Court Of Appeal

Judges

THE HON. CHIEF JUSTICE JOSEPH AZZOPARDI
THE HON. MR. JUSTICE JOSEPH R MICALLEF
THE HON. MR JUSTICE TONIO MALLIA

Sitting of Friday, 14th December, 2018

Number: 5

Application Number: 213/17 JPG

In the matter of the Executive Warrant of Eviction number 169/2017 in the names:

Catherine Imperia **CARUANA**

vs

Olena **CARUANA VERBYTSKA**

The Court:

1. This is an appeal lodged by applicant Olena Caruana Verbytska (hereinafter denoted as "the appellant") pursuant to a decree pronounced by

the Civil Court – Family Section (hereinafter designated "the first Court") on November 6th 2017 whereby, and for the reasons therein stated, that Court rejected the appellant's request to provisionally suspend the execution of the above-mentioned executive warrant (hereinafter designated "the warrant") and to issue the relative counter-warrant under such terms and conditions as that Court may deem appropriate;

2. In delivering that decision, the first Court had the following considerations to make:

> "*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:*
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> *"Whereby she respectfully submits:*
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> *"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.*
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> *"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 applicatnt 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 żmien sena mil-lum b'dan illi qed tipprojbixxi lil terzi persuni milli jirrisjedu f'dan il-fond. Ksur ta' din il-kondizzjoni iwassal għat-tmien prematuri tad-dritt ta' abitazzjoni hawn konċess lill-konvenuta. Il-konvenuta qed tiġi ordnata illi mal-iskadenza tal-imsemmija sena tiżgombra 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:-*

"Għal dawn il-motivi l-Qorti tiddeċiedi l-appell billi tiċħdu interament u tikkonferma s-sentenza appellata kompriż għall-kap tal-ispejjeż, l-ispejjeż kollha tal-appell huma a karigu tal-appellanti.

"It-termini imposti 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-kawża proprja 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.

"8. 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 (up). 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.*
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> *"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'.*";

3. In an Application filed on the 10th of November, 2017, appellant stated that she felt aggrieved by the decision of the first Court and requested this Court to reverse the decree delivered by that Court on November 6th of that year and proceed to uphold appellant's requests;

4. Respondent Caruana replied to the appellant's Application by virtue of a Reply filed on November 30th 2017, wherein she rebutted all of the appellant's

grievances and requested that this Court reject the appeal and confirm the first Court's decree in its entirety with costs against appellant;

5. The Court heard the parties' counsels' oral submissions;

6. Took cognizance of all the acts in the record of the case;

7. By decree dated 9th October, 2017, the Court put off the case for judgement for to-day's hearing;

Considers:

8. The action filed by appellant is a procedure in terms of article 281 of the Code of Organisation and Civil Procedure, following the issue of the warrant at the request of the respondent. Appellant had been married to respondent's son. The marriage broke down and, following unsuccessful annulment proceedings, appellant's husband – Paul Caruana – filed a suit for personal separation in 2010, to which appellant filed a counter-claim. Caruana passed away testate in August of 2015, a few weeks after judgement had been handed down by the Civil Court (Family Division) at first instance on the 5th of February, 2015[1], by which time, appellant had filed an appeal from that judgement;

[1] PP. 34 to 47 of the record

9. The warrant[2] was issued on June 26th 2017 in execution of a judgement handed down by this Court on June 26th 2016[3], which had confirmed the afore-mentioned judgement of the Civil Court (Family Division), which had, amongst other things, granted in part a request made by appellant in a counter-claim to the effect that she be allowed to reside in what had been the matrimonial home for a period of one calendar year from said judgement to the exclusion of any other third party and, after the lapse of which period, she had to vacate the premises;

10. By virtue of the judgement handed down by the Court of Appeal as afore-said, the terms granted by the judgement of the Family Court were to run from the date of the appellate judgement;

11. On November 22nd 2016, appellant filed a new suit in the First Hall of the Civil Court[4] against respondent to have her estranged husband's last will set aside as null and void. The case is ongoing;

12. The warrant calls for the eviction of appellant from the apartment internally marked two (2) forming part of a building designated "*Regent Place*",

[2] Warrant Number 169/17MG Doc "A" at pp. 4 – 6 of the record
[3] PP. 48 to 65 of the record
[4] Rik. Nru. 1064/2016LM

sited at Triq il-Venerabbli Nazju Falzon, in Birkirkara. The execution failed to materialise for failure to serve the acts of the application and the Court's decree in spite of three attempts a service by the Court's executing officials. Eventually, service was effected upon appellant;

13. Appellant raises four heads of grievance against the decree appealed from: viz. (i) that the warrant was issued out of respondent's spite and hate for appellant, who is bereft of suitable income and assets whereby she could seek or secure alternative accommodation; whereas respondent has her own residence and is bent upon taking possession of the apartment appellant is being evicted from solely for speculation and greed; (ii) that the warrant effectively deprives appellant from her right to the peaceful enjoyment of her possessions when, in actual fact, she holds title to at least one half undivided share of the apartment; (iii) that the effective execution of the warrant would be tantamount to forcing appellant to forego her current suit against respondent to have the will quashed, as she would not be able to afford the costs of the protracted litigation, thereby depriving her of her right of access to a court for the protection of her rights; and (iv) that in determining the reasons why appellant's requests were not upheld, the first Court delved into the merits of the legal separation judgment, which matter was beyond the remit of the exercise which ought to have been made under the particular procedure prescribed by article 281 of Chapter 12 of the Laws of Malta;

14. In her reply, respondent pleaded the utterly frivolous and vexatious nature of the appeal and submitted that the appeal is procedurally faulty. She argues that appellant's attempt is merely to unjustifiably prolong litigation by attacking a valid warrant issued on the strength of a judgement which appellant is obstinately trying her level best to defy;

15. This Court has to take note of the fact that, both in the original application filed by the appellant at the outset, as well as in oral submissions by learned counsel on her behalf (both before the first Court as well as before this Court) the aim of the present instance is to withhold the execution of the warrant rather than to quash it. Counsel repeatedly stated that there is no prejudice to respondent if the warrant's execution did not take place immediately. Similarly, it was submitted to the first Court's consideration that the main reason why this application was filed was principally in view of the law-suit pending before the First Hall of the Civil Court challenging the validity of appellant's former husband's will;

16. That matter alone should have been enough for the first Court to question the validity of the application and to ascertain that this procedure was intended to use the pending law-suit as a pretext to suspend execution rather than as a

remedy for impugning the warrant on the basis of an annulling ground recognised at law;

17. Furthermore, this Court notes that appellant brought forward no cogent reason why the warrant should be revoked, except by suggesting that the warrant ought to be revoked because it was premature pending the outcome of the said law-suit. Appellant fails to justify why a warrant issued on the basis of a binding judgement can conceivably be revoked because another lawsuit is pending between the same parties which in no way challenges the said judgement and which appellant, in her own words, is considering abandoning. Were such a circumstance to be deemed “a valid reason at law” in terms of article 281(1) of the Code of Civil Procedure, then it would conveniently be possible for any interested person to stultify the effects of an executive title by resorting to the stratagem of instituting a law-suit on any marginal matter;

18. As shall be presently pointed out, if appellant’s true design was that of halting the warrant’s execution, recourse to the remedy under article 281 is not the proper way to go about it;

19. It is settled law that, in the application of the true nature of the procedure envisaged under article 281 of the Code of Civil Procedure, the remedy granted by those provisions is a particular one geared toward impugning the validity of

any executive warrant on an issue of form of the act itself. The procedure itself is aimed at being summary and brief and should not be allowed to revive questions which relate to the executive **title** on the strength of which the executive **act**, being the warrant itself, is issued;

20. In the present case, respondent rightly and justifiably requested the issue of the warrant on the basis of a judgement which had become final and binding upon the appellant too;

21. Thus, the fact that appellant filed this procedure with the declared aim of halting the execution of a warrant approved by the proper Court authorising it, without there being a claim against the validity of the warrant itself, gives rise to a procedural issue affecting the validity of the procedure pursued by appellant. Clearly, a request under article 281 to revoke a warrant is altogether different to a request to halt its execution, though the former necessarily affects the latter. For article 281 to be applicable, it must be shown that there exists a reason the law considers serious and valid to bring about the full or partial revocation of an executive warrant[5]. As correctly pleaded by respondent in her Reply, the procedure for the suspension of an executive warrant's execution is not that laid down in article 281[6];

[5] F.H. GCD **28.5.1999** in the case ***Gianfranco Tolio vs Danuta Komarzynic***
[6] Civ. App **5.2.2002** in the case ***Persiano et vs Persiano*** (Kollez. Vol: **LXXXVI.ii.257**)

22. Procedural practice affords the remedy in terms of law where a person wishes to attack the execution of a warrant and that such remedy is identified in the form of an ordinary lawsuit by way of a Sworn Application[7];

23. The Court acknowledges that there might have been the occasional judgement which upheld the view that the procedure under article 281 could be resorted to even in the case where only the suspension of the execution of the warrant was sought rather than its quashing[8]. However, it is this Court's considered opinion that a proper reading of the provisions of article 281 would only entertain claims for the revocation of the warrant and not just a suspension of its execution. This view is buttressed also by the fact that the remedy granted at law (by way of a 'normal' law-suit) to whosoever wished to halt the execution of a warrant was already available decades before the special procedure applicable to article 281 was brought into effect[9]. One must bear in mind that the special procedure granted under the aforesaid article 281 is, as expressly stated in the operative part of that very same article, "without prejudice to this and any other law"[10];

[7] Cfr. F.H. AJM **5.3.2001** in the case ***Terranet Limited vs Linknet Limited et***
[8] Cfr., for instance, F.H. GC **12.2.2010** in the case ***Car Care Products Ltd vs John Buġeja et*** (which expressly forbade recourse to the procedure in art. 281 to attack the execution of an executive warrant) as opposed to F.H. AE **2.8.2011** in the acts of the Application in the names ***Alan Bartoli noe vs A Gatt Trading Ltd et*** (where a procedure under art. 281 was permitted in the case of a request to bar the execution of an executive warrant of seizure of goods not belonging to the execution debtor)
[9] Cfr. Art. 276 of Chap. 12 which was invariably interpreted as granting the right to contest the execution by ordinary writ of summons
[10] Inf. Civ. App. **9.1.2008** in the case ***Awtorita' Marittima ta' Malta vs Polidano Brothers Ltd***

24. For this reason, mainly, the appeal is being rejected as manifestly and procedurally void. In view of this finding, the Court does not have to delve into the four grounds of grievance raised by appellant to the appealed decree. Nevertheless, it is to be pointed out that they constitute claims which would not have yielded appellant any success to her appeal were the correct procedure resorted to, given the particular nature of the exercise which any Court is expected to undertake in examining whether to annul an executive warrant;

Decides:

25. For these reasons the **appeal is rejected** as unfounded, **with costs** to be borne by the appellant at both first and second instances.

Joseph Azzopardi Chief Justice	Joseph R Micallef Judge	Tonio Mallia Judge

Deputy Registrar
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