

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2021] SCSC 4
CP 01/2021

In the matter between:

NASIM ONEZIME
(rep. by Basil Hoareau)

Petitioner

and

THE ATTORNEY GENERAL
(rep. by Aisha Molle)

First Respondent

GOVERNMENT OF SEYCHELLES
(rep. by Stephan Knights)

Second Respondent

Neutral Citation: *Onezime v AG & Or* (CP 01/2021) [2021] SCSC 4 (7 September 2021)

Before: Govinden CJ, Burhan, Carolus JJ

Summary: The Petitioner's affidavit is inadmissible in Seychelles Courts. An affidavit from a State that is not a party to the Convention Abolishing the requirements of Legislation for Foreign Public Documents, otherwise known as the "Apostille Convention" will only be admissible in Seychelles, if it is authenticated in terms of section 28 of the Evidence Act. The law of Evidence in England is not applicable in Seychelles since the Evidence Act in place in Seychelles governs the admissibility of foreign affidavits and how these should be authenticated.

Heard: 8 June 2021

Delivered: 7 September 2021

ORDER

Preliminary objection upheld. Petition dismissed. No order in respect of costs.

RULING

GOVINDEN CJ (BURHAN J and CAROLUS J concurring)

1. The Petitioner Mrs. Nasim Onezime, is a Kenyan National married to a Seychellois National, Andy Terry Onezime, who was legally resident in Seychelles until 1st February 2021 when she was arrested and subsequently deported to Kenya.
2. The Attorney General is the First Respondent in terms of section 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, represented by Aaisha Molle, and the Government of Seychelles (hereinafter referred to as the Government) is the Second Respondent represented by Mr. Stephan Knights also from the Attorney General's department.
3. Following the deportation, the Petitioner Nasim Onezime, represented by Mr. Basil Hoareau, filed a petition before this Court seeking damages against the Government of Seychelles in the amount of SCR 1,010,800.00 (one million ten thousand and eight hundred rupees) for unlawful arrest and detention that infringed on several of her Constitutional Rights. The petition comprised of a petition and an affidavit by the Petitioner.
4. The Petitioner's affidavit was signed by the Petitioner in Mombasa, Kenya and notarised before a Mr. Geoffrey Sirioyi. On the affidavit is a red seal sticker and a blue stamp with the words Commissioner of Oaths and Notary Public inscribed on it.
5. The Second Respondent raised as a preliminary objection that the petition should be struck out on the grounds that the affidavit is defective, because it was not certified in accordance with the laws of Seychelles.
6. This ruling is in respect of this preliminary objection.

The Legal Issue

7. The legal question is whether the Petitioner's affidavit is admissible in the Seychelles Courts.

Submissions

8. In their heads of argument on the preliminary objection, the 2nd Respondent submitted as follows:
 - 8.1. that the affidavit was not signed in Seychelles;
 - 8.2. that the affidavit is not accompanied by an apostille;
 - 8.3. that the affidavit is not certified by the Seychellois Consul in Kenya;
 - 8.4. that the affidavit is not certified by the Kenyan Ministry of Foreign Affairs and the Seychellois Department of Foreign Affairs.
9. Mr. Knights for the 2nd Respondent highlighted the legislation relevant to sworn affidavits in Seychelles including section 171(b) of the Seychelles Code of Civil procedure; Sections 12; 28 (2) and (3) of the Evidence Act, and the Convention Abolishing the requirements of Legislation for Foreign Public Documents, otherwise known as the “Apostille Convention”.
10. He noted that section 171(b) of the Seychelles Code of Civil procedure gives a court in Seychelles powers to designate other persons in Seychelles to witness the swearing of an affidavit, but this power cannot be applied extra-territorially.
11. After analysing sections 28(2) and (3) of the Evidence Act, Mr. Knights concluded that, Seychelles being a party to the Apostille Convention, any affidavit made before a competent authority in another State Party to the Apostille Convention can be admissible before a court in Seychelles by virtue of section 28 of the Evidence Act, if the apostille is attached or allonged to the affidavit, otherwise a double certification process would apply.
12. Mr. Knights then discussed section 12 of the Evidence Act, and stated that this provision preserves the colonial position of the English law of evidence in Seychelles, in which case an affidavit can be certified by a British Consul on foreign soil.
13. He referred to Robinson J.A in the case of *Pillai v Rajasundaram and Anor SCA 10/2017*, where section 12 of the Evidence Act was analysed in relation to affidavits made in foreign

jurisdictions. Robinson J.A held that an affidavit sworn in foreign parts before a person authorized by the law of the foreign country to administer oaths there, and whose authority is verified by the nearest British vice-consul, may still be filed as under the old practice.

14. Mr. Knights agreed with the position that a Seychellois Consul can certify an affidavit drawn up and signed before a court in Kenya. But this would be dependent on the Consul having specific terms of reference from the Department of Home Affairs to sign affidavits for the purposes of court proceedings.
15. Mr. Knights referred to the case of *Kanga v Ministry of Employment Immigration and Civil Status* [2020] SCSC 657 (14 September 2020) which states that where either country, the originating country or the receiving country of the affidavit is not a state party to the Apostille Convention, then an authentication and certification procedure needs to be adhered to in both jurisdictions, before a court in either jurisdiction can admit the affidavit into evidence.
16. Learned Counsel for the petitioner contended that:
 - 16.1. section 7 of the United Kingdom Civil Evidence Act of 1851 which applies in Seychelles by virtue of section 12 of the Evidence Act is not applicable in the present case, since the document in question is not a copy of an affidavit, but an original which has not been deposited with the foreign court;
 - 16.2. the ruling in *Pillai v Rajasundaram and Anor* (Supra) is incorrect.
 - 16.3. Seychelles imported English Law in respect of evidence law up to 1962, which means that Order 41(12) of the White Book in the Supreme Court Practice 1979 is still applicable. In extension that an affidavit sworn outside England, and for that matter outside Seychelles, and sworn in the commonwealth before a number of persons including a notary public is admissible.
 - 16.4. section 28(4) of the Evidence Act in essence means that the English Law of Evidence is applicable.
17. The legal provisions applicable to affidavits and the admissibility of other evidence in Seychelles Courts are outlined below.

The Law on Foreign Affidavits in Seychelles Courts

18. The law on the admissibility of affidavits/foreign affidavits in Seychelles courts is provided for under the Seychelles Code of Civil Procedure and the Evidence Act.

19. In terms of section 171 of the Seychelles Code of Civil Procedure

“171. Affidavits may be sworn in Seychelles –

(a) before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar; and

(b) in any cause or matter, in addition to those mentioned in paragraph (a) before any person specially appointed for the purpose by the court.”

20. This provision does not provide for the admissibility of affidavits sworn in foreign countries.

21. Section 28 (1) of the Evidence Act provides for the judicial recognition of any document from any foreign country sworn before diplomatic or consular officers in foreign countries other than public documents from a Convention State. Whilst section 28 (2) of the Evidence Act deals with the judicial recognition of public documents executed in the territories of a Convention State.

22. Following a thorough reading and comparison of section 28 in various sources including the 2010 Revised Edition of the Consolidated Laws of Seychelles, the Greybook on Seylii, and the Evidence Amendment Act 16 of 1996, we established that there were several discrepancies and omissions in some of the provisions.

23. In terms of Section 4(b) of the Statute Law Revision Act, 2012, the revised edition of the Laws of Seychelles shall comprise of the revised edition of the Acts. The version in the 2010 revised edition is the most recent one, but we identified that the version of section 28 included in this edition had several omissions, and did not reflect amendments from the Evidence (Amendment) Act No.16 of 1996. Accordingly, we had to refer to the 1996 Evidence Amendment Act and read this together with the 2010 Revised Edition of the Laws of Seychelles. This amendment was published in the Supplement to the Official Gazette and gazetted on 14 October 1996.

24. Following this research, we outline below the correct heading, the provisions in section 28, and we highlight the omissions in the 2010 Revised Edition by underlining these:

Judicial Recognition of Documents sworn before Diplomatic Consular Officers in Foreign Countries or public documents executed in the territories of a Convention State

“28.(1)When any document executed in any foreign country or place, not being a public document executed in the territory of a Convention State, is produced before any court in Seychelles purporting to have affixed impressed or subscribed thereon the seal and signature of any British Ambassador, Envoy Minister, Chargé d’Affaires, Secretary of Embassy or Legation, British Consul General, Consul, or Vice Consul, Acting Consul, Pro Consul, Consular agent, Acting Consul General, Acting Vice Consul, or Acting Consular agent, duly authorised by section 6, subsection (1) of the Commissioners for Oaths Act, of the Imperial Parliament as amended by section 2 of the Commissioners for Oaths Act, 1891, of the Imperial Parliament to administer an oath in testimony of any oath, affidavit or act being administered, taken or done by or before any such officer, such document shall be admitted in evidence without proof of the seal or signature being the seal or signature of any such officer and without proof of the official character of any such officer, and the court shall presume that such seal or signature is genuine and that the officer signing any such document held at the time when he signed it the official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in the United Kingdom of Great Britain and Northern Ireland in accordance with the English law of evidence for the time being: Provided always that anything in this section contained shall not be deemed or taken to render inadmissible as evidence in the courts in Seychelles any deed, writing, act or thing which before the passing of this Act would have been admissible or would by law have been taken judicial notice of.

(2) When any public document executed in the territory of a Convention State is produced before any court in Seychelles purporting to bear on it or on an allonge a certificate issued by the Competent Authority of the Convention State in which the document is executed, such document shall be admitted in evidence without proof of the seal or signature of the person executing it and the court shall presume that such seal or signature is genuine and the person signing it held at the time it was signed the official character which the person claims and the document shall be admissible for the same purpose for which it would be admissible in accordance with the law of evidence for the time being.

(3) In this section -

“Competent Authority” means a person designated by a Convention State as a Competent Authority to issue the certificate in accordance with Article 4 of the Convention and referred to in subsection (2);

“Convention” means the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents signed at the Hague on 5th October, 1961;

“Convention State” means a State signatory to the Convention or a State which has acceded to that Convention.

“public document” means —

- (a) documents emanating from an authority or an official connected with the courts or tribunals of a Convention State, including those emanating from a public prosecutor, a clerk of a court or a process server;*
- (b) administrative documents;*
- (c) Notarial acts;*
- (d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificate recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures;*

but does not include;

- (e) documents executed by diplomatic or consular agents; and*
- (f) administrative documents dealing directly with commercial or customs operations.*

(4) Anything in subsection (2) shall not be deemed or taken to render inadmissible as evidence in the courts of Seychelles any documents which before the commencement of that subsection would have been admissible or would by law have been taken judicial notice of.”

Discussion

25. Section 12 of the Evidence Act provides that:

“12. Except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail.”

[26] As already referred to herein, section 28 of the Evidence Act clearly sets out the procedure to be adopted in the judicial recognition of foreign documents in the Seychelles. This Court is therefore of the view that there is no necessity to have recourse to English law on this issue. Therefore this court disagrees that the English law of evidence is applicable in Seychelles and refers to the case of *Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited (SCA 15 & 18/2017.)*

[27] In the aforementioned Vijay Construction case, it was held that although English jurisprudence is referred to in Seychelles courts as persuasive authority, the reference to English jurisprudence should not be misconstrued as a license to graft or introduce new laws to the legislation already in place in Seychelles. To do so would amount to a violation of the separation of powers between the National Assembly and the Judiciary, and in some cases, of the Executive. Article 85 of the Constitution clearly indicates that legislative power is vested in the National Assembly, and this power cannot be delegated to a foreign legislative making body.

[28] Therefore it is our view that section 28 of the Evidence Act is the existing provision governing the judicial recognition of documents from foreign jurisdictions, and section 12, which recognises the applicability of the English law of evidence in Seychelles, would only have been applicable if there was no existing provision in the Evidence Act.

[29] Section 28(1) is the provision applicable to any document from any foreign country that are executed abroad excluding public documents from a Convention State which are covered by section 28(2) of the Evidence Act. In order for such a document to be admissible it must be authenticated by either the British Ambassador, Envoy Minister, Chargé d'Affaires, Secretary of Embassy or Legation, British Consul- General, Consul, or Vice

Consul, Acting Consul, Pro Consul, Consular agent, Acting Consul-General, Acting Vice Consul, or Acting Consular agent, duly authorised by section 6, subsection (1) of the Commissioners for Oaths Act, 1889.

[30] The Apostille Convention was ratified by Seychelles in 1978 and came into force in 1979. Kenya has not ratified the Apostille Convention and is therefore not a party. Hence section 28(1) would be applicable to documents from Kenya and other States that are not a party to the Convention.

[31] Although section 28(1) has provided the procedure for authentication of foreign affidavits and documents from any State, in this instant case before us, this procedure does not seem to be adequately followed which has resulted in the challenge before this Court.

[32] The difficulties expressed by this provision have seen a number of cases looking into the correct procedure for the authentication of foreign affidavits sworn in a State that is not a party to the Apostille Convention, and these are discussed below.

[33] In ***Robert Poole v Government of Seychelles (Constitutional Case no 3 of 1996)***, (which was prior to *the Vijay Construction (Proprietary) Limited* case discussed in 26 and 27 herein) an affidavit sworn before a Notary in Kenya was filed as an affidavit of facts under Rule 3(1) of the Constitutional Court Rules. The Court in Seychelles ruled that only documents authenticated by a Diplomatic Mission or by a Foreign Court or competent Jurisdiction could be admitted in proceedings before a Court in Seychelles by virtue of Section 28 of the Evidence Act.

[34] In this case Perera J held that –

“A commissioner for oaths or a notary in any country is authorised to attest or execute deeds and documents that have legal validity in their own country....

“thus a document notarially executed in a foreign country will not be admissible in judicial proceedings in Seychelles, save in circumstances contemplated in Sections 12 and 28 of the Evidence Act(Cap. 74). Section 28 permits the admission of any oath, affidavit, or other act taken or administered before any British Ambassador, consul etc, “without proof of the seal or signature of such officer and without proof of the official character of any such officer.” It further provides that “the court shall presume that such seal or signature is genuine and that the officer signing any such document held at the time when he signed it, the official

character which he claims....” The proviso to that section however states that “any deed, writing, act or thing which before the passing of this Act would have been admissible or would by law have been taken judicial notice of” maybe admissible. But it has not been adduced that an affidavit sworn before a Notary in Kenya falls within this proviso.”

[35] In remarking on section 12 of the Evidence Act Perera J stated that –

“it is settled law in Kim Koon & Co Ltd v R (1969)SCAR 60) that the effect of that section is to apply to Seychelles the English Law of Evidence as it stood on 15 October 1962 (the date on which Section 12 was enacted), which was the Evidence Act 1851 (U.K). Section 7, thereof provided that if the document sought to be proved, be it a judgment, decree order, or other judicial proceedings of a foreign Court or affidavit, pleading or other legal document filed or deposited in such Court, the authenticated copy to be admissible must purport to be sealed with the seal of the foreign court to which the original document belongs, without proof of the seal. Hence what is common to sections 12 and 28 is the authentication either by a diplomatic mission or by a court of competent jurisdiction.”

[36] Perera J concluded that —

“As there is no consular representative of Seychelles in Kenya, and hence with a view to conform with the spirit of the provisions of sections 12 and 28 of the Evidence Act, this affidavit must be duly sworn before a Notary public or commissioner of oaths, whose signature must be duly authenticated by the Registrar of the High Court of Kenya and stamped by the seal of that Court.”

[37] The case of *Joy Kawira Kanga v Ministry of Employment, Immigration and Civil Status and Anor* [2020] SCSC 657 (14 September 2020) addressed the admissibility of an affidavit sworn in Kenya, a non-party State to the Apostille Convention.

[38] In this case the First Respondents, raised the preliminary objection that the petition was not in compliance with Rule 2(1) of the Supreme Court Rules, in that the affidavit of the Petitioner sworn before an overseas Notary in Kenya was not in conformity with the Apostille Convention, hence the affidavit was not acceptable in judicial proceedings in Seychelles.

[39] The Second Respondent, on the other hand stated that while the affidavit in support of the petition was sworn before a Notary, it had not been authenticated and the alternative

procedure provided for under section 28 of the Evidence Act was not followed by the Practitioner.

[40] Govinden J (As he was then) held in paragraphs 13 and 14 that:

“If a State is not party to the Convention the documents must be authenticated. Authentication stands for the verification of the genuineness of a document or signature, to make it effective or valid. For countries which are not party to the Apostille Convention, documents are required to go through the authentication process certifying the authenticity of the document before being presented in the country of use.”

“A State that has not signed the Convention must specify how foreign legal documents can be certified for its use. Two countries may have a special convention on the recognition of each other's public documents, but in practice, this is infrequent and authentication would be the norm. The document must be certified by the foreign ministry of the State in which the document originates and then by the foreign ministry of the government of the State in which the document will be used; one of the certifications will often be performed at an embassy or consulate. In practice this means that the document must be certified twice before it can have legal effect in the receiving country.”

Further Submissions

[41] On 20 July 2021, the Second Respondent filed a further petition seeking leave from the Court to provide further written submissions on the preliminary objection, and specifically to show that learned Counsel for the Petitioner misinterpreted both sections 3 of the UK Commissioners for Oaths Act of 1889 and Order 41 Rule 12 of the 1979 UK Supreme Court Practice Act. He also provided a copy of the original Evidence (Amendment Act) 1996 and highlighted errors identified in section 28 of the Evidence Act in the Revised Edition of the Laws of Seychelles and in the Greybook on Seylii.

[42] The Petitioner responded to the further submissions in writing, and more or less maintained their views on the applicability of the UK Commissioner for Oaths Act and Order 41 (12) of the Supreme Court Practice Act which recognises affidavits sworn in commonwealth countries.

- [43] We maintain that section 28 of the Evidence Act, as discussed above is the specific legislation governing the admissibility of evidence in Seychelles, and there is no legal basis for referring to UK Law.
- [44] On the errors identified in the Evidence Act, Counsel for the Second Respondent highlighted that the definition of “Convention State” was missing in both the Revised Edition of the Laws of Seychelles and on the Greybook on Seylii, and section 28(4) was missing in the revised edition of the Laws of Seychelles.
- [45] We acknowledge and commend the Second Respondent for highlighting the missing provision and definition, and also call upon the office of the Attorney General to ensure that the Evidence Act is correctly amended in the Consolidated and Revised Edition of the Laws of Seychelles to correct all errors as highlighted in paragraph 24 herein. The Court will also see to it that the necessary amendments are made on the Greybook on Seylii.
- [46] Both parties to this case have admitted that Kenya is not a party to the Apostille Convention, accordingly, the affidavit by Mrs. Onezime, signed by a commissioner of oaths and or Notary public, does not suffice. This accordingly renders the Petitioners affidavit inadmissible in the Courts in Seychelles.
- [47] It is also important to note that Counsel for the Petitioner had indicated at the hearing on 11 May 2021 that there might have been an issue with the affidavit, and the Court in response to this, gave him an opportunity to re-submit the affidavit at the next hearing on 18 May 2021.
- [48] Counsel for the Petitioner did not submit any amended affidavit but proceeded to maintain that the Petitioners affidavit was admissible since it was authenticated by an official from a Commonwealth country, which we disagree with as indicated in the discussion above. It is our considered view that a notary from a commonwealth country does not fall under section 6 of the UK Commissioner for Oaths Act, 1889, and a notary from Kenya is not a person authorized to authenticate an affidavit for the purposes of any court or matter in Seychelles in terms of Section 28(1) of our Evidence Act. Learned Counsel for the Petitioner did not submit any amended affidavit but proceeded to maintain that the

Petitioners affidavit was admissible since it was authenticated by an official from a commonwealth country and as it is an original document. We are not convinced at all by learned counsel for the Petitioners arguments that section 28 (1) gives authority to Seychelles Courts to accept document signed by all notaries from commonwealth countries. The categories of persons who should authenticate such documents are clearly listed in section 28 mainly diplomatic missions and it is our considered view this does not include every notary from a commonwealth country and the reference to *any document* includes originals of such documents being produced under section 28 (1) of the Evidence Act.

[49] The failure to amend the affidavit by the Petitioner means that it would be impossible to continue with hearing the petition, since we have established that the affidavit that the Petitioner relies on is inadmissible.

[50] Furthermore, it would also not be possible to file a petition *de novo* as any petition would be out of time, and well past 3 months of the alleged contravention. Rule 4 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules provides that:

- (1) *Where the petition under rule 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the Registry of the Supreme Court-*
 - (a) *in a case of an alleged contravention, within 3 months of the contravention;*
 - (b) *in a case where the likely contravention is the result of an act or omission, within 3 months of the act or omission;*
 - (c) *in a case where the likely contravention arises in consequence of any law, within 3 months of the enactment of such law;*
- (2) *Where a petition under rule 3 relates to the application enforcement or interpretation of any provisions of the Constitution, the petition shall be filed in the Registry of the Supreme Court within 3 months of the occurrence of the event that requires such application, enforcement or interpretation.*
- (3) *Notwithstanding subrules (1) and (2), a petition under rule 3 may, with the leave of the Constitutional Court, be filed out of time.*
- (4) *The Constitutional Court may, for sufficient reason, extend the time for filing a petition under rule 3.*

[51] In the case of *Assemblies of God v The Attorney General and Others* (2020) SCSC 976, it explained the essence of Rule 4 above and stated as follows in paragraph 24 of the judgment:

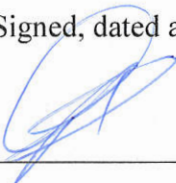
“A petitioner has three months within which to file a petition in this court for any contravention of rights. The relevant date for the commencement of the three month time period for filing an application is the date on which the Petitioner acquired knowledge of the alleged contravention, and not the date of the alleged contravention itself. Should a Petitioner miss the three month period, and file a petition outside the three month period, they have to seek the court's permission to do so. In other words, they have to obtain leave of the Constitutional Court.

The Constitutional Court may grant such leave if the applicant shows sufficient reasons to justify an extension of time: the court must be satisfied that there is good and sufficient cause for the delay. The longer the delay the more onerous is the burden on an applicant. The court is not empowered to act on its own and grant leave where none has been sought and where facts have not been deponed to before it showing sufficient reasons to extend time.

[52] Therefore, the Petitioner would have to seek leave to file a petition outside of the 3 months period, and sufficient reason would have to be provided for the extension of time. Considering that the Petitioner had an opportunity to rectify the affidavit but failed to do so, it is unlikely that there would be any sufficient reasons to extend this time.

[53] In conclusion, this Court dismisses the petition on the basis of the above findings and the inadmissibility of the Petitioners affidavit. Each of the parties shall bear their own costs.


Signed, dated and delivered at Ile du Port on 7 September 2021



Govinden CJ



Burhan J



Carolus J