent had not pleaded in favour of the conditions set and the court in imposing any conditions to a dismissed plaint, acted *ultra petita*. Thirdly, the conditions set in respect of halting the execution of the Will is wrong as it was imposed without giving the Appellant the opportunity to address the court on it.

[33] In my view, this Court must first consider what legal provisions the trial Judge relied on to find the power to set conditions. In essence, what is the legal basis on which the learned Judge acted? If there is a legal basis, I will proceed to deal with the contention of the Appellant that the conditions themselves are erroneous based on the three things indicated above. This is because the legal basis on which the Judge would have acted would have been improperly applied if it ran contrary to the rules of prescription, was *ultra petita* and without regard of natural justice of being heard as

submitted by the Appellants. If however, there is no legal basis on which the trial judge acted, then I need not consider the contention of the Appellant that the conditions were erroneous because such conditions were made with no legal basis.

[34] It is not contested that the learned Judge gave reasons why the *plea in limine* would succeed and upon which he subsequently dismissed the Plaint. What is contested is the conditions he proceeded to impose. On a closer reading of the judgment at paragraph [23], the learned Judge draws in on the equitable powers of the court. It is from those equitable powers that he went further to impose conditions in respect of an extension of time to institute new proceedings and simultaneously halt the execution of the Will. The question which this Court will have to answer is whether this was the correct approach to be adopted by the learned judge.

[35] Equitable powers of the Court are there to assist where there is no legal remedy available to a party. This Court has affirmed this through the cases of *Gill & Ors v Film Ansalt (SCA 28 of 2009) [2013] SCCA 11 (03 May 2013); Allied Builders (Seychelles) Limited v Resort Development Limited (SCA 10 of 2016) [2018] SCCA 25 (30 August 2018)* among others. In the present case, were there no sufficient legal remedies available to the Respondent such that the circumstances that would enable the court to exercise its equitable jurisdiction? If there were none, then indeed equity might have come to the aid of the Respondent. If however there were sufficient legal remedies for the Plaintiff to cure any defects in the suit, then the trial court ought not to have not resorted to its equitable powers.

[36] The point of law raised by the Appellant in the lower court was to the effect that the parties who ought to have been sued were the heirs who would in fact suffer reduction and not the executors of the deceased's estate. At that juncture, the rules pertaining to joinder of parties to a suit were available to the Respondent. The Respondent could have filed a motion to join parties in terms of section 112 of the Seychelles Code of Civil Procedure which reads:

> *"**The court may at any stage of the proceedings**, either **upon** or without **the application of either party**, and on such terms as may appear to the court to be just, **order that the names of any persons improperly joined**, whether as plaintiffs or defendants**, be struck out, and that the names of any parties**, whether plaintiffs or defendants, **who ought to have been joined**, or whose presence before the court may be necessary **in order to enable the court***

effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter*, be added."*

[Emphasis added]

[37] The essence of the above cited provision, as bolded for my own emphasis, is that at *any* stage of the proceedings a party may file an application for joinder of parties who must be parties to the suit in order for the court to properly adjudicate and settle the case before it. Applying this provision in the present case, the Respondent did have a legal remedy available under section 112 of the SCCP. As such, it was not necessary for the Court to employ equity in order to impose the contested conditions.

[38] In the circumstances, I find that the learned Judge erred in relying on the equitable powers of the court to set conditions which are presently contested by the Appellant. However, the analysis goes further in view of the arguments raised by the Respondent that he had prayed that the Court make any order it thinks necessary in the circumstances and on the reliance of *Jean Jacques Leveille* (*Leveille v Pascal* (SCA 5 of 2004) [2005] SCCA 7 (20 May 2005)). Suffice it to say, the circumstances in *Jean Jacques Leveille* differ from the present case. This is because in the former case, the party prayed for *'any order as the Court thinks fit'*, while in the present case, the party prayed for *'any such other orders as the Court may think fit in adjustment of the succession to incorporate the Plaintiff into the class of lawful heirs'*. The former is open-ended, while the latter is qualified and specific.

[39] The term 'any such orders' is often invoked by counsel in their prayers. The term is not envisaged in both procedural and substantive laws of this jurisdiction. Presumably, it is used to appeal to the conscience of the court to make orders it deems just and appropriate in the case before it. However, I do not think the term is available for the court to make orders where there is no legal basis to make such an order. For example, in the present case, there was no legal basis on which the learned Judge could have acted to set conditions as he did. While he relied on the equitable powers of the Court under section 6 of the Courts Act, this was erroneous because equity is only invoked where there is no statutory provision to assist a party. I also find that the discretion in 'any such order' must be exercised judiciously so as to avoid making a case for parties.

[40] Having found that there was no legal basis on which the learned judge could have relied on to set conditions, I do not find it necessary to engage at length with other matters considered an error in law: namely prescription, *ultra petita* and breach of fair hearing.

[41] As such, ground 1 succeeds.

GROUND 2

[42] It is the contention of the Appellant that the trial judge ought to have dismissed the plaint on its merits. According to the Appellant, the dismissal of the Plaint was dictated by two things. First, the trial judge heard the merits of the case. Second, the trial judge went on to determine that the Respondent had failed to lead evidence on the value of the estate and that there was not enough evidence to grant the reliefs sought. In support of this, the Appellants submit that the learned Judge made some findings on the merits of the case to the effect that the Respondent had neither pleaded nor adduced sufficient evidence to prove her case. Therefore in the circumstances, the learned Judge ought to have dismissed the Plaint.

[43] The Respondent on the other hand considers that the learned Judge was correct in not dismissing the Plaint because had he done so, it would have prevented him from making the order as he did, and in particular, the condition that new proceedings could be instituted within six months.

[44] On a closer reading of the judgment, I note that learned Judge Dodin said, at para [25]:

> *"…Having upheld the plea in limine litis on the grounds above, albeit with conditions,* ***a determination of this point would be purely academic****. However, I shall express my opinion on the same so that the parties may, if they so wish, take guidance should the matter be pursued further."*
>
> [Emphasis added]

[45] It is clear to me that following the upholding of the plea *in limine litis*, any discussion on the merits of the case was purely academic. I am of the view that judges must have the liberty to express views and opinions because such is in itself is *obiter* and useful

in the broader jurisprudential development of our legal system. However, in expressing opinions and engaging with issues academically, judges must caution against making findings that might exhaust issues at hand and lead to grounds and prayers as in the present case.

[46] In view of the above, I find no merit in ground 2 because it is clear the learned judge was expressing an opinion and had in any regard dismissed the plaint on a plea *in limine litis.*

DECISION

[47] Given the circumstances, the appeal succeeds on ground 1. In the result, the decision of the learned Judge in respect of the conditions set on dismissing the plaint, *namely (i) six months period to file a new suit; and (ii) halting of execution of Will, in the impugned judgment,* are set aside.

ORDER

[48] In conclusion, this Court orders as follows:

(a) The appeal succeeds on ground 1. The decision of the learned Judge in respect of the conditions set on dismissing the Plaint, namely *(i) six months period to file a new suit; and (ii) non-execution of Will until the expiration of a period of six months within which no fresh proceedings have been initiated and if proceedings have been initiated until the conclusion of such proceedings, in the impugned judgment,* are set aside.

(b) No order is made as to costs.

Signed, dated, and delivered at Ile du Port on 16 December 2022.

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S. Andre, JA

I concur _____

Dr. Twomey-Woods

I concur _____

Dr. L. Tibatemwa-Ekirikubinza, JA