IN THE SEYCHELLES COURT OF APPEAL

Reportable
[2022] SCCA 14
SCA 54/2019
(Arising from Ex-Parte134/2017)

In the matter between

MIRANDA ESPARON **Appellant**
(rep. by Sundaram Rajasundaram)

and

ALEXIS MONTHY **Respondent**
(rep. by Divino Sabino)

Neutral citation:	*Esparon v Monthy* (SCCA 14) (29 April 2022) SCA 54/2019 (Arising in Ex-Parte134/2017 SCSC 727
Before:	Fernando, President, Twomey-Woods and Robinson, JJA
Heard:	13 April 2022
Summary:	sale by licitation-objection- stay of proceedings- grounds of hardship-financial hardship
Delivered:	29 April 2022

ORDER

The appeal is allowed. The stay of the sale by licitation shall operate for a period of 6 months or until the declaration of the shares of the parties' respective shares in the joint property, whichever is the earliest.

JUDGMENT

TWOMEY JA

Background

[1] The parties in this case once lived together as concubines. They purchased a property in Glacis in 1995 with the assistance of a loan from the Mortgage Finance Company. Things soured between them and in 1998 the Respondent, Mr. Monthy was locked out of the

house. Both parties rebuilt their lives and moved on but the issue of the property they had purchased together has been haunting the corridors of the courts of Seychelles for more than a decade.

[2] In the first suit brought in 2010 by the Appellant, Miranda Esparon, an order was sought to have Mr. Monthy's name "erased from all property documents [relating to Parcel H2557] …" the property [to] bear her sole name upon repayment to [Mr. Monthy] of all moneys (sic) paid towards the said housing loan and that [Mr. Monthy] be evicted for the house at Glacis."

[3] In the subsequent decision of the Court of Appeal, ultimately dismissing Ms. Esparon's suit, it was emphasised that where co-owners no longer wish to remain in indivision there are three options available under the Civil Code to them: sale by licitation, partition or an action *de in rem verso* and that these remedies could have been availed of by the parties.

[4] Another six years elapsed before Mr. Monthy brought an application for a sale of the property by licitation.

[5] Ms. Esparon objected to this sale on the grounds of grave hardship under section 102 as read with section 106 of the Immovable Property (Judicial Sales) Act and prayed for the licitation to be stayed.

[6] In a ruling delivered on 4 September 2019, the court *a quo* found that there was no evidence to support the objection on grounds of hardship on the part of Ms. Esparon and that Mr. Monthy would suffer greater hardship if the stay of licitation proceedings was granted.

The appeal

[7] It is from this decision that the Ms. Esparon has appealed on the following grounds:

(1) The learned trial judge erred on the law and on the facts in finding at paragraph 29 of the Ruling that the Appellant would not suffer hardship if the licitation proceedings proceeded and thereby declining to stay and /or dismiss licitation proceedings at

paragraph 31 of the said ruling in that the learned trial judge ignored the compelling circumstance of the Appellant's hardship and the Respondent's own testimony in favour of such stay and /or dismissal under section 106 of the Immovable Property (Judicial Sales) Act.

(2) *The learned trial judge erred on the law and on the facts in finding at paragraph25 of the Ruling "that the Respondent having to vacate the house upon the sale of the property is in essence a natural if not normal process" and thereby ignored the compelling circumstances of the Appellant's hardship and the Respondent's own testimony necessitating the stay and /or dismissal of licitation proceedings on grounds of hardship.*

(3) *The learned trial judge erred on the law in finding at paragraph 26 of the Ruling that hardship suggests some extraordinary circumstance such as in the case of physical disability in order to justify the postponement of sale in that the learned trial judge imposed a higher threshold for hardship than is required under section 106 of the Immovable Property (Judicial Sales) Act.*

(4) *The learned trial judge erred in its determination of the objections on the ground of hardship in that the learned trial judge ignored the following compelling evidence:*

1. *That the Appellant solely repaid the loan for the purchase of the property and made substantial improvements to the said property over the past 22 years.*
2. *That the Appellant faces the risk of eviction in that she does not have any alternative property to move to in the event of the sale of the property as opposed to the Respondent who has his wife's property.*
3. *The Respondent no longer has a medical predicament for the immediate sale of the property.*
4. *The Respondent's testimony that the sale of the property ws now needed so that he could buy a house to take his son to live with him, an adult.*

And gave weight to unnecessary considerations.

(5) *The learned trial judge erred in law and on the facts in making a finding that the Appellant and Respondent were entitled to equal shares in the property at paragraph 28 in that the learned trial judge had no jurisdiction to so in proceedings under section 106 of the Immovable Property (Judicial Sales) Act in view of the dismissal of the objections of the grounds of hardship and in view of overwhelming evidence that the Appellant solely repaid the loan for the purchase of the property and of substantial improvements to the said property over the past 22 years.*

[8] The appeal grounds concern only two issues to be resolved by this Court – whether the grounds of hardship raised by Ms. Esparon constitute grounds grave enough for the sale by licitation to be stayed and whether the court misdirected itself in respect of the shares of the parties in the property when it availed itself of the presumption under Article 816 of the Civil Code.

1. Grounds of Hardship under the Immovable Property (Judicial Sales) Act

[9] It is at this stage proper to set out the law on which the court *a quo* and the parties relied on for their respective decisions and submissions. Sections 106 to 107(2) of the Immovable Property (Judicial Sales) Act provide in relevant part:

> "Application for stay of licitation on grounds of hardship
>
> *106. (1) Any defendant in licitation, may, within the time prescribed in section 103, apply by petition to a Judge for an order staying the proceedings in licitation on grounds of hardship.*
>
> *(2) The provisions of sections 108, 109 and 110 shall apply in the case of an application under this section.*
>
> *(3) The Judge may, after hearing the parties and notwithstanding the provisions of Article 1686 of the Civil Code of Seychelles, make an order staying the proceedings in licitation if he is satisfied that greater hardship would be caused by refusing to grant the order than by granting it.*
>
> *107 (2) Any co-owner of an immovable property may also by petition to a Judge ask that the property be divided in kind or, if such division is not possible, that it be sold by licitation."*

[10] Article 821 of the Civil Code substantively provides as follows:

> *"1. In the case of immovable property held in co-ownership, if the fiduciary or a co-owner decides to proceed to licitation, the court may, upon the application of any interested party, order the postponement of the sale for a fixed period, which may subsequently be renewed…*
>
> *The Court may make such order on two alternative grounds –*

1st That greater hardship would be caused by refusing to grant the order staying the proceedings in licitation than by granting it;

2nd That the property may be conveniently and profitably divided in kind amongst those entitled. In that case the Court, in order to effect such partition, shall decide the manner of partition and the allocation of the divided property amongst the persons entitled."

[11] The Immovable Property (Judicial Sales) Act and the Civil Code are in conformity with each other on the sale by licitation of a property jointly owned. Additionally, while the Civil Code provides the substantive law on the issue, the Immoveable Property (Judicial Sales) Act sets out the procedure for the sale. The provisions under both laws expound the test to be carried out for a stay of the sale.

[12] With regard to the present matter, although Ms. Esparon has brought the objection under both grounds of Article 821 of the Civil Code, as set out above, she only adduced evidence to support the ground of greater hardship being caused to her. Simply stating in her affidavit that the land extends to 1,167 square meters is certainly not enough to convince the court that the land can be subdivided. She would need to bring, at the very least, a land survey report to show that the land could be conveniently divided. In the circumstances, no more needs to be said about the objection to the sale on this ground as it cannot be sustained.

[13] With regard to the provision relating to hardship, the learned trial judge had this to say:

[21] "What is the test for hardship? Effectively the test is will greater hardship be caused to the Respondent if the application for stay is refused or will greater hardship be caused to the Petitioner if the application for stay is granted?

[22] In the case of Appiani v Geers (1995) Civil Side 35 of 1995 the Court found that "the Court has the discretion to adjourn a case at any time before the sale takes place, but the discretion must be exercised judiciously if the applicant shows strong grounds of necessity or expediency."

[23] I note that the Appiani case above arose out of different facts but the principle in my view applies in that the Court must always exercise its discretion judiciously.

[24] On the one hand the Respondent argues that she has contributed the most funds and eviction will cause greater hardship to her whereas on the other hand the Petitioner argues that he needs the money from the sale for medical treatment as well as the fact that the Respondent had failed to bring her case in a timeous manner hence will suffer greater hardship if the application for stay is granted.

[25] The Respondent having to vacate the house upon the sale of the property is in essence a natural if not normal process of separation.

[26] Furthermore, without giving the impression and that is not to say that separation is not a difficult process to go through, hardship suggests some extraordinary circumstance. I take for example a co-owner or a dependent of a co-owner with a physical disability whose house is in a location that's easily accessible and fitted with specialized equipment, in those circumstances to sell the property and move that co-owner out of the property would in my view cause greater hardship than postponement of the sale.

[27] As for the Petitioner, is the Petitioner not suffering greater hardship by not being allowed to liquidate his share in the property after 14 years of going back and forth to Court in addition to another 7 years of inaction by the Respondent? As the Court of Appeal stated in its judgment "he was unlawfully ejected and has not as a co-owner been able to enjoy his property." If the Respondent in fact was concerned about the risks of eviction should she or would she not have sought a declaration of her share as clearly explained to the parties in 2012 by the Court of Appeal? To my mind she was put on notice by the Court of Appeal in 2012 and it was for her to protect herself or for that matter take steps to declare her share since then, as opposed to waiting until the Petitioner attempted to liquidate his share and then object to the Petition.

...

[29] For the above reasons this Court is not satisfied that greater hardship will be caused by refusing the application for stay of licitation proceedings."

[14] If I understand Ms. Esparon's submission, it is that she would suffer great financial hardship if the sale were to go ahead, especially with Mr. Monthy's share in the property being presumed to be equal to hers. She has been in occupation of the property for 22

years, paid off the loan substantially by herself and renovated the house at her own expense. If the sale were to go ahead she would be evicted from the only home she has known and become homeless whereas Mr. Monthy would continue to share the home he resides in with his wife.

[15] On the other hand, while Mr. Monthy does not contest that Ms. Esparon has a greater share in the property than he does, he submits that he has not been able to enjoy the property from 1998, has not derived any benefit from it and that because of his medical ailments he would benefit from the proceeds of the sale of the property.

[16] No definition of hardship is provided in statute. The ordinary dictionary meaning of hardship is the following:

> *"A situation, circumstance, or condition that is unusually stressful, difficult to tolerate, and causes the person(s) experiencing it an undue burden of distress, pain, or financial difficulties."*[1]
>
> *"1: privation, suffering*
> *2: something that causes or entails suffering or privation"*[2]

[17] In view of these definitions, I respectfully cannot agree with the learned trial judge's interpretation of "hardship" to suggest "some extraordinary circumstance". Nor can the interpretation exclude economic hardship. I am of the view that it suffices that evidence of privation or suffering or serious financial difficulties be shown. In the present case, the deprivation of Ms. Esparon of her substantive property right, a right enshrined in the Constitution only to realise and liquidate the small share of a co-owner amounts, to my mind, as hardship on her part.

[1] https://www.oxfordreference.com/view/10.1093/acref/9780191844386.001.0001/acref-9780191844386-e-1863
[2] https://www.merriam-webster.com/dictionary/hardship

[18] Although I agree with the learned trial judge that the test of hardship must be carried out judiciously, I cannot agree that in the balance it falls on the side of Mr. Monthy. I give reasons.

[19] In the case of a division in kind, section 111(i) of the Immovable Property (Judicial Sales) Act provides that the judge with carriage of the sale may "refuse the application for a division in kind … if the rights of the parties are not liquidated". I believe that the hardship proviso in section 106 (3) operates in the same way.

[20] In *Chiffone v Volcere*,[3] in very similar circumstances to this case, the court ordered that the sale by licitation be stayed until the determination of the shares of the parties in ownership, finding that:

> *"[It was] important in a practical point of view (sic) as well as logical too, that the proportionality of shares each entitled to, in the proceeds of sale by licitation ought to be determined before the property is sold in a public auction"*
>
> .

[21] In *Seychelles International Mercantile Bank v Lesperance & Or*[4], a bank lodged an application for rectification of a nullity in proceedings under section 68 of the Immovable Property Judicial Act in a demand for a sale by licitation. An interested party, an inscribed creditor, who had not been given notice of the proceedings objected to the application on the grounds that were the provisions of section 68 strictly applied, it would breach its right to a fair hearing because it would not be heard before the property was set for sale in adjudication.

[22] The Chief Justice, R. Govinden, agreed and read down the application for licitation within the context of the Charter of Rights in the Constitution. He added:

> *"The Immovable Property (Judicial Sales) Act on which the application is made is subject to the Constitution and as such has to be given the right and proper interpretation in the light of the constitutional rights of parties. Article 19 (7) of*

[3] (151 of 2008) [2010] SCSC 88 (26 January 2010)
[4] (MA 40/2018 Arising in CM 37/2017) [2018] SCSC 232 (05 March 2018)

the Constitution grants to any civil authority or Court exercising its civil jurisdiction the obligation to hear both parties and to adjudicate on their respective competing interest before making a final determination. Section 68 apparently does not permit this to happen.

[23] I believe the Charter of Rights in the Constitution enacted in 1993 nearly 120 years after the Immovable Property (Judicial Sales) Act should be equally applicable to give a allow time for the adjudication of an undeclared right in immoveable property before its sale.

[24] I am fortified by the view that the legislation could not have intended that a co-owner who buys a property with another co-owner by virtue of a mortgage, and leaves the property (constructively or otherwise) after 3 years without paying any sums towards the mortgage and waits for the other co-owner to pay off the mortgage, to maintain and develop the property so that it appreciates considerably in value, to 22 years later claim an equal share in the property by operation of Article 815 of the Civil Code. It would be a palpable injustice to endorse such an approach to licitation proceedings.

[25] In this respect, it was also incorrect for the learned trial judge to impose the duty to have the respective shares of the parties in the co-owned property liquidated, solely on the shoulders of Ms. Esparon. Mr. Monthy was equally put on notice in 2012 to liquidate his share in the property. He has also sat on his rights.

[26] This ground of appeal, therefore, has merit.

2. Co-ownership in equal shares

[27] The finding with regard to co-ownership in equal shares is fiercely contended by Ms. Esparon. This arises from the following paragraph of the learned trial judge's Ruling:

"[28] The Respondent having failed to seek a declaration that she owned the property outright or owned a greater share in the property, she is subject to Article 815 which provides that in the absence of any evidence to the contrary, it shall be presumed that the co-owners are entitled to equal shares."

[28] In this respect is important to bring to light Article 816 of the Civil Code. It provides:

> *"Co-ownership arises when property is held by two or more persons jointly. In the absence of any evidence to the contrary it shall be presumed that co-owners are entitled to equal shares."* (emphasis added)

[29] In her submissions to this Court, Ms. Esparon has contended that the learned trial judge did not take into account the compelling evidence relating to the rebuttal of the presumption under Article 815. This relates inter alia to Mr. Esparon admitting that he stopped contributing to the repayment of the loan prior to him leaving the joint property in 1998 thus admitting that Ms. Esparon had a substantially bigger share than he did in the property.

[30] The parties in this case were permitted to adduce evidence of their respective shares in the property. A valuation of the property was also made available to the court. The 2012 case which the court referred to mentioned that Mr. Monthy's share in the property in 2012 had been assessed at SR 70,000. In the face of all this evidence, the finding by the learned trial judge of equal shares in the property cannot stand. It is clear that the presumption was rebutted by the evidence of both parties.

[31] I agree with the submission of Ms. Monthy that the learned trial judge misdirected herself in finding that the presumption of equal co-ownership operated as she had not sought a declaration of her share in the property

[32] We invited the parties to this case to agree to their respective shares in the property but no agreement was forthcoming. This court, a final appellate court, much that it regrets further delay in this long unfinished matter is at a remove to investigate and make a declaration with respect to the shares of the parties in the property. Such an exercise ought necessarily to be carried out by a trial court who will decide their respective shares in Parcel H2557.

Decision

[33] The provisions of the Immovable Property (Judicial Ssles Act) must be strictly adhered to. However, given the exceptional circumstances of this case a deviation from the time limits are necessary. The application for stay of the sale by licitation is granted. The stay shall operate for a period of 6 months or until the declaration of the shares of the parties whichever is the earliest.

Order

[34] I make the following orders:

1. *The appeal is allowed.*
2. *A stay of the sale by licitation is granted for a period of 6 months or as soon as a declaration of the shares of the parties in Parcel H2557 is obtained, whichever is the earliest.*
3. *Each party is to bear its own costs.*

Signed, dated, and delivered at Ile du Port on 29 April 2022.

Dr. Mathilda Twomey-Woods, JA

I concur

Anthony Fernando, President

I concur

Fiona Robinson, JA