CIVIL COURT
FIRST HALL

HON. MR JUSTICE
ROBERT G. MANGION

SITTING OF THE 30TH JUNE 2021

Case No: 5
Sworn App No: 175/2016 RGM

Jan Christian Gundersen Nygaard

vs.

Carmen Nygaard (K.I. 622760M)

The Court,

Having seen **the sworn application of Jan Christian Gundersen Nygaard** filed on the 4th of March 2016, which reads as follows:

Dikjarazzjoni dwar l-Oggett tal-Kawza u l-Fatti

1. Illi r-rikorrent izzewweg lill-intimata Carmen Nygaard nee Camilleri fl-20 ta' Mejju, 1989 (**Dokument A** anness);

2. Illi matul iz-zwieg il-partijiet ghexu fid-dar matrinmonjali sitwata numru 175, Flat 14, Triq it-Torri, Sliema wara li huma xtraw din il-proprjeta` permezz

ta' kuntratt redatt fl-atti tan-nutar Dr John Cachia Zammit nhar it-18 ta' Novembru, 1989 (**Dokument B** anness);

3. Illi d-dar matrinomjali msemmija tinkludi zewg spazji fejn jistghu jigu pparkjati l-karozzi, u dawn bin-numri 10 u 11 fil-garaxx li jinsab f'175, fi Triq it-Torri, Sliema, liema spazji kienu ukoll mixtrija permezz tal-istess kuntratt msemmi aktar il-fuq;

4. Illi z-zwieg tal-partijiet tkisser irrimedjabilment u ghalhekk huma applikaw ghas-separazzjoni personali. Illi huma sseparaw permezz tas-sentenza moghtija mill-Qorti tal-Familja nhar it-28 ta' Marzu, 2007 (**Dokument C** anness);

5. Illi bis-sahha tal-imsemmija sentenza l-intimata Carmen Nygaard inghatat id-dritt li tibqa' tghix gewwa d-dar matrimonjali flimkien mat-tifla tal-partijiet, Karin Nygaard, u dan ghal massimu ta' tlett snin mid-data tas-sentenza, ossia sat-28 ta' Marzu, 2010. Illi wara din id-data l-Qorti kienet ordnat li l-intimata ghanda tivvaka mid-dar matrimonjali sabiex din tkun tista' tinbiegh fis-suq apert jew, fin-nuqqas, permezz ta' subbasta;

6. Illi bis-sahha ta' l-imsemmija sentenza r-rikavat minn tali bejgh kellu jintuza sabiex jigu saldati d-djun relattivi ghall-komunjoni tal-akkwisti li kien hemm bejn il-partijiet, b'dak li jibqa' jigi diviz b'mod ugwali bejn il-partijiet;

7. Illi sal-gurnata tal-lum l-intimata baqghet tghix fid-dar matrimonjali minghajr ma hadet l-ebda pass jew inizzjattiva sabiex tottempera ruhha mal-ordnijiet tal-Qorti tal-Familja sabiex tivvaka u tbiegh l-imsemmija dar matrimonjali;

8. Illi l-intimata qieghda ukoll tikri z-zewg spazji ta' parkegg formanti parti mid-dar matrimonjali lil terzi, bi profitt, u minghajr il-kunsens tar-rikorrent, minghajr ma tinfurmah bid-dettalji relattivi u wisq inqas thallsu xi tip ta' kumpens bhala korrispettiv (**Dokument D** anness);

Raguni ghat-Talbiet f'dawn il-Proceduri

9. Illi konsegwentement l-intimata bbenefikat indebitament mill-okkupazzjoni illecita, illegali u abbuziva tad-dar matrimonjali, b'dan li arrikat lilha nnifisha ukoll bil-kiri illegali, illicitu u abbuziv tal-ispazji tal-parkegg relattivi, u dan b'detriment lir-rikorrenti;

10. Illi simultanjament ir-rikorrent gie pregudikat fit-tgawdija tal-proprjeta` tieghu stante li ma jistghax jghix god-dar matrimonjali u lanqas jista jaghmel xi uzu minnha, u dan allavolja huwa s-sid ta' nofs indiviz ta' din il-proprjeta`;

11. Illi kumpens ekwu u gust hu ghalhekk dovut lir-rikorrent mill-intimata ghall-okkupazzjoni tad-dar matrimonjali u l-kiri tal-ispazji tal-parkegg relattivi;

12. Illi ghalkemm r-rikorrent debitament interpella lill-intimata, inkluz permezz ta' ittra legali mibghuta nhar l-4 ta' Dicembru, 2015, l-intimata baqghet inadempjenti (**Dokument E** anness);

13. Illi konsegwentement ir-rikorrent ma kellu l-ebda ghazla ohra sabiex jissalvagwardja d-drittijiet tieghu hlief li jistitwixxi l-proceduri odjerni;

14. Illi r-rikorrent jikkonferma li huwa jaf b'dawn il-fatti personalment;

Talbiet

Tghid ghalhekk ir-rikorrenti, prevju kwalsiasi dikjarazzjoni necessarja u opportuna u ghar-ragunijiet premessi, ghaliex din l-Onorabbli Qorti m'ghandhiex:

1. Tiddikjara li l-intimata arrikkiet ruhha b'mod indebitu u dan bl-okkupazzjoni ingusta tad-dar matrimonjali sitwata f'175, Flat 14, Tower Road, Sliema u bil-kiri taz-zewg spazji ta' parkegg li jinsabu f'10 u 11, f'175, Triq it-Torri, Sliema, u dan b'detriment ghar-rikorrent;

2. Tillikwida l-valur lokatizzju tal-proprjeta` relattiva li giet okkupata mill-intimata minghajr titolu skond il-ligi, u dan okkorendo bl-opera ta' periti nominandi;

3. Tillikwida l-quantum tas-somma li biha l-intimata arrikixxiet ruhha indebitament u tkompli tarrekixxi ruhha ingustament b'detriment tar-rikorrent permezz tal-okkupazzjoni taghha tal-fond relattiv u permezz tal-kiri taz-zewg spazji ta' parkegg, okkorendo bl-opera ta' periti nominandi;

4. Tordna li l-ammont hekk likwidat jigi mhallas mill-intimata lir-rikorrent bhala kumpens ghall-okkupazzjoni u l-kiri tal-proprjeta` msemmija, u dan taht dawk il-kundizzjonijiet li din l-Onorabbli Qorti jidrilha xierqa u dan sakemm l-intimata tivvaka l-proprjeta` msemmija u taderixxi ruhha mas-sentenza tal-Qorti tal-Familja ta' nhar it-28 ta' Marzu, 2007 fl-ismijiet tal-partijiet;

Bl-ispejjez, inkluz l-interessi legali, kontra l-intimata li hi minn issa ingunta ghas-subizzjoni.

Having seen the **reply of Carmen Nygaard** filed on the 4th of April 2016 which reads as follows:

1. Fl-ewwel lok jigi eccepit illi t-talbiet kif imressqin mir-rikorrent huma intempestivi stante li huwa qatt ma wera ebda interess jew koperazzjoni biex il-proprjeta` matrimonjali mertu ta' dawn il-proceduri tinbiegh u wisq anqas qatt ma talab sabiex l-esponenti tivvaka mill-proprjeta` in kwistjoni jew ressaq kwalsiasi proceduri legali biex l-istess proprjeta` tinbiegh;

2. Illi fit-tieni lok, minghajr pregudizzju ghas-suespost izda anki ghar-ragunijiet hawn fuq imsemmija, ghandu jirrizulta li t-talbiet ta' l-istess rikorrent huma nfondati fil-fatt u fid-dritt mhux biss ghaliex anki l-fatti kif elenkati minnu fil-premessi mhumiex korretti izda wkoll ghaliex, kif ser jigi ampjament spjegat matul il-mori ta' din il-kawza, dan certament mhux kaz ta'

arrikkiment indebitu anzi hija l-esponenti li sforz id-disinteress totali muri mir-rikorrent matul dawn is-snin kollha fir-rigward tal-fond matrimonjali, minkejja t-tentattivi li kienet taghmel l-esponenti biex tipprova tikkomunika mal-attur fir-rigward u biex tbiegh il-proprjeta` in kwistjoni, kienet hi li sofriet pregudizzju fil-frattemp kif spjegat fil-kontro-talba kontestwalment prezentata, u b'hekk kellha tara kif ser taghmel tajjeb imqar jekk *in parte*, ghall-pregudizzju soffert, kif ser jirrizulta matul is-smiegh ta' dawn il-proceduri;

3. Illi l-anqas ma huwa l-kaz li l-esponenti qed tokkupa l-istess proprjeta` minghajr titolu validu fil-ligi ghaliex il-proprjeta` mertu ta' din il-kawza kienet u ghandha titqies li ghadha l-proprjeta` matrimonjali tal-partijiet. Fi kwalunkwe kaz l-okkupazzjoni mill-esponenti u bint il-partijiet tal-istess proprjeta` ghandha titqies li hi gustifikata ghar-ragunijiet li ser jinghataw matul il-mori ta' dawn il-proceduri kif ukoll li wara kollox, l-istess okkupazzjoni kienet ir-rizultanti tan-nuqqas ta' interess muri mill-attur kif spjegat hawn fuq bil-konsegwenti accettazzjoni tacita tieghu li l-esponenti tibqa' tghix ma' bintha fl-istess proprjeta`;

4. Illi konsegwentement, tenut kont ta' dak hawn fuq spjegat u dak li ser jirrizulta b'mod aktar dettaljat matul il-mori ta' din il-kawza, l-ebda talba ghal-likwidazzjoni tal-valur lokatizzju tal-proprjeta` mertu ta' dawn il-proceduri ma ghandha tintlaqa' u konsegwentement l-ebda talba ghal kwalsiasi ordni ta' hlas ta' kumpens kif mitlub mill-attur fil-konfront tal-esponenti ma ghandha tintlaqa';

5. Salv eccezzjonijiet ulterjuri.

Bl-ispejjez ta' dawn il-proceduri a karigu tal-attur rikorrent.

Having seen the **counterclaim filed by Carmen Nygaard** on the 4th of April 2016 which reads as follows:

1. Illi bis-sahha tas-sentenza imsemmija mill-attur rikonvenzjonat fir-rikors promotur tieghu, moghtija mill-Qorti Civili (Sezzjoni tal-Familja) fit-28 ta' Marzu, 2007 fl-ismijiet Carmen Nygaared vs. Jan Nygaard, gie deciz li l-esponenti kellha diversi krediti ta' somom sostanzjali favuriha dovuti mill-attur rikonvenzjonat, b'mod partikolari kreditu fis-somma ta' LM30,000 (€69,881) u LM74,450 (€173,421.85) cirka liema krediti kellhom jithallsu lill-esponenti mir-rikavat tal-bejgh tal-proprjeta` matrimonjali numru 14, fi blokk numru 175, gewwa Tower Road, Sliema msemmija mill-attur rikonvenzjonat fir-rikors promotur tieghu b'dan illi wara li kellhom jithallsu l-krediti kollha dovuti anki lil terzi, il-kumplament tar-rikavat kellu jinqasam b'mod ugwali bejn il-partijiet;

2. Illi rizultat tad-disinteress totali tar-rikorrent rikonvenzjonat biex jottempora ruhu mas-sentenza hawn fuq imsemmija, b'mod partikolari n-nuqqas ta' interess u koperazzjoni biex jinsab il-bejgh tal-istess fond matrimonjali, l-esponenti soffriet *inter alia* pregudizzju konsistenti mhux biss mill-fatt li hija spiccat thallas wahidha, d-dejn referibbli ghall-istess fond matrimonjali li kien ghadu dovut mal-HSBC Bank Malta plc kwantifikat fis-somma ta' LM8,040.94 (€18,730.35) b'imghaxijiet ulterjuri li spiccat thallas wahidha u spejjez ohra konnessi ma' l-istess fond matrimonjali, izda wkoll pregudizzju, dovut ghall-fatt li l-krediti l-ohra li skont l-istess sentenza gew dikjarati dovuti lilha kif imsemmi fl-ewwel premessa u inkluza wkoll is-somma ta' LM7,000 (€16,305.61 – bhal kumpens dovut lilha wara li l-vettura Wolkswagen Golf imsemmija fil-proceduri ta' separazzjoni giet assenjata lill-attur rikonvenzjonat) baqghu ma thallsux lilha, bid-diffikultajiet finanzjarji kollha li dan il-fatt wassal ghaliha u b'telf ta' imghaxijiet li hija kienet fil-frattemp tinghata fuq l-istess somom li kieku dawn thallsu lilha;

3. Illi fil-frattemp, l-istess rikorrent rikonvenzjonat naqas ukoll milli jhallas lill-esponenti l-manteniment dovut ghal binthom kif imsemmi u ordnat fl-istess Sentenza deciza mill-Qorti Civili (Sezzjoni tal-Familja) hawn fuq imsemmija fis-somma ta' LM650 (€1,514.09) fix-xahar liema manteniment kellu jibqa' jithallas sakemm l-istess minuri ssir maggorenni.

Ghaldaqstant in vista tas-suespost u dak kollu li ser jintwera mill-esponenti matul il-mori ta' din il-kawza, ghandu jkun l-attur rikonvenzjonat jghid ghaliex din l-Onorabbli Qorti ma ghandhiex:

1. Tiddikjara illi rizultat tad-disinteress totali u nuqqas ta' koperazzjoni murija mir-rikorrent rikonvenzjonat sabiex jinsab il-bejgh tal-proprjeta` matrimonjali numru 14, fi blokk numru 175, gewwa Tower Road, Sliema kif kienet inghatat l-opportunita` li ssir skont is-sentenza moghtija mill-qorti Civili (Sezzjoni tal-Familja) fit-28 ta' Marzu, 2007 fl-ismijiet Carmen Nygaard vs Jan Nygaard, l-esponenti soffriet danni li ghandu jaghmel tajjeb ghalihom l-attur rikonvenzjonat fis-somom li jistghu jigi kwantifikati matul il-mori ta' din il-kawza bil-hatra ta' esperti nominati minn din l-Onorabbli Qorti jekk tirrizulta l-htiega;

2. Tiddikjara li l-attur rikonvenzjonat kien inadempjenti fl-obbligu tieghu li jhallas il-manteniment dovut ghal bintu fis-somma ta' LM650 (€1,514.09) fix-xahar ai termini ta' dak deciz fis-sentenza moghtija mill-Qorti civili (Sezzjoni tal-Familja) fit-28 ta' Marzu 2007 fl-ismijiet Carmen Nygaard vs Jan Nygaard;

3. Tillikwida l-kumpens dovut lill-esponenti skont dak mitlub minnha skont l-ewwel talba hawn fuq elenkata kif ukoll tikkwantifika u b'hekk tillikwida l-ammont komplessiv ta' arretrati ta' manteniment li baqghu dovuti lilha mill-attur rikonvenzjonat skont dak mitlub fit-tieni talba hawn fuq elenkata;

4. Tordna sabiex l-attur rikonvenzjonat ihallas lill-esponentii s-somom hekk likwidati skont it-tielet talba hawn fuq elenkata f'terminu qasir u perentorju li jigi mpost minn din l-Onorabbli Qorti;

Bl-ispejjez ta' dawn il-proceduri a karigu tal-attur rikonvenzjonat.

Having seen the **reply of the Plaintiff to the counter claim** filed on the 18th of April 2016;

Having seen that the Court ordered that these proceedings be conducted in the English language;

Having seen the acts of the case together with all documentation filed;

Having heard all witnesses under oath;

Having appointed Architect Godwin Abela to effect the valuation of the premises in question as well as the two parking spaces in the same block of apartments;

Having seen the report of Architect Godwin Abela filed on the 5th of August 2019[1];

Having seen the note of submissions filed by Plaintiff on the 23rd of November 2020[2] as well as the note of submissions of the Defendant filed on the 15th of February 2021[3];

Having seen that the case was adjourned for today for judgement.

Considers as follows.

The Claim and Counter Claim.

On the 20th of May 1989 the parties to this case got married and lived in 175, Flat 14 , Tower Road, Sliema which they had bought on the 18th of November 1989 before Notary Dr. John Cachia Zammit. Together with this apartment they bought one car space and subsequently they bought a second car space,

[1] Page 675 of the proceedings.
[2] Page 808 et seq of the proceedings.
[3] Page 821 et seq of the proceedings.

both found in the garage forming part of the same block of apartments. On the 6th of September 1991, Karin was born. The parties started having marital problems separation proceedings were initiated by Jan Christian Gundersan Nygaard on the 24th of June 1998 followed by another separation case initiated by Carmen Nygaard on 2nd March 1999 and both decided by the Family Court on the 28th of March 2007. By a court decree of the 3rd of March 1998, the Plaintiff was ordered to pay Lm850 of which Lm650 were maintenance for the minor and Lm200 for the wife. All payments done by the Plaintiff were less than the amount ordered by the court. From October 1999 up to March 2000 he only paid Lm200 as maintenance. On the 4th of May 2003, the Plaintiff was ordered to leave the matrimonial home. From that day onwards, the Plaintiff stopped paying the loan. The Family Court ordered that Carmen Nygaard, and their daughter could reside in the matrimonial home for three (3) years, after which they had to evacuate the house and sell the property. From the proceeds they had to settle the debt that they jointly had, and the remaining proceeds had to be equally divided. From 2008 up to 2011 the Plaintiff gave his daughter Karin Gundersen Nygaard pocket money for the sum of €139.76 and bought her clothes every now and again as well as mobile credit cards. Notwithstanding that the three years passed from the sentence delivered by the Family Court, Carmen Nygaard still resides in the matrimonial home. On the other hand, the Plaintiff failed to pay the Defendant the sum as determined by the Family Court in its separation judgement.

Evidence.

Plaintiff submitted an affidavit . He said that he met Carmen at a bar while she was already engaged with someone else, and this notwithstanding, they met regularly which eventually led her to break off her engagement. According to the Plaintiff, Carmen was not well off and since he made a good living, she pressured him to get married very fast. In order to have somewhere to live he bought a flat in Tower Road, Sliema and since Carmen did not work, he took a loan from Lohombus Bank on his own. He also paid to have the flat furnished with paintings and furniture. They got married on the 20th of May 1989. The marriage was not a happy one so much so that problems started from as early

as the honeymoon. Notwithstanding the said problems, they had a child, Karin on the 6th of September 1991, however problems continued even after. Separation was granted by the Family Court on the 28th of March 2007 by which the Court ordered Carmen to continue living in the flat with their daughter for three years after which they had to sell the flat and split the money. According to the Plaintiff, she did not do this and continued living in this flat while he rented an accommodation for himself. She even rented out the two car spaces which belong to him. He insists that although she is still living in his flat, she did not and is still not paying any rent. He states that he cannot understand why she claims that she should be paid maintenance when this payment must only be made after the sale of the flat, apart from the fact that he paid the maintenance that he owed his daughter directly to her. Furthermore, the Plaintiff explains that he instituted these proceedings because the Defendant is making profit at his expense apart from living in the flat without giving him anything in return.

During the cross-examination he confirmed that for a good number of years he failed to pay maintenance as well as the loan, however he explains that he did so because he was thrown out of his flat on the 5th of May 2003 by a Court order based on what he calls false accusations. He paid the bank loan every month all the way up to May 2003 after which he did not pay any further instalments as he had covered his share of the loan. Up until April 1996, the loan repayments were Lm218 per month, after which the loan payment was reduced to Lm187, after Carmen rearranged the mortgage. He states that the pending sum of Lm7,337.11 as loan had to be paid by his ex-wife. He clarified that from 1997 up to 2000 he paid Lm850 a month as maintenance after that he paid Lm200 maintenance for his daughter. After he was ordered to leave the matrimonial home, he kept paying Lm200 maintenance for his daughter up until when she was 20 or 21, although he confirmed that this sum varied. The witness presented bank transfer statements for the sum of Lm200 covering from 30th November 2011 up to 28th March 2012. After those 6 payments he wasn't able to pay the maintenance as he was out of a job and sick, but he paid his daughter pocket money and bought her everything she wanted. When he stopped seeing her, he stopped giving her pocket money. He also insisted that

he had his own expenses and that's why he stopped paying maintenance to his daughter. He confirmed that he sent one thousand dollars ($1,000) to a lady in Brazil from their joint account but in return his estranged wife withdrew one thousand sterling from the account (£1,000)[4]. He states that the Brazilian lady eventually gave him back his money, however he was not able to provide documentary evidence to confirm this. He states that he is retired and have been so from when he reached 62 years of age and has a pension of about €1,300 per month. He clarified that the Lm850 that he used to give to Carmen included money to pay the bank. He also clarified that the Lm850 included money to pay Lm200 a month for the car loan which she eventually stopped paying. He states that he removed the number plates from their car, and he did so because he was unable to use the car when he was in Malta given that his estranged wife made a lock with the steering wheel. The Plaintiff filed a folder with receipts from 2003 up to 2011.

Karen Gundersen Nygaard, daughter of the parties, gave evidence on the documents that her father presented. She cannot confirm neither deny that her father paid for two phone cards in total of €15. She explained that several payments that he said he did were not substantiated by documents or receipt while some other receipts were illegible. She confirmed that her father did buy her clothes sometimes. She also confirmed that before she started university, when she was 20 years old, her father used to buy her top up phone cards, but surely not after. She explained also that while she was doing her A-levels she worked part-time, and she was already buying her own top-up cards and everything herself. As with withdrawal of money in Norway she couldn't say whether he gave her the withdrawn money or spent them on her or spent them on someone else. She doesn't recall ever going to an ATM to withdraw two thousand Krones and she doubt she ever got all that money, although he did give her some money in Krones to spend. While she was on holiday in Norway with her father, she stayed with her aunt and not in a hotel, they had breakfast at her aunt and sometimes they had a light lunch outdoors but supper was most of the times indoor at her aunt. She explained that she spent a day or two in

[4] Page 72 of the proceedings.

London on their way to Norway. She cannot confirm whether the receipt of the hotel they were staying in while in London covered only her share or also included his, given that they were staying in separate rooms, same goes for the train tickets. She does not remember from which shop she bought clothes while she was in London, but she does remember that he bought her things while they were there. She confirms that she never had a foreign Vodafone SIM as she always had a local SIM. She confirmed that in 2005 her father bought her a Nokia as that was the only way she could communicate with her father as he was working and living abroad. She also remembers that he bought her a laptop from Forestals. It is also probable that her father bought her clothes in 2005. She does confirm that it could be that in December 2006 as a Christmas present, he took her shopping. With regards to the holiday in Spain, Karen Nygaard explained that it was a Youth Exchange which was at a reduced price and which she clearly remembers her mother paying for all of it. When she was asked by court whether her mother was re-imbursed for the expenses paid, the witness said that as far as she knows no.

She states that in 2008 her father started giving her pocket money of €139.76 per monght and which she confirms that he kept making these payments till 2011, that is up until she just started University. As with regards to the receipt referring to sunglasses bought from Sunlab, the witness says that she is 100% sure that her father never bought her sunglasses from Sunlab. As with regards to the operation which she urgently needed, the witness said that it was paid by her mother and although her father said that he was going to pay for it he never did.

The witness noted that she is certain that on the 31 of August 2009 her father did a bank transfer to her account, but he never gave her the same amount in cash. As with regards to driving lessons, the witness explained that her father promised that he would pay for them however at some point he stopped paying. Her father paid half of her private tuition at St Thomas Institute. She also confirmed that her father bought her a notepad together with its case as a present. She also confirmed that her father bought her a textbook and a dictionary in the Norwegian language. With regards to the incident in Munich

she said that she had an argument with her father while having a coffee and as he started calling her names she stormed out of the cafeteria, went to the hotel, packed all her stuff, booked a flight back Malta which was the following morning. She said that she spent the whole night in the reception area as she was sharing the bedroom with her father.

Plaintiff took the witness stand and explained that it was actually him who paid the bill for the operation. He explained that when his daughter got to know that she needed an operation, she emailed him to help her. He said that he replied and told her to give her the details of the doctor so that he gives him a call. He explained that he actually called the doctor and informed him that he was in the States and whether he would find any objection if he carried out the operation and he will pay afterwards. He said that the doctor found no objection and that is what happened, and he even presented the invoice. With regards to the parking spaces that they have in the garage underlying their flat, he explained that he paid half of the second parking area (i.e. Lm2,500) to Alfred Borg via bank transfer from Barclays Bank. After the separation proceedings commenced, he did not make any further payment given that Lm200 were maintenance for his daughter and Lm650 had to cover all other expenses. He stopped making payments for the second parking area because he did not have enough money. He explained that given that his daughter didn't get anything from the share that he was sending Carmen, he decided to stop sending the money and instead opened a bank account in her name and started transferring money into her account. When he was asked whether he was aware that Carmen had to stop their daughter music lesson as well as to stop from sending her to a private school because she was not receiving any maintenance, he explained that he was not aware that she was attending piano lessons given that while he was still living under the same roof she never attended music lessons and as with regards to private schooling, he was not aware of that as he thought that she was attending government schooling.

During the re-examination, Mr. Gundersen Nygaard explained that when he was ordered to leave the house, he was abroad, and he was unable to pick up his personal belongings. He presented a list of the personal belongings still in

the matrimonial home. He confirmed that besides the flat in Sliema they also had two parking spaces. He explained that after he left the house, he never made use of them. He stated that while his estranged wife was using one parking space, the other one was being rented out by his wife to Ms. M. Salamone. He said that he tried several times contacting her but she never replied. The witness presented two valuations of the property, one prepared on the 3rd of May 2002 and another one on the 22nd of March 2006, both prepared by Anthony Sciberras, estate agent at Perry Limited.

During cross-examination he said that Plaintiff never contacted him to pick up his personal belongings. Given that he could not enter the flat since the lock was changed, he never collected his belongings.

Karen Maria Cremona, Executive at Transport Malta, explained that the vehicle with registration number IBJ 065 was property of Carmen Nygaard between the 18th of September 2009 and 16th November 2013. She also explained that vehicle MSS 001 is registered under the name of Mariella Salamone since the 1st of March 2005.

Maria Stella Salamone was called as witness. She confirmed that she is the owner of vehicle with registration number MSS 001. When she was asked where she parks it, she said that she parks in Creche Street underneath Frank Salt and has been doing so since 2009, before that she parked it in Tower Road. She confirmed that although she had no agreement of lease, she paid one Maltese Lira (Lm1) per day which she paid to Carmen Nygaard. She explains that parking her vehicle in Tower Road was temporarily and she has done so for a year or a year and a half. During cross examination she stated that she does not know the Plaintiff and they never spoke.

Defendant Carmen Nygaard filed an affidavit in which she started off by explaining that through a separation judgement delivered by Hon. Judge Noel Cuschieri, her husband was responsible for the matrimonial breakup after he had an affair with a Brazilian woman. With regards to maintenance arrears, the witness explained that her estranged husband was ordered by a decree of

3rd March 1998 to pay maintenance for their daughter and herself the sum of Lm850 per month. She went on to say that the first payment was made on the 20th of March 1998 and the amount was of Lm695 instead of Lm850. All payments were less than the sum ordered by Court apart from always being late in payment. In fact, from October 1999 to March 2000 her husband only paid Lm200 instead of Lm850 and the last payment was on the 29th of March 2000. She stated that the maintenance arrears amount to €320,492.50 without interest and another €12,130.77 judicial costs according to the judgement given by Hon. Justice McKeon and Hon Justice Cuschieri. Carmen Nygaard stated that even though he stopped paying maintenance he was still residing under the same roof and making use of all the utilities. This went on until he was ordered by the Court to leave in May 2003.

With regards to the loan, she insisted that Plaintiff stopped paying maintenance as sell as the loan repayments and other bills. She states that "although I tried to make an arrangement with the bank regarding the house loan to be reassessed according to my salary, it was very difficult to come to an agreement. At last my sister agreed to pay the loan of the flat on my behalf by standing order for some time which money eventually I also paid back."[5] She said that she started working as Probation Officer in 1999 and attending a part-time University course, she even worked part-time as a Youth Worker to increase her income. Her daughter stopped attending private school after Year 6, she stopped attending piano lessons and playing bowling with friends and this because she could not afford paying everything on her own. She said that their mobility was restricted as although her ex-husband had a Porsche he used the Golf, the car which they bought part-exchange with her personal car and also paying the loan on the car (Golf). She said that after she placed a hackle on the steering wheel to avoid him from using it since he had other means of transport, he removed the number plates.

As with regards to the flat, she explained that her husband never tried to communicate with her regarding the sale of the flat although several attempts

[5] Page 491 of the proceedings.

were made on her part including meeting up once to discuss the sale, but he only showed interest in transferring the car (Golf) to their daughter. She said that she explored the possibility of taking a bank loan to buy a new property but since she was paying another loan combined with a low salary, the Bank refused to grant her a loan. She says that she made her estranged husband aware of this. She said that "even before and after this instance I had tried to communicate with him that I needed to buy another property before I evacuate the flat because I had nowhere to go and I did not have the means to rent."[6] She needed his consent to sell. She said that she wrote and spoke with his lawyers but received no answers. She also made reference to the fact that her husband failed to pay for the second parking space and although she wanted to pay half of the money owed, Alfred Borg, the owner, refused payment as he wants all the money at one go. She always paid the loan that they had on their flat and her last payment was on the 25th of May 2015.

During cross-examination she explained that they bought one parking space with the flat and then they bought the second one later on and there should be a contract for that as well.

Architect Godwin Abela inspected the immovable property owned by the parties and made a report concluding that the current market value on today's open market is of eight hundred thousand Euro (€800,000) and the value of two parking spaces is that of sixty thousand Euro (€60,000). On the other hand, the rental value of the apartment is forty thousand Euro (€40,000) annually while the rental value of both parking spaces is that of three thousand Euro (€3,000) annually.

[6] Page 492 of the proceedings.

Considerations of the Court.

Plaintiff's Action - *Actio de in Rem Verso*.

The action brought forward by Plaintiff is known as the *actio de in rem verso*, where the Plaintiff is claiming that his estranged wife unjustly enriched herself when she kept on residing in their matrimonial home, 175, Flat 4, Tower Road Sliema over and above the thre years allowed by the Family Court as well as by leasing out the two car spaces underlying the said block of apartments to third parties and pocketing the rent herself.

The action *de in rem verso,* as noted in local case-law "*hija rimedju sussidjarju estiż għall-każijiet meta tkun avverat ruħha lokupletazzjoni effettiva għad-dannu ta' ħaddieħor, u ssib il-fondament tagħha fil-prinċipju "jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem*" *(L. 206 fr. de regulis juris)*"[7] It is considered as a subsidiary action due to the fact that the issue between the parties is not regulated by any contract, law or by any other obligation.

This action is now-a-days established in **Article 1028A of the Civil Code** which provides that:

> "(1) Whosoever, without a just cause, enriches himself to the detriment of others shall, to the limits of such enrichment, reimburse and compensate any patrimonial loss which such other person may have suffered.
> (2) If the enrichment constituted a determinate object, the recipient is bound to return the object in kind, if such object is still in existence at the time of the claim."

[7] **Giuseppe Calleja vs. Walter Zammit Tabona** decided by the Court of Appeal (Commercial Jurisdiction) on the 5th of April 1957.

One can exercise this right of action when she or he has no other action available to make up for the loss suffered and this is in accordance with **Article 1028B of the Civil Code**:

> "The *actio de in rem verso* may not be exercised where the person who suffers the loss may take another action to make up for such loss."

In **Blye Engineering Co. Ltd vs. Victor Balzan** (Sworn Appl 589/2001), the Court of Appeal (Inferior Jurisdiction) held that

> "*l-gurisprudenza taghna tidher li hi wahda konkordi u pacifika.*
>
> *(1) "L-azzjoni de in rem verso hija esperibbli biss meta mhiex esperibbli l-azzjoni "ex contractu"; u ghalhekk meta l-attur ghandu l-azzjoni "ex contractu" kontra d-debitur, huwa ma jistax jagixxi kontra haddiehor bl-azzjoni 'de in rem verso' –* ***Kollez. Vol. XXXIV pIII p784****);*
>
> *(2) "Kwantu ghall-pretensjoni tal-appellant, fis-sens li huwa ghandu dritt ghall-hlas tas-somma reklamata bl- "actio de in rem verso", jinghad li din l-azzjoni hi rimedju sussidjarju estiz ghall-kazijiet meta tkun avverat ruhha lokupletazzjoni effettiva ghad-dannu ta' haddiehor, u ssib il-fondamentament taghha fil-principju "jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem" (L206 fr.de regulis juris). Dan irrimedju gie koncess fil-kazijiet fejn ma hiex esperibbli lazzjoni "ex contractu" -* ***Kollez. Vol. XLI pI p631****.*
>
> *(3) "Minn dan li ntqal fuq jitnissel illi din l-azzjoni, ntrodotta mill-ekwita` tal-pretur ruman, giet estiza ghal kwalunkwe vantagg li persuna tirritraji mill-fatt ta' haddiehor, minghajr titolu guridiku, jew b'titolu difettuz, jew null" –* ***Kollez. Vol. XXXIX pII p764****).*
>
> *(4) Ghalhekk, ad exemplum, "meta obbligazzjoni tigi annullata minhabba inkapacita` ta' wiehed mill-kontraenti, ma taghtix lill-kontraent l-iehor ebda dritt ghar-restituzzjoni ta' dak li jkun gie moghti, jew ta' dak li jkun*

gie imhallas in forza ta' din l-obbligazzjoni, imma di regola hija sogggetta ghall-eccezzjoni fil-kaz li jigi pruvat li l-haga moghtija jew imhallsa tkun avvantaggjat lil min kontra tieghu ssir lazzjoni. Minn dan jitnissel li l-obbligazzjoni trid tkun giet kuntratta ma' inkapaci, li l-istess ghalhekk tkun giet annullata, u l-pagament ikun gie realment maghmul in forza ta' l-obbligazzjoni annullata" – ***Kollez. Vol. XLI pII p816***."

The Three Elements of the *Actio de in Rem Verso*.

There are three basic elements which need to be present for this action to succeed, namely,

1. The enrichment;
2. The relation of causality; and
3. The unjust character of the enrichment.[8]

In the case under examination the Plaintiff's demand is based on a judgement delivered by the Family Court in the names **Carmen Nygaard vs. Jan Nygaard** (Sworn Appl. 525/1999) decided on the 28th of March 2007 (appealed but was deserted on 2nd September 2008). In the said judgement the Court held that "*Id-dar matrimonjali, l-appartament numru 14, blokk numru 175 f'Tower Road Sliema, inkluz l-ghamara ezisteni […] jinbiegh fi zmien tlett snin millum, bis-subbasta, izda l-partijiet huma liberi li jiftehmu li jbieghu l-post fuq is-suq liberu; […]*"[9] Add to this, the Family Court was very clear that "*sa perijodu ta' tlett snin l-attrici ghandha d-dritt tibqa' tghix fil-fond ma' bintha ad eskluzjoni tal-konvenut; izda minn issa qeda tigi ordnata li gheluq it-tlett snin millum hija u bintha jivvakaw l-fond."* Moreover, when the Family Court was considering the apartment, it was also considering the parking spaces[10] and thus all observations hereunder apply to both the apartment as well as to the garage spaces.

[8] See **Said vs. Testaferrata Bonnici** (XXIX.II.1105) decided by the Civil Court, First Hall on the 16th of June 1936.
[9] Page 27 of the proceedings.
[10] "*Id-dar matrimonjali konsistenti f' appartament f' tas-Sliema numru 14, fil-blokk numru 175 f' Tower Road, flimkien ma' zewg garage spaces li skond valutazzjoni, mhux kontestata, li saret fit-12 ta' Lulju 2004 gew stamti fis-somma ta' Lm130,000*." (underlining added by this Court).

It is uncontested by Defendant that upon the lapse of three years she failed to vacate the matrimonial home, so much so that she still lives in the said home up to this very day, 10 years from the lapse of the three years.

However this does not necessary amount to unjustified enrichment. The Family Court authorised Defendant to continue living in the matrimonial home up to three years after judgment after which the property had to be sold either by judicial sale or on the open market.

The Court must also consider whether the Plaintiff had any action at his disposal to, first and foremost, avoid the loss allegedly suffered by him.

. It results that Plaintiff took no steps to proceed with the judicial sale. He neither took steps to force Defendant to vacate the premises. Plaintiff had an executive title in hand which he could use to enforce the court judgment ordering Defendant to vacate. The fact that Defendant continued living in the matrimonial home after the lapse of three years from when the judgment became res judicata does not automatically translates to unjustified enrichment.

Plaintiff gave no explanation as to why after so many years have passed since the Family Court judgment, he did not proceed to enforce it.

Since Plaintiff has to date made no attempts to enforce the judgment of the Family Court he cannot claim that he suffered damages because Defendant continued living in the matrimonial home.

It would have been a different situation had Plaintiff proceeded to enforce the judgment and Defendant obstructed the proper execution of the judgment.

Another consideration made by this Court is that the fact that Defendant continued staying in the matrimonial home after the lapse of three years was not the cause of damages to Plaintiff. It would have been a different situation

had the consequence of Defendant vacating the premises translated to the repossession of the immovable property by Plaintiff and the possibility of renting it out to third parties thus generating an income or of using it himself.

The Court firmly believes that one should not benefit from his inaction. This is the merits of the first plea raised by Defendant.

This Court opines that after allowing years to pass without taking action to enforce a judgement to avoid any possible loss, Plaintiff cannot claim to be the victim of unjustified enrichment.

Through these proceedings Plaintiff attempts to substitute one procedure with another. To date he failed to resort to take actions available to seek enforcement of the judgement and ensure that the Defendant vacated the apartment and the parking spaces. One should shoulder responsibility for his or her inaction. The *actio de in rem verso* is not an action to make up for lack of interest or action by the Plaintiff. Given that the Plaintiff had other remedies which he could have availed off immediately upon the lapse of three years mentioned in the judgement delivered by the Family Court this Court is going to reject the demand with regards to compensation from unjustified enrichment linked to the matrimonial home.

Unjustified Enrichment Claim and the Lease of Parking Spaces.

Next to be considered is the Plaintiff's claim that the Defendant enriched herself from leasing the two parking spaces marked 10 and 11, situated in 175, Tower Road, Sliema. While it has already been considered by this Court that the use of these parking spaces by Carmen Nygaard falls fairly and squarely under the judgement delivered by the Civil Court (Family Section), this Court is to consider the alleged leasing out of the parking spaces to third parties.

To prove his allegation, the Plaintiff presented a photo of two cars parked in the said spaces with registration number IBJ 065 owned by Carmen Nygaard and MSS 001 which belonged to Mariella Salamone. Ms. Salamone took the

witness stand and swore that she parked her car in one of the said parking spaces for a year or a year and a half up until 2009 and although she did not have any lease agreement with Carmen Nygaard, she paid her one Maltese Lira (Lm1) equivalent to two Euro and thirty three cents (€2.33) per day. The Plaintiff did not provide any other evidence to substantiate his allegation that the parking spaces were leased also to other third parties, so the Court is to limit itself to the leasing out of one parking space to Ms. Mariella Salamone.

With leasing out one of the parking spaces – although at a very low price when compared to the renting value estimated by the Court appointed Architect Godwin Abela – Carmen Nygaard still made profit from it. Ms. Salamone was not certain for how long she parked her car in the parking space underlying 175, Tower Road, Sliema, but she was certain that she did not park there for more than one year and half. If the Court had to take the period of one year and a half, with a payment of €2.33 per day, the Defendant received one thousand, two hundred and seventy six Euro and eighty four cents (€1,276.84). Given that the parking space in question belongs to both parties in equal share between them, Plaintiff's claim in this regard is justified and the Court is ordering Defendant to pay Plaintiff half the amount she received, ie. the sum of six hundred and thirty eight Euro and forty two cents (€638.42).

Having considered the claim by Plaintiff, the Court now turns to consider the counter claim filed by the Defendant. In her counter claim Carmen Nygaard refers to the personal separation judgement delivered by the Family Court on the 28th of March 2007. By virtue of the said judgement the Family Court ordered Jan Christian Gundersen Nygaard to pay Carmen Nygaard the sum of Lm74,450 as maintenance owed to the reconvening Defendant as well as:

"[E] Krediti ta' nofs l-ammonti ta' Lm171.11 u LM85.64, rapprezentanti kontijiet tat-telefon u dawl u ilma, mhallsa mill-attrici u li jirriferu ghal data antecedenti l-imsemmi digriet;

[F] Kreditu ta' Lm30,000 dovut lill-attrici rapprezentanti proprjeta' parafernali, u f'dan ir-rigward il-Qorti tikkondividi u taddotta l-

konsiderazzjonijiet u konkluzjoni tal-pert legali kontenuti fil-paragrafu 68[a] tar-relazzjoni tieghu;

[G] Kreditu ta' mija disa u tletin lira maltin [Lm139] dovuti lill-attrici, rapprezentanti nofs il-flus [1000USD] migbuda mill-kont kongunt tal-partijet, mill-konvenut ad insaputa ta' l-attrici u mibghuta mill-konvenut lil mara indikata fuq ir-ritratt esebit."[11]

As pointed out earlier, the Family Court ordered the sale of the matrimonial home within three years from the date of the judgement through judicial auction, but the parties where free to agree to sell it on the open market.

The court also ordered that from the proceeds of the sale ("*mir-rikavat tal-bejgh*"[12]) several debts had to be paid to the respective creditors of the community of acquests and enlisted the credits including, amongst others:

"[c] Il-kreditu ta' tletin elef lira maltin [Lm30,000] proprjeta' parafernali ta' l-attrici u dovut lilha;
[d] Il-kreditu ta' erba u sebghin elf, erba mija u hamsin lira Maltin [Lm74,450] arretrat ta' manteniment dovut lill-attrici;
[e] Il-manteniment dovut favur il-minuri li ma jkunx thallas sa dak in-nhar jew sakemm it-tifla tkun saret maggjorenni;
[...]
[g] Il-kreditu ta' mija tmienja u ghoxrin lira Maltin u tlieta u tletin centezmu [Lm128.33] dovut lill-attrici;
[h] Il-kreditu ta' mija disa u tletin lira Maltin [Lm 139] dovut lill-attrici;"

Plaintiff in the present case put forward the following defences to the claims of Defendant in her counter claim:

[11] Page 26 of the proceedings.
[12] Page 27 of the proceedings. Underlining done by the Family Court.

(a) that the reconvening Defendant failed to provide an English translation of the sworn counter claim;
(b) that there is lack of connection between his claim and the counter claim;
(c) that there is conflict between the cause of the claim and the claim made;
(d) that the claim is premature;
(e) that the sworn application lacks formality;
(f) that the reconvening Defendant lacks juridical interest and
(g) that the action is time barred.

Plaintiff's Pleas to the Counter-Claim.

Before proceeding to the merits of the counter claim, the Court is to first consider all the preliminary pleas raised by the reconvened Plaintiff.

Plaintiff's First Plea - Counter claim not accompanied by English translation.

The first plea refers to the fact that the reconvening Defendant failed to provide an English translation of the sworn counter claim. On the 20th of April 2016, the reconvening Defendant filed a note attaching with it a translation in the English language of her reply to the Plaintiff's claim together with a translation of the counter claim. The court also took into consideration the fact that Plaintiff filed his sworn reply to the counter claim within the time limit established by law. Consequently the Court considers the merits of this plea as having been exchausted.

Plaintiff's Second Plea - Lack of Connection between Claim and Counter-claim.

With the second preliminary plea Plaintiff alleges that there is lack of connection between the claim and the counter claim.

Article 396 of Chapter 12 holds that a counter-claim is allowed (a) when the claim arises from the same fact, or same contract or title giving rise to the claim of the Plaintiff; or (b) when the claim is to set-off the debt claimed by the Plaintiff, or to bar in any other manner the action of the Plaintiff or to preclude its effects.

The Civil Court, First Hall in **Carmel Farrugia vs. Alexandra Farrugia** (Sworn Appl 924/1997) decided on the 6th of March 2003, quoting from **Neg. Luigi Spiteri Debono vs. Neg. Charles Darmanin noe** decided on the 24th of April 1930, held that a counter-claim can be permitted when there is:

"*(i) La communanza di origine delle causi e vi e` communanza di origine quando le due domande emanano dallo stesso fatto o dallo stesso contratto o titolu, ovvero;*
(ii) La eliminazione reciproca delle due domande che esiste non solo in caso di pretesa compensazione, ma anche quando le domande dell' attore verebbe a esser in qualche altro modo perente, ovvero benche il vincolo permanga, pure non posse produrre ulteriori effetti.

Illi minn dan jirrizulta li l-legislatur kien liberali sew, u l-intenzjoni tieghu kienet mhux biss li tigi eliminata l-obbligazzjoni attrici, jew ikkompensata, izda ukoll jekk id-domandi attrici jigu b'kull mod, jekk mhux estinti, anke newtralizzati.

Illi tenut kont tal-fatt, li l-iskop tal-kontro-talba, huwa sabiex zewg kawzi bejn l-istess partijiet jinstemghu fi process wiehed, u b'hekk jigu evitati multiplicita' ta' kawzi bejn l-istess persuni, l-interprettazzjoni tal-istess artikolu ghandha tkun wahda estensiva, imbasta l-bazi tal-istess tigi rispettata u mhux znaturata.

Illi ghalhekk fl-interprettazzjoni tal-fonti ta' origine tal-istess kontro-talba, u cjoe` il-kuntratt, it-titolu u l-fatt, dawn ghandhom dejjem jigu nterpretati fil-kumpless ta' cirkostanzi li jaghtu hajja ghall-kawza u li jifformaw il-bazi tal-litigazzjoni. Dan tant huwa minnu li l-legislatur permezz ta' sub-artikolu

(2) jestendi l-istess ghal kull mezz li bih l-azzjoni attrici tigi estinta, jew l-effetti taghha jigu newtralizzata."

In **Gasan Insurance Agency Ltd noe vs. Simon Soler et** (Civ App 863/99) decided by the Court of Appeal (Inferior Jurisdiction) on the 22nd of November 2002 it held that

*"*Effettivament l-estremi rikjesti ghar-rikonvenzjoni skond l-imsemmi artikolu jikkonsistu fl-ispjega elokwenti li nsibu fid-decizjoni klassika fuq din il-materja, riportata a Vol XXVII p1 p895:
(i) 'nella comumanza di origine delle due cause', ovvero;
(ii) nella eliminazione reciproca delle due domande."

Reference is also made to the judgement delivered by the Civil Court, First Hall in the names **Joseph Scerri vs. Anna Fenech et** (Sworn Appl 1672/2001) on the 3rd of July 2003 where it was made further clear that:-

"Hawnhekk, il-Qorti thossha fid-dmir li taghmilha cara li l-fatt li l-ghan ta' parti mharrka jkun li ggib fix-xejn azzjoni mressqa kontriha ma jirrendix gustifikat invarjabbilment it-tressiq ta' att gudizzjarju fl-ghamla ta' rikonvenzjoni. L-istess ghan jintlahaq b'nota tal-eccezzjonijiet. Ma kien qatt il-hsieb tal-legislatur li jirrendi l-azzjoni rikonvenzjonali bhala strument ordinarju li bih kull kawza tfaqqas fi tnejn. Kemm hu hekk, ir-rikonvenzjoni hija rimedju straordinarju procedurali li ghandu hsieb u ghan specifiku, u kemm hu hekk hija wahda minn dawk il-proceduri li l-Kodici ssejjah 'specjali'."

"Illi dwar it-tifsir tal-konnessjoni mehtiega mal-azzjoni attrici biex tista' triegi l-kontro-talba, wiehed irid izomm quddiem ghajnejh ukoll li fl-istitut tar-rikonvenzjoni, l-azzjoni u l-azzjoni rikonvenzjonali jitqiesu bhala zewg azzjonijiet li kapaci joqoghdu wahedhom f'ezistenza indipendenti u awtonoma. Kemm hu hekk, l-artikolu 401 tal-Kodici jseddaq din l-awtonomija. Ghalhekk, b''konnessjoni' wiehed certament ma jifhimx li l-kontro talba tkun dipendenti fuq it-talba jew in-natura taghha [Ara per

ezempju, App. iv. 5/10/2001 fil-kawza fl-ismijiet *Sammy Meilaq noe vs Oral Attinel pro et*]. Izda l-elementi li trid il-ligi jridu jkunu murija sewwa biex il-kontro-talba tista' titressaq kif imiss".

Although the right to bring a counter claim is conferred on the Defendant without limitation as to the form of action in which it may be brought[13], this does not however mean, that each Defendant has a justifiable basis to bring a counter claim in any case brought against it. As specified in Article 396 of Chapter 12, a counter claim shall be linked to the principal claim by having the same fact, the same contract or the same title. The legislator therefore specified a list of reasons for the connection.

These three elements were considered in detail in recent judgement delivered by the Civil Court, First Hall in the names **Antoinette Debono vs. Mario Vella** (Sworn Appl 780/2011 GM) delivered on the 30th of May 2019:

"in kwantu l-kelma "kuntratt" hija waħda ben definita. Il-ġustizzja u l-prinċipju tal-ekonomija tal-ġudizzji jitolbu bla dubbju li l-kwistjonijiet kollha li jiskattaw minn kuntratt jiġu epurati u deċiż fl-istess ġudizzju mill-istess imħallef."

[...]

"il-konnessjoni permezz tal-istess titolu hija l-unika konnessjoni permessa mil-liġi Taljana, kuntrarjament għal dik Maltija, li tippermetti l-konnessjoni anke permezz tal-istess kuntratt u tal-istess fatt. Fil-verita' iżda d-differenza mhix kbira daqs kemm tidher mal-ewwel daqqa t'għajn, billi min-naħa l-waħda, il-kelma "titlu" facilment tinkludi "kuntratt" u min-naħa l-oħra, din giet interpretata b'mod ferm wiesa mid-dottrina u l-ġurisprudenza Taljana tant li giet tinkludi anke l-kelma "fatt"."

[13] See **F. Mercieca & Sons Mobili Ltd vs. George Borg et** (Sworn Appl 940/00 GV) decided by the Civil Court, First Hall on the 20th of February 2001.

[...]

"il-leġislatur x'qiegħed jifhem bil-kelma '*fatt*'? Skont definizzjoni mogħtija mid-Digesto Italiano, u accettata mill-Qrati Maltin [Negoziante Luigi Spiteri Debono noe v Negoziante Charles Darmanin noe 25.04.1930 QA [A. Mercieca – F Buhagiar – E Ganado] XXVII.i.886.] "*Il 'fatto' e' la manifestazione esteriore delle facolta' intellettuali e volitive dell'uomo e come tale puo' formare causa di obbligazione [*Voce 'Fatto'(Diritto Civile) Vol IX p. 548)] *e nel caso procedurale 'fatto' significa anche 'il complesso di tutte le circostanze che hanno dato causa e che formano l'oggetto di una lite'* [(Digesto Italiano p. 549 Procedura Civile).]

[...]

Is-sentenzi l-iktar awtorevoli tal-Qrati tagħna, u, b'mod konsistenti, is-sentenzi tal-Qorti tal-Appell**, <u>interpretaw il-kelma "fatt" b'mod wiesa</u>** <u>bħala li tfisser</u> **<u>mhux biss iċ-ċirkostanza partikolari dedotta fil-ġudizzju mill-attur, imma wkoll il-kumpless ta' cirkostanzi antecedenti għaliha, jew konkomitanti magħha.</u>**"[14]

Apart from permitting a counter claim when the fact, contract or title are the same, a counter claim can also be put forward when Defendant attempts to neutralise Plaintiff's claim by way of a sett off or to bar in any other manner the action of the Plaintiff or to preclude its effects. This means that paragraph (a) and (b) of Article 398 are alternative to each other.

Applying the above principles to the present case, the Court is of the view that while the Plaintiff is right in stressing that the counter claim is not directly connected with his claims, on the other hand Plaintiff is incorrect in stating that the counter claim is not connected by the same facts.

[14] See also (a) **Paul Gambin vs. Frank Gambin pro et noe** decided by the Court of Appeal (Superior Jurisdiction) on the 27th of March 1996; (b) **Sammy Meilaq noe vs. Oral Attinet noe** (Civ App 814/1992) decided by the Court of Appeal (Superior Jurisdiction) on the 5th of October 2001; (c) **Air Malta plc vs. Lawrence Borg noe** (Sworn Appl 791/2003 JRM) decided by the Civil Court, First Hall on the 30th of June 2004.

While the Plaintiff lodged an action alleging damages caused by Defendant for not vacating the matrimonial home after the time limit imposed by the Family Court elapsed; the counter claim is based on alleged damages that resulted from the lack of interest and lack of cooperation by the reconvened Plaintiff to sell the matrimonial home. Furthermore, the second demand of the counter claim can also succeed under the premise of setting off or neutralising the claim. The Court therefore rejects the second plea of the reconvened Plaintiff.

Plaintiff's Third Plea - Conflict between the premises of the counter-claim and the counter-claim itself.

In his third plea Plaintiff claims that there is conflict between the premises of the counter-claim and the claims in the counter-claim. According to the reconvened Plaintiff, while the premises of the counter claim are based on various credits which Defendant claims against Plaintiff, the claim made in her counter claim are damages suffered caused by the Plaintiff's lack of interest and cooperation in selling the matrimonial property. The plea further states that it is unclear whether the reconvening Defendant is claiming the payment of the maintenance arrears as liquidated by the Civil Court (Family Section) or whether she is simply claiming the payments due to her as from the date of the said judgement onwards.

In considering this third plea the Court refers to the case **Philip A. Tabone noe vs. Concrete Mic Ltd** (Sworn Appl 1750/1999) decided by the Civil Court, First Hall on the 28th of July 2004 where it held that:-

> "Illi dwar l-element ta' kjarezza fl-Att taċ-Ċitazzjoni, l-liġi ma tinsistix fuq formola preċiża jew kliem partikolari, u sakemm it-talba tkun tista' tinftiehem, ma jimpurtax jekk il-kawżali tkunx imfissra b'mod xott jew saħansitra mifhuma jew implikata mit-talba nnifisha [P.A. **15.12.1955** fil-kawża fl-ismijiet **Moore noe vs Falzon et.** (Kollez. Vol: **XXXIX.ii.807**)];

Illi ngħad ukoll li fejn ma jkunx hemm kontradizzjoni għall-aħħar bejn il-premessi u t-talbiet jew bejn it-talbiet innifishom, il-Qrati għandhom iqisu b'ċirkospezzjoni eċċezzjoni ta' nullita' ta' att ġudizzjarju. Biex att ta' Ċitazzjoni jgħaddi mill-prova tal-validita' huwa biżżejjed li t-talba tkun imfassla b'mod tali li l-persuna mħarrka tifhem l-intenzjoni ta' min ħarrikha [P.A. : **14.2.1967** fil-kawża fl-ismijiet **J.G. Coleiro vs Dr. J. Ellul** (Kollez. Vol: **LI.ii.779**)] u li tali tifsila ma tkunx ta' ħsara għall-imħarrek li jiddefendi lilu nnifsu mit-talba tal-attur [App. Kumm. **20.1.1986** fil-kawża fl-ismijiet **Carmelo Bonniċi vs Eucharistico Żammit noe et**]

Illi fis-sentenza li għaliha għadha kemm saret riferenza ftit iżjed 'il fuq, il-Qorti qalet li "*hu neċessarju illi jkun jirriżulta rapport ta' konnessjoni raġonevolment identifikabbli bejn il-premessi miġjubin bħala l-kawża tat-talba u t-talba stess kif diretta kontra l-konvenut*";

Illi huwa wkoll miżmum bħala prinċipju ġenerali li n-natura u l-indoli tal-azzjoni għandhom jiġu misluta mit-termini tal-att li bih ikunu nbdew il-proċeduri [App. Ċiv.: **7.3.1958** fil-kawża fl-ismijiet **J. Tabone vs J. DeFlavia** (Kollez. Vol: **XLII.i.87**)]. Normalment, b'dan wieħed jifhem li dak li kellu f'moħħu min ikun fetaħ il-kawża jkun irid jirriżulta mill-att taċ-Ċitazzjoni innifsu u mhux minn provi li jitressqu iżjed 'il quddiem fil-kawża [App. Ċiv. **30.3.1998** fil-kawża fl-ismijiet **Raymond Beżżina vs Anthony Galea**], u għalkemm id-dikjarazzjoni maħlufa hija meħtieġa ad validitatem biex iċ-Ċitazzjoni tkun tiswa, dak li jingħad fl-istess dikjarazzjoni ma jiswa qatt biex jirrimedja dak li jista' jkun nuqqas fl-Att taċ-Ċitazzjoni [Ara P.A. **6.3.1958** fil-kawża fl-ismijiet **Żahra vs Żahra et** (Kollez. Vol: **XLII.ii.948**)], għalkemm jista' jitfa' dawl fuq il-kawżali u jiċċaraha [App. Ċiv. **23.4.1945** fil-kawża fl-ismijiet **Savona noe vs Asphar** (Kollez. Vol: **XXXII.i.228**); u P.A. 6.6.19**57** fil-kawża fl-ismijiet **Demarco vs Fiteni** (Kollez. Vol: **XLI.ii.1035**)]. B'dan il-mod, jekk id-difett fit-tfassila tal-att li bih tkun inbdiet il-kawża ma jġibx preġudizzju serju lill-parti mħarrka, allura l-proċedura tkun tista' tiġi salvata basta dan ma jaffettwax is-sustanza tal-azzjoni jew tal-eċċezzjonijiet [P.A.: **24.6.1961** fil-kawża fl-ismijiet **Falzon vs Spiteri et** (Kollez. Vol: **XLVIII.ii**)];"

Considering the standpoint taken by our courts as reflected in this judgement and the jurisprudence referred to in the said judgement, the Court does not agree with the Plaintiff that the premises of the counter claim contradict the claim itself. The second premise gives the reasons why the reconvening Defendant is asking for damages, namely that she suffered prejudice when she was not paid the sum allegedly due by the Plaintiff and that she incurred various expenses which she allegedly could have avoided if the Plaintiff had shown interest in selling the matrimonial property. While the premises of the counter claim could have been better worded and better explained, this does not tantamount to prejudice to the Plaintiff. This is evident from the detailed sworn reply of the reconvened Plaintiff which clearly shows that he understood very well what Plaintiff is requesting in her counter claim and the reasons supporting it.

As with regards to the maintenance counter claim, the Court is of the view that the third premise is clear and does not contradict in any way the second claim of the reconvening Defendant. The Defendants' claim refers to the maintenance as liquidated by the Family Court, that is, the sum of Lm650 per month until their daughter reaches the age of majority. Given that when the decision by the Family Court was delivered Karin Nygaard was still a minor, Carmen Nygaard is asking for the liquidation of maintenance that goes beyond the date of the judgement delivered by the Family Court but does not go beyond the age of majority. Given that a claim and/or a counter claim must not be declared null unless for grave reasons[15], the Court is rejecting the third preliminary plea of the reconvened Plaintiff.

Plaintiff's Fourth Plea - Counter-Claim is Premature.

In his fourth plea reconvened Plaintiff contends that the counter claim is premature. According to Jan Christian Gundersen Nygaard the claim of

[15] See **Capua Palace Ltd vs. Borid Arcidiacono** (Sworn Appl 383/2001) decided by the Civil Court, First Hall on the 30th of January 2003.

Defendant refers to the credit which must be paid from the proceeds of the matrimonial home which to date has not been sold.

The Family Court in its decision of March 2007 held that "mir-rikavat tal-bejgh ghandhom jigu mhallsa s-segwenti krediti lill-krediturі rispettivi" and went on to list all the creditors of the community of acquests including those due to Carmen Nygaard.

The Court observes that through her counter claim Defendant is not asking for the payment of the credits due on the date of the Family Court decision, as those are already declared due by the Civil Court (Family Section). That matter is res judicata.

What Defendant is claiming by her counter-claim are damages that she allegedly suffered when according to Defendant Plaintiff failed to show interest to sell the property. In her note of submissions Carmen Nygaard submits that:-

> "the Defendant did not and has not asked this court to order the Plaintiff to pay the credits themselves since it is obvious that there is already a separation judgement that has clearly ordered the payment of such sums when the sale of the matrimonial property takes place so the Defendant did not need to request any decision in this sense."[16]

Though Defendant filed evidence in the form of a list of the credits due to her already considered and decided by the Civil Court, (Family Section), she also presented evidence of damages she allegedly incurred due to the alleged lack of interest by the Plaintiff for example the interest paid on the loan and the accruing interest on the parking spaces, and the monthly maintenance due.

These are the counter-claims that this Court will decide upon.

[16] Page 836 of the proceedings.

For the sake of clarity it is opportune to underline that this Court does not have the jurisdiction to decide on matters that fall under the competence of the Family Court and which have already been decided upon by the said Court in its judgement delivered on the 28th of March 2007. This Court will decide the counter-claim regarding alleged damages allegedly suffered by Defendant post Family Court judgment.

The Family Court had ordered that the credit due to the Defendant is to be paid once the apartment, the former family home of the parties, is sold. Given that the apartment has not yet been sold, neither on the open market nor by judicial auction, this Court cannot change the clear condition imposed by the Family Court in its judgment.

Since the counter claim is limited to damages and not to the credits enlisted in the separation judgement, this Court rejects Plaintiff's fourth plea.

Plaintiff's Fifth Plea – Nullity of the Counter-Claim.

In his fourth plea Plaintiff pleads that in her counter-claim Defendant failed to indicate the facts that she personally knows, and that this is in breach of Article 156 (1) (a) of Chapter 12.

Article 398 (3) of Chapter 12 provides that "Where proceedings are by sworn application, the setting up of a counter-claim in a sworn reply shall be equivalent to the filing of a sworn application with respect to that claim […]". The filing of a sworn application is regulated by **Article 156 of Chapter 12**. The Plaintiff specifically refers to paragraph (a) of sub-article (1) of Article 156, which reads as follows:

> "(1) The sworn application shall be prepared by the Plaintiff and shall contain –
> (a) a statement which gives in a clear and explicit manner the subject of the cause in separate numbered paragraphs, in order to emphasise his claim and also declare which facts he was personally aware of;"

These provisions must be read in conjunction with **Article 789 (1) (c) and (d) of Chapter 12** which provides that:

"(1) The plea of nullity of judicial acts is admissible –
[…]
(c) if the act contains a violation of the form prescribed by law, even though not on pain of nullity, provided such violation has caused to the party pleading the nullity a prejudice which cannot be remedied otherwise than by annulling the act;
(d) if the act is defective in any of the essential particulars expressly prescribed by law:

Provided that such plea of nullity as is contemplated in paragraphs (a), (c) and (d) shall not be admissible if such defect or violation is capable of remedy under any other provision of law."

Although the wording used in Article 156 might give the impression that it should be interpreted rigorously, however, throughout the years our Courts gave a wide interpretation to this provision. For instance, in the case **Av Dr Carlo Moore noe vs. Perit Carmelo Falzon et**, the Civil Court, First Hall on the 15th of December 1955 held that:

"għalhekk ġie ritenut illi l-liġi ma tirrikjediex kliem partikolari għal kif għandha ssir iċ-ċitazzjoni, biżżejjed jiftiehem xi jkun qiegħed jitlob l-attur, b'mod li l-kawżali tista' tkun espressa lakonikament, u saħansitra tista' tkun anke ndotta mid-domanda".

This reasoning was reinforced in **Guido J Vella A&CE vs. Dr Emanuel Cefai** decided by the Court of Appeal (Superior Jurisdiction) on 4th November 1991 when it observed that:

"meta f'ċitazzjoni teżisti vjolazzjoni tal-forma in kontravenzjoni tal-Artikolu 156 (1) (a), għax ma jkunx fiha tifsir ċar u sewwa tal-oġġett u r-raġuni tat-talba, l-eċċezzjoni tan-nullità taċ-ċitazzjoni tista' tiġi milqugħa

biss kemm-il darba dik il-vjolazzjoni tkun ġiebet lill-parti li titlob in-nullità preġudizzju illi ma jistax jissewwa xort' oħra ħlief billi l-att jiġi annullat".

For the plea of nullity to be acceded to it must be shown that the way the counter claim was drawn up created a grave prejudice to the other party and that the violation can only be remedied by nullifying the act.

Furthermore, with the recent amendments to Article 175 and with the proviso of Article 789 (1), it is clearly shown that Article 156 is to be given a wide interpretation.

Although in Defendant's counter-claim there is no separate section on the facts that the Defendant personally knows, the facts that she knows are mentioned in the first paragraph of her counter-claim, which counter claim is confirmed under oath. The Court therefore concludes that there is no nullity of the form prescribed by law for the setting up of Defendants' counter-claim, in terms of paragraph (c) of Article 789 (1) of Chapter 12, and nor is the act lacking any essential particulars, even if not required on pain of nullity, in terms of paragraph (d) or any other paragraph of the said Article, and consequently reject Plaintiffs' fifth preliminary plea of nullity.

Plaintiff's Sixth Plea - Defendant lack of Judicial Interest.

The next preliminary plea to be considered is that the reconvening Defendant lacks juridical interest.

Three are the elements that need to be satisfied to establish whether the party proposing the action has an interest in what he or she is requesting. These elements were considered several times by our Courts, amongst which is the case **John Muscat et vs. Rachelle Buttigieg et** decided by the Civil Court, First Hall on the 27th of March 1990 where it was stated that

"*L-interess irid ikun a) guridiku, jigifieri d-domanda jrid ikun fiha ipotesi ta' l-ezistenza ta' dritt u l-vjolazzjoni tieghu; b) dirett u personali: fis-sens*

li huwa dirett meta jezisti fil-kontestazzjoni jew fil-konsegwenzi taghha, personali fis-sens li jirrigwarda lill-attur, hlief l-azzjoni popolari; c) attwali fis-sens li jrid johrog minn stat attwali ta' vjolazzjoni ta' dritt, jigifieri l-vjolazzjoni attwali tal-ligi trid tikkonsisti f'kondizzjoni posittiva jew negattiva kontrarja ghall-godiment ta' dritt legalment appartenenti jew spettanti lid-detentur."

These elements were further explained in the case **Emilio Persiano vs. Il-Kummissarju tal-Pulizija fil-kwalità tiegħu bħala Uffiċċjali Prinċipali tal-Immigrazzjoni** (Sworn Appl 1790/2000/2) decided on the 18th of January 2001 where it was held that :

"*Illi ghal bosta snin il-Qrati taghna fissru li l-elementi mehtiega biex isawru interess tal-attur f'kawza huma tlieta, u jigifieri li l-interess irid ikun guridiku, li l-interess irid ikun dirett u personali u li dak l-interess ikun attwali. B'tal-ewwel, wiehed jifhem li dak l-interess ghandu jkollu mqar iz-zerriegha ta' l-esistenza ta' jedd u l-htiega li tilqa' ghal kull attentat ta' ksur tieghu minn haddiehor. Dan l-interess m'hemmx ghalfejn ikun jissarraf fi flus jew f'valur ekonomiku [ara, per ezempju, Qorti tal-Appell fil-kawza fl- ismijiet Falzon Sant Manduca vs Weale, maqtugha fid-**9 ta' Jannar, 1959**, Kollezz: Vol: **XLIII.i.1**];*

*Illi minbarra dawn l-elementi, gie mfisser ukoll li biex wiehed ikollu interess li jiftah kawza, dak l-interess (jew ahjar, il- motiv) tat-talba ghandu jkun konkret u jesisti fil-konfront ta' dak li kontra tieghu t-talba ssir [ara, per ezempju, sentenza ta' din il-Qorti (PASP) moghtija fit-**13 ta' Marzu, 1992**, fil-kawza fl-ismijiet Francis Tonna vs Vincent Grixti, Kollez. Volum: **LXXVI.iii.592**]*".

More recently is the case **Nike Ventures Limited et vs. John Patrick Hayman et** (Sworn Appl 378/2009) decided by the Civil Court, First Hall on the 15th of September 2014:

*"[...] rekwizit imprexxindibbli ta` kull azzjoni huwa l-interess f`min jippproponiha ; u dan l-interess ma ghandux ikun ipotetiku imma hemm bzonn li jkun konkret u sussistenti di fronti ghal dak li jigi maghzul mill-attur bhala kontradittur legittimu ("**Balluci vs Vella Gera**" – Prim`Awla tal-Qorti Civili – 12 ta` Marzu 1946 ; "**Zammit vs Formosa et**" – Qorti tal-Appell – 11 ta` Gunju 1948 ; "**Zammit Psaila et vs Ellul**" – Prim`Awla tal-Qorti Civili – 23 ta` Jannar 1956).*

"Il-Qorti tirrimarka li l-interess tal-attur fl-azzjoni jezisti meta l-attur juri li permezz tal-azzjoni jista` jipprokura xi rizultat vantaggjuz jew skop utili. L-attur irid juri illi ghall-esercizzju tad-dritt tieghu ghandu attwalment bzonn li jinvoka l-protezzjoni tal-Qorti ("**Bartoli pro et noe vs Zammit Tabone et**" – Qorti tal-appell – 24 ta` Marzu 1961). L-interess huwa l-mizura ta` l-azzjoni. Dan l-interess ghandu karattru personali jigifieri illi l-vjolazzjonijiet biss ghad-drittijiet li jappartjenu lill-atturi jawtorizzawh li jezercita l-azzjoni. U dan l-interess, ikun x`ikun, morali jew pekunarju, irid ikun dejjem guridiku, jigifieri, korrispondenti ghal-lezjoni tal-veru dritt ; u jrid ikun dirett jew derivanti minn kawza korrelattiva mal-persuna li tagixxi, kif ukoll irid ikun legittimu u attwali. Ir-rekwizit ta` l-interess huwa ndispensabbli ghall-proponibilita` ta` domandi fi kwalunkwe sede kontenzjuza ; huwa l-bazi tal-azzjoni u ma jistax ikun hemm azzjoni jekk ma jkunx hemm interess. Jekk l-azzjoni tkun inkapaci li tipproduci rizultat vantaggjuz jew utili ghal min jippproponiha, dik l-azzjoni ma tistax tigi pretiza ("**Camilleri et vs Sammut et**" – Prim`Awla tal-Qorti Civili – 7 ta` Jannar 1953)."

The second claim of Carmen Nygaard reads as follows: "declares that the reconvened Plaintiff was in default of his obligation to pay the maintenance due to his daughter in the sum of Lm650 (€1,514.09) per month in terms of what was decided in the judgement delivered by the Civil Court (family Section) on the 28th of March 2007 in the names Carmen Nygaard vs Jan Nygaard"[17].

[17] Page 57 of the proceedings.

Plaintiff pleads that Defendant does not have juridical interest to bring forth the claim regarding the arrears in maintenance due to the parties' daughter Karin Nygaard. He further explained in his reply to the counter claim that this ground of defence is limited to those payments which were allegedly due to their daughter from that moment in time when she attained the age of majority.

The Court refers to the judgement delivered by the Family Court on the 28th of March 2007 were Jan Christian Gundersen Nygaard was ordered to pay maintenance, "*tordna lill-konvenut jhallas lill-attrici manteniment ta' sitt mija u hamsin lira Maltin [Lm650] fix-xahar favur binthom Karin sakemm din issir maggjorenni*". It is clear that the Civil Court (Family Section) ordered Jan Christian Gundersen Nygaard to pay Carmen Nygaard the maintenance due to Karin Nygaard until the latter becomes of age.

One important factor that emanates from this sentence is that the maintenance had to be paid to Carmen Nygaard. Another important factor is that the maintenance is due until Karin Nygaard reaches the age of majority and not beyond. This Court therefore opines that given that the maintenance as ordered by the Family Court had to be paid until Karin reaches the age of majority, it is her mother who has juridical interest to claim any maintenance due up until that age. The reconvened Plaintiff himself explained that his defence refers to payments due after Karin Nygaard attained the age of majority and not for those payments which could have been due before.

For these reasons the Court rejects Plaintiff's sixth plea.

Plaintiff's Seventh Plea - Prescription Article 2156 (b) Chapter 16.

The final preliminary plea put forward by the Plaintiff is that the counter-claim for payment of arrears in maintenance is time barred in terms of Article 2156 (b) of Chapter 16.

Said article provides as follows:

"The following actions are barred by the lapse of five years:

[…]

(b) actions for payment of maintenance allowances"

The Court considers this plea as unfounded. Said article does not apply to actions for the payment of maintenance allowances ordered by the courts.

A judgment is an executive title as per **Article 253 (a) of Chapter 12**.[18] In this regard it is Article 258 which is applicable namely that upon the lapse of fifteen years from the delivery of judgement, it may only be enforced after a demand is made and accepted to render the executive title executable again.

Also of relevance is that according to **Article 2123 of the Civil Code** prescription does not run between spouses. This was highlighted in the judgement delivered by the the Court of Appeal (Superior Jurisdiction) in the names **John Baptist Sammut vs. Marina Ciarlo** (Civ App 600/2009) delivered on the 30th of May 2014 where it was held that:

"*Is-separazzjoni ma ggibx fi tmiemha r-relazzjoni ta' ragel u mara mizzewga, izda tawtorizza biss il-firda taghhom. Is-separazzjoni ggib biss attenwazzjoni fir-rapport maritali, izda l-koppja tibqa' titqies mizzewga, tant li s-semplici fatt ta' rikonciljazzjoni jittermina l-effetti personali tas-separazzjoni minghajr ebda htiega ta' formalita` ulterjuri.*

[...] Is-sospensjoni tal-preskrizzjoni hija relatata mal-istat taz-zwieg, u dment li dan ghadu jissustixxi, tezisti bejn il-koppja relazzjoni li ma tippermettix li jibda jiddekorri z-zmien tal-preskrizzjoni fir-rigward ta' pretensjonijiet reciproci. Is-separazzjoni, kif jiddisponi l-Artikolu 35 tal-Kodici Civili, iggib fi tmiemha "l-obbligu ta' bejniethom li jghixu flimkien", pero`, ma ttemmx ir-rabta. [...]"

[18] See **Nobbli Charles Sant Fournier ne vs. Paul Muscat** decided by the Court of Appeal (Commerical Jurisdiction) on the 5th of December 1951; **Av. Dr. Richard Sladden vs. Joseph Galea** (Claim 8/2012) decided the Small Claims Tribunal on the 4th of July 2012.

The legal position of legally separated spouses is that unless and until they are divorced or their marriage is annulled, the statute of limitations does not apply in respect of their claims against each other.

Once a claim is acceded to in a definitive judgment, as is the present case, then no statute of limitations applies.

For theses reasons the seventh plea of Plaintiff is rejected.

Plaintiff's Pleas as to the Merits of the Counter-Claim.

Having considered all preliminary pleas raised by the reconvened Plaintiff, the Court is moves on to consider the pleas raised in respect of the merits of the counter-claim.

The reconvening Defendant states that she suffered damage when the Plaintiff failed to show interest to sell the matrimonial home, 175, Flat 14, Tower Road Sliema on the open market.
This Court observes that although the evidence shows that Plaintiff did not show any interest to sell the property on the open market, the Family Court also gave both parties the right to proceed for the sale by Court auction.

The Court also observes that the Civil Court (Family Section) held that the apartment had to be sold "*fi zmien tlett snin millum, bis-subbasta, izda l-partijiet huma liberi li jifthemu li jbieghu l-post fuq is-suq liberu*". This therefore shows that the sale of the apartment had to be through judicial auction however the parties were given the opportunity to sell it on the open market.

Defendant gives the impression that the sale had to be exclusively made on the open market. This is not the case. She had every right, if she wanted, to proceed for the sale by judicial auction in virtue of the court judgment, and consequently recover what is due to her from the proceeds of the sale. Same

as the Plaintiff, her inaction to sell the property should not be rewarded. This court is of the opinion that both parties must be responsible for their actions or inactions to enforce the judgement and ensure the sale of the property as ordered by the Family Court.

Defendant claims that "the Plaintiff's actions which led to this situation include amongst others the fact that he had for instance contested one of the sums in question by filing another case after the separation case, which he eventually lost a number of years later. […] the Plaintiff would have stalled such process (or at least, the liquidation of the sums in favour of the Defendant) on the basis of the court case he had filed or else contested the enforcement of what was meat to be paid to her upon the sale of the property […]"[19]

The case that the Defendant is referring to is in the names **Jan Christian Gundersen Nygaard vs. Carmen Nygaard** (Sworn Appl 587/2010) decided by the Civil Court, First Hall on 15th of September 2014. Through that case Mr. Nygaard had claimed that Carmen Nygaard,

> "[…] avvanzat pretensjoni b`mod gharieqi billi qalet li hija ghandha taghti flus lil Lucia Camilleri fejn sahansitra qalet li l-ammonti huma ta` Lm4,500 u Lm500, total ta` Lm5,000 ekwivalenti ghal €11,647 [hdax-il elf sitt mija erbgha u sebghin Euro];
>
> […] l-istess intimata avvanzat pretensjoni ohra b`mod gharieqi fl-ammont ta` Lm30,000 ekwivalenti ghal €69,881 [disgha u sittin elf, tmien mija wiehed u tmenin Euro]".

The Court observes that the proceedings by Mr. Nygaard were instituted within the three year period stipulated by the Family Court for the Defendant and her daughter to reside in the matrimonial home. Defendant failed to initiate the judicial sale upon the lapse of three years on the premise that there were other proceedings pending.

[19] Page 836A of the proceedings. See also page 843 et seq of the proceedings.

The Court is however of the view that Defendant's justification for her inaction is not substantiated by the evidence. Suffice to point out that the case above mentioned became res judicata in 2014, two years prior to the filing of the present action, during which time none of the parties tried to enforce the Family Court judgment regarding the sale of the apartment.

Hence it is the Court's view that Defendant has no right to claim damages as a result that to date the apartment has not been sold. The latin maxim Imputet Sibi perfectly applies to the counter-claim under consideration. The first counter-claim is rejected.

In her second claim Defendant requests that Plaintiff be ordered to pay her all the arrears of maintenance due for her minor daughter which were not covered by the Family Court judgment until she reached the age of majority.

The Family Court decided that Plaintiff had to pay Defendant "*manteniment ta' sitt mija u hamsin lira Maltin [Lm650] fix-xahar favur binthom Karin sakemm din issir maggjorenni*".

The evidence shows that Plaintiff did not pay the maintenance ordered by the Family Court. Said credit due to Defendant is not conditional on the sale of the apartment.

Although Plaintiff states that he paid part of the maintenance up till the daughter reached majority age, he produced no tangible proof of such payments. The occasional payment of pocket money to the minor daughter cannot be considered as part of the payment of maintenance due to Defendant for her daughter. On the other hand Defendant contested that she received any payments from Plaintiff. Since Plaintiff failed to bring forward any evidence showing payments of maintenance, the Court accepts Defendants counter-claim in respect of her claim for the liquidation and payment of maintenance following the Family Court judgment until the daughter reached majority age.

The Family Court judgment was delivered on the 28th March 2007 whilst the parties' daughter attained majority age in September 2009. Lm650 is equivalent to €1514.09 which multiplied by 28 months amount to €42, 394.52 (forty two thousand, three hundred and ninety four euors and fifty two cents) with interest from date when the counter claim was notified to Plaintiff.

Defendant's claim for further maintenance for the period from when the daughter attained the age of 18 till her 23rd birthday was not ordered by the Family Court and such matters may only be decided exclusively by the Family Court.

Decision

For these reasons, the Court decides Plaintiff's claims and Defendant's counter-claims as follows:

1. Rejects Plaintiff's first and second claims;

2. Partially accedes to Plaintiff's third demand and liquidates the sum of six hundred thirty eight Euro and forty two cents (€638.42);

3. Partially accedes to Plaintiff's fourth demand and orders Defendant to pay Plaintiff the sum of six hundred thirty eight Euro and forty two cents (€638.42);

4. Rejects Plaintiff's preliminary pleas raised against Defendant's counter claims;

5. Partially rejects and partially accepts the pleas raised by Defendant regarding the merits of the counter claims for reasons given above;

6. Rejects Defendant first claim in her counter-claim.

7. Accedes to the second, third and fourth claim in the counter claim; liquidates the amount due by Plaintiff to Defendant in the amount of forty two thousand, three hundred and ninety four euros and fifty two cents (€42,394.52) and orders Plaintiff to pay Defendant said amount with legal interest from date when the counter claim was notified to Plaintiff till the date when the whole amount is paid.

Costs to be borne as to three fourths (3/4) by Plaintiff and as to one fourth (1/4) by Defendant.

Read in open court.

Onor. Robert G. Mangion
Imhallef
30 ta' Ġunju 2021

Lydia Ellul
Deputat Registratur