IN THE SUPREME COURT OF SEYCHELLES

Ex Parte:

Allen Jude Medine **Applicant**

Mr. Melchior Vidot
of Premier Building, Victoria **Intervener**

Civil Side No: 266 of 2004

Mr. C. Lucas for the Applicant
Mr. A. Lablache for the third party

D. Karunakaran, J

RULING

One Allen Jude Medine, hereinafter referred to as the "applicant" makes this application *ex parte* seeking a declaration to establish his paternal descent. The cause title herein reads as *"Application under Article 340 of the Civil Code of Seychelles as amended by the 4th Schedule of the Children's Act*". In fact, Article 340 of the Civil Code runs thus:

"*It shall not be allowed to prove paternal descent, except:*

(a) In cases of rape or abduction, provided that the time when the rape or abduction took place coincides with that of the conception.

(b) When an illegitimate child is in possession of status with regard to his natural father or mother as provided in article 321.

(c) In cases of seduction, provided that the seduction was brought about by fraudulent means, by abuse of authority or promise of marriage.

(d) When there exist letters or other writings emanating from the alleged father containing an unequivocal admission of paternity.

(e) When the alleged father and the mother have notoriously lived together as husband and wife, during the period of conception.

(f) When the alleged father has provided for or contributed to the maintenance and education of the child in the capacity of father.

2. The right to prove paternal descent under this Article is for the benefit of the child alone, even if born of an incestuous or adulterous relationship.

*3. **An action** (underline mine) under this Article may be brought -*

(a) by the child's mother, even if she is under age, or by his guardian, at any time during the child's minority; or

(b) if action has not been brought under sub-paragraph (a), by the child within 5 years of his coming of age or within 1 year of the death of the alleged father whichever is the later.

4. A child whose paternal descent has been proved under this Article is entitled to bear his father's name (in addition to a share in his father's succession under the title Succession).

Article 321referred to, in the above article reads as follows:

1. Possession of status may be established when there is a sufficient coincidence of facts indicating the relationship of descent and parenthood between a person and the family to which he claims to belong.

The principal facts are:

That that person has always borne the name of the father whose child he claims to be;

That the father has been treating him as his child and that, in his capacity as father, he has provided for his education, maintenance and start in life;

That he has always been recognised as a child of that father in society;

That he has been recognised as such by the family.

2. *Natural descent may also be established by the possession of status, both as regards the father and the mother in the same manner as legitimate descent.*

In this matter, the applicant, who is a natural child, claims that he is the child of one late Jean Claude Guy Vidot, hereinafter referred to as the "deceased", who died testate in Seychelles on 26th October 2004. According to the applicant, he is in possession of status as the child of the said deceased. Hence, the applicant intends to prove his paternal decent in terms of Article 340 (1) (b) of the Civil Code with regard to his alleged natural father and so seeks the declaration first-above mentioned.

The applicant has averred in his application that he was born on the 18th day of November 1982 and the deceased was his father. In the birth register, only his mother's name has been registered as "Marie Lourdes Medine", who is still alive, whereas his father's name has not been recorded. According to the applicant, since his childhood he had known the deceased as his father, who had also been providing maintenance during the former's childhood. Furthermore, it is averred in the application that the deceased had throughout his life, referred to the applicant as his son. In the circumstances, the applicant claims his paternal decent through the deceased and hence, prays this Court for a declaration accordingly.

Although the application was initially sought to be heard ex parte, since the legal heirs to the estate of the deceased had an interest in this matter, the Court issued a notice to one Mr. Melchior Vidot, who is admittedly a legal heir as well as a joint-executor to the estate of the deceased. Following that notice Mr. Melchior Vidot intervened in the proceedings. His

counsel Mr. C. Lablache raised a preliminary objection to this application based on two points of procedural law and in that he submitted in essence, as follows:

(i) The procedure adopted by the applicant in this matter is improper, as this action must be commenced by way of a plaint, not by way of an application. Moreover, a remedy of this nature cannot be sought through an ex parte proceeding but should be heard inter parte joining all the heirs to the estate of the deceased as parties to the proceedings.

(ii) The affidavit filed in support of this application is improper and incompetent since the counsel himself having acted as a notary, has administered oath to the applicant for deponing the said affidavit.

On the other hand, Mr. C. Lucas, learned counsel for the applicant contended that the procedure adopted by the applicant in this matter is proper and notice of this application has already been given to Mr. Melchior Vidot, a co-executor to the estate of the deceased. Hence, Mr. Lucas submitted that the preliminary objections are baseless and so urged the court to dismiss the objections and proceed to hear the case on the merits.

I meticulously analyzed the submissions made by both counsel in this matter. Indeed, the preliminary objection raised by the intervener involves two fundamental questions of procedural law, which require determination in this matter. They are:

(i) What is the proper procedure that should be adopted by a party to seek a declaratory relief in respect of paternal descent under Article 340 of the Civil Code?

(ii) Is it proper for an Attorney to act as commissioner for oath and attest an affidavit of his client in the case in which he himself appears as counsel?

As regards the first question, it is truism that neither the Civil Code nor the Seychelles Code of Civil Procedure contains any explicit provision stipulating the procedure that should be adopted by a party while seeking a declaratory relief in respect of paternal descent under Article 340 of the Civil Code. It could even be perceived as an ambiguity in the statute. However, the intention of the makers as to the procedural requirement in this regard, is evident

from paragraph 3 of Article 340, which reads thus: "***<u>An action</u>*** *(underline mine) under this Article may be brought .... Etc"*

Now the question arises "What does the term **<u>action</u>** mean in civil proceedings?" The answer lies in the "Definitions" clause under Section 2 of the Seychelles Code of Civil Procedure, which reads as follows:

"suit" or "action" means a civil proceeding commenced by plaint

Therefore, in our civil jurisprudence the terms "suit" and "action" are synonymous and interchangeable. Whichever terminology one elects to employ, whether "suit" or "action" in a civil matter, the fact remains that it should be commenced only by way of a plaint. That is mandatory. Hence, the very use of the term "action" in Article 340 supra, reveals the unequivocal intention of the legislature in that, any civil matter brought under this particular article for proving paternal descent, ought to be commenced by a plaint. Now, one may arguably ask,

"Is it proper for the court to find the intention of the legislature, when there is no explicit provision or when an ambiguity appears in a statute?"

As I see it, whenever a statute comes up for consideration it must be remembered as Lord Denning once mentioned, that it is not within human power to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms of free from all ambiguity. In such situations, a judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the statute has not provided for this or that or complaints that it is silent or defective of some or other ambiguity. It would certainly save the judges trouble, if statutes were drafted with divine prescience and perfect clarity providing for all contingencies. In the absence of it, when an ambiguity or silence or defect appears in a statute a judge cannot simply blame the draftsman or the lawmaker. He must set to work on the constructive task of finding the intention of the legislature, and he must do this, not only from the language of the statute, but also from a consideration of the fact that what if the makers of the statute had themselves come across this ambiguity, how they would have cleared it out. The judge must do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the

creases in the structure of the statute. Approaching this case on hand in that way, I cannot help feeling that if the legislature had known that someone might in future misconceive the procedure and seek a relief under Article 340 by way of an application, the legislature would have certainly, expressly stated in the statute itself that such a relief should be sought by way of plaint. In the circumstances, I conclude that a party seeking a declaratory relief in respect of paternal descent under Article 340 of the Civil Code, should commence the action by way of plaint. In my view, this is the proper procedure, which must be adopted in all cases of this nature, and failure to follow this procedure meant that the court has no jurisdiction to try the matter. ***See, Choppy Vs. Choppy SLR 1956 p162***. For these reasons, I find that the present application is not proper. It is procedurally not maintainable in law and liable to be struck off.

As regards the second question as to the alleged affidavit, undisputedly Learned Counsel Mr. C. Lucas represents the applicant in his capacity as an Attorney and counsel in this matter. At the same time, Mr. C. Lucas, in his capacity as a Notary Public and Commissioner for Oaths, has also signed the affidavit filed in support of the instant application. It is well settled position in our case law that a commissioner for oaths cannot act as such in cases in which they or their principals or partners are solicitors, agents or parties respectively. ***Vide United Opposition Vs. Attorney General Const. Case No 8 of 1955*.** Herein, it is pertinent to note Order 41 Rule 8 of the Supreme Court Rules of UK also reads thus:

> *"No affidavit is sufficient if sworn before the solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner, or clerk of the solicitor".*

However, Order 41, Rule 4 of the White Book, provides that the affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof. In the instant case, the applicant has not obtained any leave from the Court condoning the said irregularity or impropriety. Hence, I find the affidavit filed in support of this application is improper, insufficient and irregular. For, Mr. C. Lucas, the attorney of the applicant has also acted as a notary for executing the affidavit in question.

For these reasons, I uphold the preliminary objections raised by the intervener on both grounds of procedural law. Accordingly, I strike off the application but make no orders as to costs.

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D. KARUNAKARAN

JUDGE

Dated this 28th Day of March 2007