

**Civil Court
(Family Division)**

**THE HON. JUDGE
JACQUELINE PADOVANI GRIMA LL.D. LL.M. (IMLI)**

Monday the 6th of November 2017

Application Number: 213/2017 JPG

**Catherine Imperia Caruana
(ID 750035M)**

VS

**Olena Caruana Verbytska
(ID 2006902P)**

The Court,

Having seen the application of Olena Caruana Verbytska (ID 2006902P), of the 27th of September 2017, (at page 1 et seqq.), which reads as follows:

Whereby she respectfully submits:

That the applicant has been notified with a warrant of eviction abovementioned which was issued following the judgement given in the lawsuit application number 150/2010 RGM 'Paul Caruana and in virtue of a decree of the 15th of March 2016 in view of his death during the pendency of the case, the records were transferred to the name of Catherine Imperia Caruana vs Olena Caruana Verbytska' which was decided by the Court at First Instance on the 5th of February 2013 and confirmed in appeal on the 24th of June 2016.

*That subsequent to the said judgement, the applicant filed a lawsuit in the Civil Court First Hall in the names **Olena Volodymyrivna Caruana Verbytska (ID 2006902P) vs Catherine Imperia Caruana (ID 750035M)**’ sworn application number 1064/2016 LM; put off for the 6th October 2017 whereby she requested that the will made by her late husband Paul Louis Caruana in the records of Notary Joseph Henry Saydon of the 6th November 2012 be declared as null and void since he did not give a valid consent and apart from that, at the moment that the will was made, he did not have the legal capacities to give a valid consent for such a will and consequently, she requested that his estate be regulated in accordance with his preceding will namely that in the records of Notary Dr Reuben Debono of the 10th of November 2010.*

That in view of the pendency of the abovementioned lawsuit, it is not possible for the premises in question to be sold as originally intended in the judgement of the Family Court and later confirmed by the Court of Appeal and this because there is a dispute as to the shares of the parties in the said property.

That the property in question, that is the property at Flat 2, Regent Place, Triq il-Venerabbli Nazju Falzon, Birkirkara is the applicant’s residential home and the applicant does not have any other premises where she can live. She does not have sufficient means to rent or purchase another place and this because her only income is what she gets from her pension at €775.72 per month.

That there is no scope or purpose for the eviction of applicant from the premises in question during the pendency of the abovementioned lawsuit since in the meantime the property cannot be sold and the applicant believes that the warrant was issued exclusively for vexatious purposes.

That the applicant as co-owner, irrespective of the share, has a right to enjoy her property until this is sold.

That the applicant submits that there are sufficient grounds for the warrant of eviction to be cancelled and revoked since this is untimely because of the abovementioned pending lawsuit.

That since applicant was notified with a warrant, she has four days within which to evict from the premises and therefore applicant is requesting that pending the eventual decision of this application, that the Court issues a provisional decree whereby it suspends the further execution of the said warrant.

Consequently, the applicant humbly request this Honorable Court, on the basis of Article 281 of Chapter 12 of the Laws of Malta:

- i. To provisionally order the suspension of the continuation of the execution of the warrant of eviction abovementioned; and*
- ii. To determine and decide this application with urgency and with the abbreviation of all legal periods;*
- iii. To definitively order the issue of a counter-warrant for the abovementioned warrant and this under such terms and conditions as the Court may deem appropriate.*

With costs.

Having seen that the application, the Court's decree of the 28th of September 2017 and the notice of the first hearing of the case were duly notified in accordance with the law;

Having seen the reply of Catherine Imperia Caruana (ID 750035M), of the 6th of October 2017, (at page 32 et seq.), which reads as follows:

- 1. That the allegations of the applicant are unfounded in fact and in law and that they are just another mere attempt to prolong the procedure, to lose time of this Honourable Court and to keep residing in a property which she has no longer a right to live in, as a result of the judgement pronounced by this Honourable Court which was differently composed and re-confirmed by the Court of Appeal.*
- 2. That in the judgement passed by the First Hall of the Civil Court in the names of **Paul Caruana vs Olena Caruana [Rik. Gur. 150/10RGM] decided on the fifth (5) of February of the year two thousand and fifteen (2015) [Doc A]** the Court amongst other things held the following:-*

...(4)tikkoncedi lill-konvenuta id-dritt li tkompli tabita fid-dar matrimonjali Regent Place, Flat 2, Triq il-Venerabbli Nazju Falzon, Birkirkara, sa zmien sena mill-llum b'dan illi qed tipprojbixxi lil terzi persuni milli jirrisjedu f'dan il-fond. Ksur ta' din il-kondizzjoni iwassal ghat-tmien prematuri tad-dritt ta' abitazzjoni hawn koncess lill-konvenuta. Il-konvenuta qed tigi ordnata illi mal-iskadenza tal-imsemmija sena tizgombra mill-fond matrimonjali.

- 3. That with all due respect the respondent is aware that third parties are living with the applicant and this could be confirmed by the neighbours, however the respondent chose not to go down that road, and she decided to*

let the time limit lapse before filing the warrant in the names abovementioned.

4. *That the Court of Appeal in giving judgement on the twenty fourth (24th) of June of the year two thousand and sixteen(2016) in the name of **Paul Caruana** and by virtue of a decree dated the 15th March 2016, that since the latter died during the of proceedings the acts where transferred in the name of **Catherine Imperia Caruana vs Olena Caruana Verbytska [Doc B]**, where the Court in its judgment held the following:-*

Ghal dawn il-motivi l-Qorti tiddeciedi l-appell billi tichdu internament u tikkonferma s-sentenza appellata kompriz għall-kap tal-ispejjes, l-ispejjez kollha tal-appell huma a karigu tal-appellanti.

It-termini impost mis-sentenza appellati jibdew għaddejjin mil-lum.

That with all due respect the decision of the Court of Appeal should abided by and respected and that is why this warrant was filed, since the defendant did not evict the premises and therefore, she is completely ignoring the decision by the Court of Appeal and she is also trying to use this Court to extend the time!

5. *That in the filed proceedings by the applicant in the names of “**Olena Caruana Verbytska vs Catherine Imperia Caruana (ID 750035M)**” the applicant is contesting the validity of the will based on the alleged mental incapacity of the decuius, which within them are all unfounded allegations. With all due respect the decuius Paul Caruana worked as an Engineer with Enemalta and had an important role in this entity. The illness which Mr. Caruana carried related to Lymphadema. As a matter of fact, if one takes a look at the cause of death, together with the applicant for revocation of these proceedings, one could observe that there was nothing mentioned on mental illness, nonetheless this is still being examined before a different Court.*
6. *In “**Camilleri vs Govè et**” decided on the 10th May 2001 the Court held the following: “mid-dispożizzjoni tal-istess Artikolu 836 jidher li l-uniku eżami li trid tagħmel din il-Qorti huwa biss dak ta’ prima facie u dan għaliex il-mertu kollu jiġi nvestigat fil-kawżaproprja bejn il-partijiet, u għalhekk hemm limitazzjoni sinifikanti fl-eżami li trid tagħmel il-Qorti f’dan l-istadju u dan tenut kont li hawn si tratta dejjem ta’ proċedura preliminari li għad qed tistenna l-eżitu finali tal-kawża proprja.” Kindly refer to **Emanuel Sammut vs Josephine Sammut, PA** decided on the 5th June 2003.*
7. *That neither of the elements referred to in article 836 (1) et seq of Chapter 12 of the Laws of Malta do not subsist in the circumstances of this case.*

*Therefore, for the reasons abovementioned, the respondent humbly asks this Honourable Court to **reject** all requests by the applicant in all their entirety with all the costs to be paid by the applicant.*

Having heard all the evidence proffered by the parties to the case;

Having taken cognisance of all the acts in the record of the proceedings;

Having seen the note in the record of the proceedings of the 18th of October 2017, (vide page 80), whereby the parties extended the statutory time limits;

Having heard oral submissions of the parties.

Deliberates:

Olena Caruana Verbytska testified at fol 81 *et seq* that she had met her husband online and they got married quickly, even though communication was difficult since she could not speak English. She explained that her relationship with her husband's family deteriorated because she could not have children, and his family pressured him into filing a separation suit against her. She testified her husband was very ill because he used to smoke too much. She had also eventually discovered that he suffered from paranoid schizophrenia, something which had been kept hidden from her. She continued that she has filed a case in front of the Civil Courts in order to have his last will declared null, because he was not mentally fit to draw up such a will. She further explained that according to the last will he left his parents as his sole heirs, whereas according to the will he had drawn up before that, he had left her 80% of his estate, and the remaining 20% to his parents. She also stated that she does not currently have the money to buy another apartment.

Under cross-examination at fol 95 *et seq* she denied that she was violent towards her husband. She claimed that she and her husband were not really separated, despite the court judgement, because they kept meeting very frequently and maintained an intimate

relationship, and she also used to go visit him regularly when he was in hospital. She confirmed that her husband had told her that he had cancer.

Catherine Imperia Caruana testified at fol 102 *et seq* and negated everything said by applicant. She explained that her son was a healthy man and worked as an engineer, but when he married applicant she took control over him, in particular his financial affairs, and she was also physically violent against him, to the extent that on one occasion she threw a knife at him as he was on his way out to work, but luckily it hit his briefcase and he was left unscathed. She stated that her son had started smoking due to the stress he was under because of this abuse. Eventually he was diagnosed with lymphoedema and later on with cancer of the bile duct. She continued that in 2007 applicant had forced her son, using physical duress, to make a will leaving applicant and her mother as his heirs in equal shares. It was on the same day that he went to her mother's house and told her that he no longer wants to live with his wife, at which point they sought legal advice. She explained that in 2012 he had another will drawn. At this time he was not suffering cancer and he was of sound mind. She explained that third parties approached her about the apartment that used to be the matrimonial home of her son and daughter in law. She continued that the other residents of the block of apartment do not want applicant to continue living there because one of the residents has young children and applicant scares them, especially by knocking on the door at night when they cry. She added that apart from this, applicant has invited third parties to reside with her, something which was expressly forbidden by the judgement of the Court of Appeal.

Under cross-examination at fol 117 *et seq* she confirmed that she is aware that Olena Caruana Verbytska filed a court case requesting that Paul's last will be declared null and void. She testified that the person interested in buying the apartment is another resident of the same apartment block, and denied that they were the same people who were trying to make life miserable for Olena Caruana Verbytska even beating her up to get her to leave. She denied that the apartment cannot be sold until the case regarding the will is decided, and reiterated that the separation judgement gave Olena Caruana Verbytska one year to vacate the apartment. Catherine Caruana confirmed that she resides in her house, and does not intend to move into the apartment.

Deliberates;

The Court notes that applicant is basing her application on Article 281 of the Code of Organisation and Civil Procedure (COCP). According to Article 281 (1), Chapter 12 of the Laws of Malta:

“[w]ithout prejudice to any other right under this or any other law, the person against whom an executive act has been issued or any other person who has an interest may make an application, containing all desired submissions together with all documents sustaining such application, to the court issuing the executive act praying that the executive act be revoked, either totally or partially, for any reason valid at law.”

The applicant argued that there is no scope or purpose for her eviction from the matrimonial home she shared with her husband, since the same property cannot be sold due to a pending court case between the parties, wherein applicant is contesting the validity of her deceased husband’s last will, and asking that his estate be regulated by his previous will.

The Court notes that the judgement of the Court of Appeal dated 24th June 2016, which confirmed the judgement of the Family Court pronouncing the separation between applicant and her husband, gave applicant one year to live in the apartment in question, after which she was obliged to vacate it.

The Court also notes that the Court of Appeal considered that the abuse that she perpetrated on her husband was serious enough to warrant the application of Article 48 (c), and that her right to continue residing in the matrimonial home in accordance with Article 633 (1) of the Civil Code was being terminated by virtue of its judgement. Furthermore, the Court of Appeal also held that by virtue of the judgement of separation, applicant had lost any right she might have had over any share of her husband’s property after his death.

In light of this, this Court considers that applicant’s request is unfounded. The argument that her vacating the apartment has no utility because the property cannot be sold pending the resolution of the case instituted by applicant to invalidate her husband’s last will, is not

a valid reason at law to suspend or revoke the warrant in question, due to the circumstances of this case. It is clear from the judgement of the Court of Appeal, that applicant was not being ordered to vacate the apartment simply as a corollary to its order that the apartment be sold. On the contrary, the Court of Appeal determined that applicant had lost her right to continue residing in the matrimonial home due to the abuse that she perpetrated on her husband, and that she was no longer entitled to her husband's share of the property upon his death for the same reason. Therefore, the fact that applicant vacating the property will not necessarily lead to the possibility of the apartment being sold is not a valid reason to suspend or revoke the warrant in question since it appears that the utility in going forward with this warrant lies in giving effect to the Court of Appeal's conclusion that applicant has lost her right to reside in the matrimonial home, a conclusion contained in a final judgement, that is binding and irrevocable by nature of the institute of *res judicata*.

For these reason, the Court denies the application of the 27th of September 2017 in its entirety.

All costs are to be borne by applicant.

Given *in camera* this day, the 6th of November 2017.

Judge Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli

Deputy Registrar