

Court Of Appeal

Judges

**THE HON. CHIEF JUSTICE SILVIO CAMILLERI
THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE NOEL CUSCHIERI**

Sitting of Friday 30th September 2016

Number: 14

Application Number: 188/05 JA

**Josette Gatesy Lewis, wife of Imre Gatsey, in her own name as well as a
curator ad litem on behalf of the minor child, Alexander Gatesy**

v.

Andy Imre Gatesy

The Court:

1. This is an appeal from a judgement [the appealed judgement] pronounced by the Civil Court [Family Section] on the 4th December 2015 whereby that court accepted defendant's request based on Article 55 [4] of the Civil Code and ordered the cessation with immediate effect of the community of acquests existing between the parties; each party bearing his/her own costs.

2. Aggrieved by this decision plaintiff filed an appeal on the 24th December 2015 requesting this Court to revoke the appealed judgement for reasons stated in her appeal application. On his part defendant filed a reply on the 25th January 2016 containing his reasons for requesting that the appealed judgement be confirmed.

The Facts

3. The facts relevant to this appeal are the following. The parties got married on the 4th July 1993 and from this marriage they have a son who is now of age.

4. On the 15th June 2005 plaintiff initiated proceedings for personal separation against defendant requesting *inter alia* the cessation and the liquidation of the community of acquests between the parties, and that these assets be divided between them.

5. Although more than 10 years have passed since the inception of the proceedings, plaintiff has still not declared that she has closed her evidence, and this, notwithstanding that on three separate occasions, that is, during the sittings of the 4th June 2010 the 8th June 2011 and the 10th October of that same year, the First Court had urged the plaintiff to conclude her evidence.

On the 20th February 2014, after being ordered to do so, plaintiff presented to that Court a list of the witnesses which she still intends to produce. This list contains more than 37 witnesses.

6. In the light of the above circumstances, on the 16th March 2015 defendant filed an application requesting the First Court to order the cessation of the community of acquests. Plaintiff filed her reply on the 11th May 2015 opposing defendant's request.

The Appealed Judgement

7. In its judgement the First Court, after citing local caselaw, accepted defendant's request chiefly on the basis that although almost 10 years have elapsed from the initiation of the suit, plaintiff has still not concluded her evidence. That Court observed further that in these circumstances it was reasonable for defendant to make such a request.

Greviances

8. Plaintiff is basing her appeal on the following grounds.

9. That the First Court should have dealt with the element of "disproportionate prejudice" which is an essential ingredient for the successful

application of Article 55[4] of the Civil Code. However, instead of examining the facts in the light of this provision of law, that Court chose to apply an objective criterieion, that of the passage of time, which is not contemplated by law. By doing so the First Court ignored the requisite of prejudice expressly stipulated in the law.

10. In her application plaintiff states that defendant is a director of various companies, amongst which is the company named Toly Malta Sales Limited, Toly Management Limited and Toly Products Limited, and according to her, from the evidence it results that during the proceedings defendant's net pay has doubled from €100,655.74 in 2013 to €185, 985.50 in 2014. Apart from these earnings defendant is earning €24,000 annually in the form of rent from the lease of an apartment, as well as the annual sum of €77,000 being his pay from Toly Products UK. These earnings amount to a total of €287,000.

11. On the other hand defendant is paying a maintenance allowance to plaintiff in an amount of a sum a bit higher than €16,000.

12. According to plaintiff the amount representing his total net earnings of about €260,000 has disappeared completely. She also maintains that the shares of the company that controls Grupp Toly have ended up in a trust, even though this is being denied by defendant.

13. Plaintiff, after pointing out that defendant had not availed himself of reconvention proceedings or instituted separation proceedings, then goes on to make the following considerations in support of her appeal:

14. [1].That the cessation of the community of acquests should not be a remedy for unnecessary delay by any of the parties in concluding his/her evidence. There are other remedies contemplated by law to address this issue.

15. [2].That the only reason for the delay on the part of the plaintiff in concluding her evidence was that she had been suffering from a serious illness.

16. [3].That the First Court should have given due consideration to the fact that the substantial yearly income earned by defendant is being kept solely by him and that he is systematically hiding from the Court these assets which belong to the community of acquests, by putting them in trusts. After the cessation of the community of acquests, defendant will then be in a position to say that the assets which he had acquired were acquired by him after the termination of that regime.

17. [4].That the concept of “disproportionate prejudice” should be dealt with in a thorough and wide manner u “tqis rebh mhux misthoqq ta’ parti wahda

bhala pregudizzju mhux proporzjonat tal-parti l-oħra għall-finijiet tal-kriterju impost mill-ligi”.

18. Plaintiff submits that in considering a request for the termination of the community of acquests during separation proceedings the following facts must be taken into account:

19. [i] That the evidence regarding the extension of the community of acquests has been concluded; [ii] that no party would be in a position to successfully declare that assets pertaining to the community of acquests have been acquired after the cessation of the community of acquests; [iii] that the party making the request for the termination of the community of acquests, in this case the defendant, must show clearly that if his request is not acceded to he will suffer unjust irreparable loss which could not be remedied in the final judgement of this court; [iv] that the court has established that none of the parties merits to continue enjoying the benefits acquired solely as a result of the other party's industry, or that none of the parties should be made to bear the debts made by the other party; [v] that due consideration should be given to the financial position of both parties to the cause as well as to the contribution made by one of the parties to the family unit, by abstaining from any economic activity in order to commit herself/himself totally to the upbringing of the children as well as doing household chores.

20. The defendant in his reply to plaintiff's appeal states that the First Court has made a correct appreciation of the facts of the case and that the appealed judgement deserves confirmation. He then goes on to make relevant considerations in support of his application for the cessation of the community of acquests. He starts by underlining the First Court's consideration that his request was reasonable in the light of the fact that, notwithstanding that 10 years have elapsed from the inception of the case, plaintiff has still not concluded her evidence.

21. Defendant goes on to underline that on various occasions the First Court has urged that she concludes her evidence without further delay.

22. Also, as evidenced by the contents of the appeal application plaintiff is well aware of the financial position of defendant, particularly his annual earnings; *multo magis* when one considers that defendant had been produced on several occasions to give evidence by referral [in subizzjoni] and on these occasions he was not reluctant to give evidence on his financial position. Therefore, plaintiff should by now have a clear and precise picture of the extent of the community of acquests.

23. Citing local caselaw,¹ defendant underlines the observation made by this Court that the cessation of the community of acquests refers to the future earnings or acquisitions of the parties and has no bearing on what has already

¹ **Lowell v. Lowell**

been acquired before the cessation has been pronounced by the Court. Apart from this, plaintiff can still avail herself of the remedies granted by law to safeguard her interests.

24. Defendant also mentions the fact that plaintiff is still living, together with the party's common son, in the matrimonial home which is his paraphernal property.

25. He concludes by stating that according to Article 55 of the Civil Code and also as stated in this court's caselaw² the onus of proving that the termination of the community of acquests at this stage would cause "disproportionate prejudice" on plaintiff lies completely on the latter. In this regard, plaintiff has not been successful.

Court's Considerations

26. The relevant sub-article of law reads as follows:

"(4) Prior to ordering the cessation of the community as provided in this article, the court shall consider whether any of the parties shall suffer a disproportionate prejudice by reason of the cessation of the community before the judgement of separation."³

27. Firstly, this Court deems it very opportune to observe that a period of 10 years is an exceedingly long period for any of the parties to a case to

² **Daniela Mizzi v. Duncan Peter Mizzi**, App.S 28 March 2014

³ Art.55 of the Civil Code

conclude his/her evidence; indeed it is a very long delay in relation to any judicial proceedings, particularly at first instance. In the circumstances this Court is not at all surprised at the First Court's repeated solicitations addressed to plaintiff in order that the latter concludes her evidence without delaying the proceedings any further.

28. Secondly, it is ironic that whilst in her writ of summons the plaintiff is requesting, inter alia, the cessation of the community of acquests existing between the parties as a result of the marriage – a request to which defendant had made no objection in his note of pleas⁴ - ten years down the line she is objecting to defendant's request made to the Court for a declaration at this stage of the proceedings for the cessation of the community of acquests.

29. The above period should have been more than adequate for plaintiff to conclude her evidence. Considering the length of the period, plaintiff had ample opportunity to discover any assets which she claims defendant is hiding from her and from the Court.

30. Thirdly, it is this Court's view that the excessively and objectively unjustified delay on part of the plaintiff in concluding her evidence is delaying unnecessarily the progress and the eventual closure of the proceedings. There is no doubt that this very long delay is making it impossible for defendant to conclude and settle his financial affairs vis-à-vis plaintiff who at

⁴ Fol.51

present, notwithstanding her initial request for the cessation of those acquests and the personal separation from defendant, is still entitled to half the earnings of defendant as well as to half of his assets. In these circumstances, rejecting defendant's request would cause him prejudice in terms of the sub-article aforementioned.

31. Lastly, this Court considers that the reason stated by plaintiff behind defendant's request for a cessation of the community of the acquests, which is that of being free to state after the cessation has been ordered that he had acquired the 'hidden' assets after the Court's declaration – which circumstance according to plaintiff would be very prejudicial to her rights over the acquests - does not hold ground in that the protraction of the court case does not impede defendant from making such claims after the final judgement has been given, hopefully without further unnecessary delay.

32. In the light of the above considerations, this Court does not consider that the acceptance of defendant's request for a cessation of the community at this stage would constitute to plaintiff disproportionate prejudice according to law.

Decision

For the above reasons, this Court is rejecting plaintiff's appeal, with expenses relating to the first instance and this appeal to be borne totally by plaintiff.

Orders that a copy of this judgement be sent to the Director of Public Registry according to Article 55 [5] of the Civil Code, and that a copy be also inserted in the records of the proceedings.

Silvio Camilleri
Chief Justice

Giannino Caruana Demajo
Justice

Noel Cuschieri
Justice

Deputy Registrar
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