Court Of Appeal

Judges

THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO (President)
THE HON. MR. JUSTICE TONIO MALLIA
THE HON. MR. JUSTICE ANTHONY ELLUL

Sitting of Thursday, 13th October, 2022.

Number: 15

Application Number: 213/19/1 RGM

1. **Joseph Saydon**
2. **Gerard Saydon**
3. **Joan Busuttil**
4. **Catherine Saydon**

v.

Avukat Dr. Joseph Ellis u Prokuratur Legali Jean Pierre Busuttil li b'digriet tal-4 ta' April 2018 ġew nominati bħala kuraturi sabiex jidhru u jiddefendu fl-interess tal-assenti intimata Mary Anne Elsdon; u b'digriet tal-20 ta' Mejju 2019, Christian Elsdon ġie nominat bħala mandatarju speċjali ta' Maryanne Elsdon u estromessi l-kuraturi deputati l-Avukat Dr. Joseph Ellis u l-Prokuratur Legali Jean Pierre Busuttil

The Court:

1. Having seen the sworn application brought forward by the plaintiffs, siblings Joseph Saydon, Gerard Saydon, Joan Busuttil and Catherine Saydon on the 28th February, 2019, whereby it was claimed that:

"1. Illi r-rikorrenti u l-intimata huma aħwa u huma t-tfal kollha tal-mejtin Carmelo Saydon u Maria Dolores Saydon xebba Xuereb;

2. Illi Dolores Saydon xebba Xuereb mietet fl-4 ta' Novembru 1999 kif jirriżulta miċ-ċertifikat tal-mewt market **dok X 1**;

3. Illi Carmelo Saydon miet fit-8 ta' Marzu 2014 kif jirriżulta miċ-ċertifikat tal-mewt market **dok X2**;

4. Illi Dolores Saydon xebba Xuereb irregolat il-wirt tagħha permezz ta' testament tal-25 ta' Ottubru 1999 fl-atti tan-Nutar Anthony Gatt LLD liema testament huwa l-aħħar testament tagħha kif jirriżultaw mir-riċerki testamentarji u testament hawn annessi bħala **dok X 3, X 4, X5** u fejn ħalliet lill-użufrutt tal-beni tagħha kollha lil żewġha Carmelo Saydon, mentri l-ulied wirtu l-proprjeta` fi sehem ugwali. Illi permezz ta' kuntratt causa mortis datat 26 ta' April 2000 fl-atti tan-Nutar Anthony Gatt sar causa mortis li jinsab anness bħala **dok X 6**;

5. Illi fl-2014, missier il-kontendenti miet (Carmelo Saydon) u ħalla l-wirt tiegħu permezz ta' testament fl-atti tan-Nutar Maria Spiteri datat 24 ta' April 2012, liema testament huwa l-aħħar testament tiegħu kif jirriżultaw mir-riċerki testamentarji u testament hawn annessi bħala **dok X7, X 8, X9 u X 10**. Illi jirriżulta wkoll il-causa mortis magħmul quddiem in-Nutar Rachel Busuttil datat it-12 ta' Frar 2016 liema dokument jinsab anness bħala **dok X11**;

6. Illi Paolo Saydon jiġi hu Carmelo Saydon li miet fid-19 ta' Mejju 2015 kif jirriżulta miċ-ċertifikat tal-mewt **dok X 12**. Illi Paolo Saydon miet ġuvni u mir-riċerki testamentarji tiegħu annessi hawnhekk bħala **dok X 13 sa X 15** inklużi, u mill-aħħar testament tiegħu tas-27 ta' Jannar 2015 fl-atti tan-Nutar Rachel Busuttil, huwa ħalla l-wirt tiegħu fi sehem ugwali bejniethom lil Joseph Saydon, Gerard Saydon, Joan Busuttil, u Catherine Saydon; illi fit-3 ta' Settembru 2015 fl-atti tan-Nutar Rachel Busuttil sar id-dikjarazzjoni causa mortis anness u markat **dok X 16**;

7. Illi din il-kawża tikkonċerna biċċa art kif ser tiġi deskritta aktar isfel li nxtrat f'ishma ugwali bejn Carmelo Saydon u Paolo Saydon, permezz ta' kuntratt fl-atti tan-Nutar Victor Bisazza tat-23 ta' Ottubru 1961 liema kopja tal-kuntratt jinsab hawn anness bħala **dok X17**;

8. Illi għalhekk il-partijiet f'din il-kawża huma koproprjetarji flimkien f'ishma indiviżi tal-porzjon art tal-kejl ta' ċirca ta' elfejn sitt mija u tlieta u ħamsin metri kwadri (2653mk), ġewwa Birkirkara, fond/terraced house numru sittax u sbatax (16, 17) u fi Triq Għar il-Gobon, u dan bl-arja libera tiegħu, bil-bitħa ta' wara u ġnien, u bid-drittijiet u l-pertinenzi tiegħu kollha kif ukoll tal-porzjoni diviża ta' art fabbrikabbli aċċessibli minn Triq Għar il-Gobon u minn Triq Venerabbli Nazju Falzon u minn Triq ġdida ġio Triq Tumas Fenech, ġio Birkirkara u konfinanti mil-Lvant ma Triq Għar il-Gobon, mill-Punent in parti ma' Triq il-Venerabbli Nazju Falzon u in parti ma' proprjeta` ta' terzi u mit-

Tramuntana in parti mal-fond de quo, liema proprjeta` hija aħjar delinejata fil-pjanta hawn annessa **dok X 18A u X18B**;

9. Illi r-rikorrenti u l-intimata wirtu s-sehem ta' ħamsa u għoxrin fil-mija (25%) mis-sućċessjoni ta' ommhom Dolores Saydon li mietet fl-4 ta' Novembru, 1999 fejn ikkonstitwiet lill-ħames uliedha eredi ugwali, u fejn għalhekk minn dakinhar akkwistaw kull wieħed 5% tas-sehem indiviż tal-proprjeta` mertu ta' din il-kawża;

10. Illi r-rikorrenti Joan, Gerard, Joseph u l-intimata Marianne wirtu s-sehem ta' din il-proprjeta` mertu ta' din il-kawża, permezz ta' prelegat fis-Sitt Artikolu tat-testment ta' missierhom Carmelo Saydon tal-24 ta' April 2012 fl-atti tan-Nutar Maria Spiteri, b'sehemijiet differenti, fejn ġew imħollija s-sehem ta'-

(i) 3/10 lil Joan Busuttil
(ii) 3/10 lill-intimata Maria sive Marianne Elsdon
(iii) 1/5 lil Gerard Saydon
(iv) 1/5 lil Joseph Saydon
u (v) tħalliet barra għal kollox (dejjem a rigward din il-proprjeta`) Catherine Saydon

u fejn għalhekk f'persentaġġi Joseph u Gerard akkwistaw 5% kull wieħed tal-proprjeta` f'sehem indiviż mentri Joan u Marianne akkwistaw 7.5% kull wieħed f'sehem indiviż tal-proprjeta`;

11. Fir-rigward tar-rimanenti ħamsin fil-mija (50%) dawn kienu taz-ziju tal-partijiet fil-kawża u ċjoe` ta' Paolo Saydon li miet nhar id-19 ta' Mejju 2015, li ħalla bħala eredi mill-aħwa Saydon, ċjoe` lil Joseph, Gerard, Catherine u Joan Busuttil;

U fejn għalhekk f'persentaġġi Joseph, Gerard, Catherine u Joan akkwistaw 12.5% tal-proprjeta` f'sehem indiviż mingħand iz-ziju tagħhom Paul Saydon. Illi Pawlu Saydon miet ġuvni;

12. Għalhekk dan il-fond u l-ambjenti madwarha mertu ta' din il-kawża jappartjenu, kwantu għal sehemijiet indiviżi:

Joseph Saydon (K.I nru. 259359 M) – 225%

Gerard Saydon (K.I. nru. 266M) – 22.5%

Catherine Saydon (K.I. nru. 380062 M) – 17.5%

Joan Busuttil (K.I.nru. 560955 M) – 25%

Mary Anne Elsdon (Passaport Malti nru 1069020 M) – 12.5%

13. Flimkien ir-rikorrenti atturi huma komproprjetarji ta' 87.5%, u ċioe ferm aktar min-nofs mitlub mill-artikolu 495A tal-Kapitolu 16 tal-Liġijiet ta' Malta. L-intimata għandha biss 12.5% tal-proprjeta` in komuni;

14. Il-komproprjeta` ilha fis-seħħ mis-suċċessjoni ta' ommhom li mietet f'1999 u mill-mewt ta' missierhom li miet 2014, u r-rikorrenti ilhom ħafna snin jitolbu lill-intimata tersaq sabiex jew taqsam jew tillwida, iżda dan b'mod inutli.

15. Illi r-rikorrenti ma jridux jibqgħu aktar komproprjetarji in komun mal-intimata Mary Anne Elsdon (Passport Malti nru. 1069020)

16. Illi r-rikorrenti daħlu f'konvenju fid-19 ta' Diċembru 2017 mas-soċjeta` Toncam Properties Limited fejn is-soċjeta` Toncam Properties Limited wiegħdet f'dan il-konvenju li tixtri u takkwista din il-proprjeta` mertu ta' din il-kawża għas-somma ta' żewġ miljuni u sitt mitt elf Euro (Euros 2,600,000), liema kopja tal-konvenju u r-reġistrazzjoni tal-konvenju jinsabu hawn annessi bħala **dok X 19A u X19B**. In-Nutar li rrediġa l-konvenju huwa n-Nutar Malcolm Mangion;

17. Illi fil-konvenju hemm kondizzjoni indikat bħala 2(b) li jistipula li l-konvenju huwa soġġett għall-estensjoni tat-triq pubblika. Illi permezz ta' ittra tas-7 ta' Diċembru 2018, l-avukat tas-soċjeta` Toncam Properties Limited tixtieq tkompli tipproċedi bil-bejgħ tal-proprjeta` u għaldaqstant qiegħda ssir din il-kawża, sabiex issa kif tinqata din il-kawża u jkun hemm eżitu favorevoli, r-rikorrenti jkunu jistgħu jersqu għall-kuntratt finali flimkien mal-intimata u f'nuqqas li ma tidhirx l-intimata l-Qorti taħtar u tappunta kuratur sabiex tirrapreżentaha;

18. Illi sabiex jiġu aderiti l-elementi tal-artikolu 495A tal-Kap 16 qiegħed jiġi anness dikjarazzjoni da parti ta' l-atturi maħluf minnhom quddiem in-Nutar Rachel Busuttil hawn anness bħala **dok X 20** datat 13 ta' Frar 2019, fejn l-atturi jaqblu mal-valur u jaqblu wkoll ma' l-ishma u jaqblu wkoll mal-kondizzjonijiet u obbligi taħt liema ser issir il-kuntratt.

19. Illi r-rikorrenti ġja intavolaw kawżi simili fil-kawżi li jisimhom Joseph Saydon et vs Dr Joseph Ellis nomine quddiem il-Prim' Awla tal-Qorti Ċivil bir-rikorsi numri 34/2018 u 272/2018.

20. Illi fil-verbal tal-Qorti tad-29 ta' Novembru 2018 fl-ismijiet Joseph Saydon vs Dr Joseph Ellis nomine bir-rikors numru 272/2018 AF, li kopja tiegħu qiegħed jiġi anness bħala **dok X 21** jirriżulta li l-indirizz ta' Marianne Elsdon skond dak iddikjara mit-tifel tagħha stess Christian, huwa "Odessa Lodge, 63 Yarmouth Road, North Walsham, Norfolk, NR28 9AV UK";

21. Illi għal kull buon fini u kif ħareġ ukoll mill-verbal tal-Qorti fil-kawża Joseph Saydon et vs Dr Joseph Ellis nomine rikors numru 31/2018 TA, Christian Elsdon iddikjara li l-indirizz tiegħu f'Malta huwa 132, Flat 10, Villa Camilleri, Triq San Pawl, Naxxar kif jidher fil-verbal hawn anness bħala **dok X 22**;

22. Illi għaldaqstant ser isiru n-notifi fiż-żewġ indirizzi appożiti u permezz ta' rikors appożitu konkorrenti ma' dan ir-rikors promotur jintalab il-ħatra ta' kuraturi deputati sabiex jirrapreżentawha;

23. Illi għalhekk kellha ssir din il-kawża;

Għaldaqstant tgħid l-intimata għaliex din l-Onorabbli Qorti ma għandhiex prevja kwalsiasi dikjarazzjoni neċessarja u opportuna:

1. Tordna (u prevja u jekk hemm bżonn li jinħatar perit arkitett sabiex issir valutazzjoni kif u meta sar il-konvenju fid-19 ta' Diċembru 2017), l-bejgħ tal-proprjeta` ossia porzjon art tal-kejl ta' ċirca ta' elfejn sitt mija u tlieta u ħamsin metri kwadri (2653mk), ġewwa Birkirkara, fond numru sittax u sbatax (16,17) u fi Triq Għar il-Gobon inkluż il-bitħa fuq wara u ġnien tiegħu, u dan bl-arja libera tiegħu u bid-drittijiet u l-pertinenzi tiegħu kollha kif ukoll tal-porzjoni diviża ta' art fabbrikabbli aċċessibli minn Triq Għar il-Gobon u minn Triq L-Venerabbli Nazju Falzon u minn Triq Gdida ġio Triq Tumas Fenech, ġio Birkirkara u konfinanti mil-Lvant ma Triq Għar il-Gobon, mil-Punent in part ma' Triq il-Venerabbli Nazju Falzon u in parti ma' proprjeta` ta' terzi u mit-Tramuntana in parti mal-fond de quo, liema proprjeta` hija aħjar spjegata u delinejata fid-**dok X 16**;

2. Tordna lir-Reġistratur tal-Qorti jippubblika kopja tar-rikors fil-Gażżetta tal-Gvern u f'Gażżetta Lokali ta' kuljum;

3. Tinnomina lin-Nutar Malcolm Mangion u/jew Nutar ieħor f'każ eċċezzjonali (iżda dan biss jekk tiġri xi ħaġa eċċezzjonalment), sabiex jippubblika l-att finali tat-trasferiment opportun u kwanlunkwe att ieħor neċessarju jew aċċessorju għall-istess;

4. Tistabilixxi jum, ħin u lok għall-pubblikazzjoni tal-att notarili opportun;

5. Taħtar kuratur/i sabiex jidher/jidhru fl-eventwali kontumaċi;

6. Tagħti dawk l-ordinijiet meqjusa neċessarji u opportuni skond iċ-ċirkostanzi.

Bl-ispejjeż kontra l-intimata, li hija min issa nġunta in subizzjoni".

2. Having seen the reply brought forward by the curators for and on behalf of defendant Mary Anne Elsdon of the 16th April, 2019, whereby it was pleaded that:

"Illi fl-ewwel lok, l-atturi jridu jġibu prova dwar l-ishma spettanti lill-partijiet rispettivi.

> Illi fit-tieni lok, u bla preġudizzju għas-suespost, prevja l-ħatra ta' perit tekniku, trid issir il-verifika illi l-prezz konvenut għall-bejgħ tal-fond de quo hu verament ġust u illi bla ebda mod il-bejgħ prospettat m'hu ser jippreġudika lill-assenti konvenuta.
>
> Illi fit-tielet lok, u subordinatament għal-premess, il-konvenuti fil-kwalita` tagħhom ta' kuraturi deputati sabiex jirrappreżentaw lill-assenti Mary Anne Elsdon m'humiex preżentement edotti mill-fatti li taw lok għal dina l-kawża u għaldaqstant, jirriservaw illi jdaħħlu eċċezzjonijiet ulterjuri aktar 'il quddiem.
>
> Salv eċċezzjonijiet ulterjuri."

3. By means of a judgement dated the 28th of October, 2021, the First Hall of the Civil Court delivered its decision, in that the case was determined, in the sense that, whereas it rejected all the pleas raised by the defendant, the plaintiffs' claims were upheld, and consequently:

(1) authorised the sale of the land measuring approximately 2653 metres squared in Birkirkara and the property bearing numbers 16 and 17, in Triq Għar il-Ġobon, Birkirkara, including the backyard, garden and relative airspace, accessible from said street as well as from Triq il-Venerabbli Nazju Falzon, and from New street in Triq Tumas Fenech in Birkirkara, as described in the promise of sale agreement of the 19th of December, 2017, for the price of €2,600,000 and under the terms and conditions agreed to in the said promise of sale agreement;

(2) appointed (i) Notary Malcolm Mangion to publish final deed of sale as therein indicated and (ii) Dr. Jonathan Spiteri as curator for defendant in the event that she fails to appear for the publication of the public deed of sale;

(3) ordered that the capital gains tax due by the sellers and the fees due to the curator be deducted from the selling price before the balance is divided between the sellers;

(4) ordered that in the event that the defendant fails to appear for the publication of the contract of sale, the amount due to her, after the above mentioned deductions, be passed from the buyer to the curator who is to deposit the relative amount under the authority of the Court within one week of the publication of the contract of sale.

Ordered that all costs of the proceedings, including those of the curator, shall be borne by all the parties according to their respective shares.

4. The First Court delivered its judgement after making the following considerations reproduced hereunder:

> "**Relevant Facts leading to the Court Case.**
>
> The parties to the case are siblings, daughters and sons of Carmelo Saydon who died testate on the 8th of March 2014 and Dolores nee Xuereb who died testate on the 4th of November 1999. Through a will of the 25th of October 1999 in the acts of Notary Anthony Gatt, Dolores Saydon nominated all her children as heirs in equal shares (nineth clause of the testament). The father of the parties through a will in the acts of Notary Maria Spiteri dated 24th April 2012 nominated Joan Busuttil, Maria sive Marianne Elsdon, Joseph Saydon and Gerard Saydon as his sole heirs in equal shares (seventh clause of the testament). Of particular interest is the sixth clause of the will by which Carmelo Saydon ordered that the land merits to this case is to devolve in the following way:

> "b'titolu ta' prelegat f'assoluta proprjetà sehemu mill-fond numru sbatax (17) Għar il-Gobon Street, Birkirkara, ma' liema post hemm għalqa ta' ċirka tomna u nofs u ċioe elf sitt mija sitta u tmenin metri kwadri (1686mk) lil erba' uliedu fl-ishma indikati u ċioe lil Joan mart Edwin Busuttil is-sehem ta' tlieta minn għaxar partijiet (3/10) indiviż tas-sehem appartenenti lit-testatur, Maria sive Marianne mart Michael Elsdon is-sehem ta' tlieta minn għaxar partijiet (3/10) indiviż tas-sehem appartenti lit-testatur, Joseph Saydon is-sehem ta' kwinta parti (1/5) indiviża tas-sehem appartenti lit-testatur u Gerard Saydon is-sehem ta' kwinta parti (1/5) indiviża tas-sehem appartenti lit-testatur."[1]

This land was acquired by the parties' father together with his brother Paolo Saydon back in October 1961 in equal shares. Paolo Saydon died on the 19th of May 2015. Through a will dated 27th January 2015 done in the acts of Notary Rachel Busuttil he instituted plaintiffs as his sole heirs in equal shares. Since the half undivided share of Paolo Saydon on the land in question was equally divided between plaintiffs, each plaintiff inherited from their uncle Paolo Saydon one eight (1/8) undivided share from the property in question.

It must be pointed out that this land was bought by the parties' father during marriage which was regulated by the community of acquest regime. Thus, the share which Carmelo Saydon had acquired must be divided into two quarters – one belonging to Carmelo Saydon himself and the other quarter belonged to his wife Dolores Saydon. The latter's share was equally divided between the five children and so each child inherited from their mother one twentieth (1/20) undivided share of the immovable.

The share held by their father, one fourth undivided share, was divided in the manner described above.

Consequently it has been sufficiently proven that plaintiffs together hold between them seven eights (7/8) undivided share of the immovable, each having a different quota as described above; while defendant Mary Anne sive Marianne Elsdon owns one eight (1/8)[2] undivided share, equivalent to 12.5%.

Plaintiffs have filed this court case because they do not want to remain co-owners with defendant and between themselves. On the 19th of December 2017 plaintiffs signed a promise of sale to sell the land in question to Toncam Properties Ltd where the latter bound itself to buy and acquire the property in question for the sum of two million and six hundred thousand Euro (€2,600,000). The promise of sale also includes a condition that the plaintiffs had to initiate the current proceedings and obtain the Court's authorisation.

Article 495A of Chapter 16 of the Laws of Malta.

Plaintiffs have resorted to the procedure stipulated under Article **495A of the Civil Code** to request authorisation from the Court to sell property 16 and 17, Triq Għar il-Ġobon, Birkirkara measuring approximately 2653mk together with a plot of land accessible from Triq Ghar il-Gobon and Triq il-Venerabbli Nazju

[1] Page 33 of the proceedings.
[2] 1/20 (inherited from Dolores Saydon) + 3/40 (inherited from Carmelo Saydon) (3/10*1/4).

Falzon, which property has been held in co-ownership between the parties for more than three years.

First sub-article of Article 495A of the Civil Code provides as follows:

> "(1) Except in cases of condominium or necessary community of property, where co-ownership has lasted for more than three years and none of the owners has instituted an action before a court or other tribunal for the partition of the property held in common, and the co-owners fail to agree with regard to the sale of any particular property, the court shall if it is satisfied that none of the dissident co-owners are seriously prejudiced thereby, authorise the sale in accordance with the wish of the majority of co-owners regard being had to the value of the shares held by each co-owner."

The same article goes on to outline the requirements to be met when the action is brought:

> "(2) The request to the court **shall be made by application** which shall be accompanied by **a declaration of the owners who agree to the sale** as well as **a prospectus showing the number and value of the shares held by each of them** as well as **the terms and conditions under which the sale is to take place**. The application shall also indicate the date on which the co-ownership arose and the circumstances thereof."

The purpose of this article was intended to facilitate the transfer of property in its entirety when there are owners of a minority share who for one reason or another do not want to sell their undivided share held in common or when the owner is not known or cannot be traced. In the case **Aloysius Farrugia et vs. Dr Josette Sultana et noe** decided on the 31st of May 2017 the Civil Court, First Hall explained that:

> "L-iskop ta' dan l-artikolu tal-liġi kien intiż biex jiffaċilita t-trasferiment ta' proprjeta' fl-intier tagħha, meta jkun hemm proprjetarji ta' minoranza ta' ishma li għal raġuni jew oħra ma jridux jew ma jistgħux jersqu għat-trasferiment fl-intier tal-proprjeta' in komun."[3]

In these proceedings the Court is to ensure that there is no abuse and exploitation of the persons holding a minority share by those holding a majority share. The Court is also duty bound to see that the co-owner holding minority shares does not suffer any prejudice. As stated by the Civil Court First Hall in its judgment of the 6th of February 2017 in the names **Josephine Grech pro et noe vs. George Joseph Parnis**[4]:

> "l-artikolu 495A tal-Kap 16 huwa eżemplari eċċelenti ta' dan il-kompromess. Propjetà li titħalla mhux maqsuma għal iktar minn għaxar snin [jew għal tlett snin fil-każ ta' wirt li jigi fis-seħħ wara l-1 ta' April, 2016], li huwa diġa perjodu twil ħafna, tista' tinbiegħ mill-komproprjetarji li jkollhom il-maġġoranza tal-ishma

[3] See also **David Abela noe vs. Dr. Simon Micallef Stafrace noe** (Ċit Nru 1177/2010) decided by the Civil Court, First Hall on the 30th of June 2011.

[4] Confirmed by the Court of Appeal (Superior Jurisdiction) on the 27th of October 2017. See aksi **Shirley Cardona et vs. Victor Bonanno (**Rik Nru 600/15LM) decided by the Civil Court, First Hall on the 4th of April 2016.

> b'kundizzjoni waħda suprema: li l-komproprjetarji dissidenti ma jkunux gravement ppreġudikati. Għalhekk mhux biżżejjed li jigu ppreġudikati, imma jinħtieg li jkunu gravament ippreġudikati. Hawn il-leġislatur qed jagħmilha ċara li anke jekk il-kundizzjonijiet tal-bejgħ ma jkunux ottimali, jew l-aħjar li jistgħu jingiebu fis-suq, xorta waħda l-bejgħ irid isir; il-linja trid tinqata' u tinqata' malajr. Altrimenti jiġi mminat l-iskop kollu tal-preċitat artikolu 495A tal-Kap 12."

Of great relevance is what has been stated by the Court of Appeal (Superior Jurisdiction) in the case **Nutar Richard Vella Laurenti et vs. John Vella Laurenti et** decided on the 27th of January 2017: "*Meta l-ligi fl-artikolu msemmi ssemmi l-kelma pregudizzju tinftiehem li dan irid ikun gravi – b'tali mod li l-bejgħ eventwali tal-propjeta' in kwistjoni jkun biex wieħed juża terminu bl-ingliż "manuifestly unfair" għad-dissident.*"

Defendant claims in her note of submissions that one of the elements required by law namely that "the co-owners fail to agree with regard to the sale of any particular property" is missing and thus the action "is fatally flawed."[5]

The Court finds this submission as unfounded.

Evidence shows that on the 12th of December 2018 defendant herself sent an email to Dr Mark Attard Montaldo, the lawyer of the plaintiffs, informing him that she was against the sale of the property, insisting that her brothers and sisters (the plaintiffs) should "not proceed with the sale of 17 Triq Ghar il-Gobon, Birkaraka until my claims are decided by the Court."[6] In the said email she also explained that she does not agree with the valuation given to the property. The court concludes that the co-owners failed to agree regarding the sale of the property in question and thus, contrary to what has been submitted by the defendant, the requisite stipulated in Article 495A (1) has been satisfied.

Article 495A (2) lists the documents that must be filed together with the sworn application, namely:

a) declaration of the owners who agree to the sale;
b) prospectus showing the number and value of the shares held by each of them; and
c) the terms and conditions under which the sale is to take place.

The plaintiffs filed together with the application a declaration stating that they as owners agree to sell the property 16 and 17, Triq Għar il-Ġobon, Birkirkara and adjoining plot of land[7]. This declaration includes a prospectus showing the number and value of the shares held by each of them as well as the share held by the defendant. Plaintiffs also filed a copy of the promise of sale agreement containing the terms and conditions under which the sale is to take place.[8] Although the law does not require *ad validitatem* evidence about the

[5] Page 217 of the proceedings.
[6] Page 337 of the proceedings.
[7] Page 66 et seq of the proceedings.
[8] Page 60 et seq of the proceedings.

root of title, plaintiffs filed the *causa mortis* of their mother Dolores Sadyon[9], of their father Carmelo Saydon[10] and of their uncle Paolo Saydon[11].

Having seen that all the documents required by law have been filed, the Court is now to proceed to decide the plea raised by the deputy curators at the time on behalf of defendant that the Court should ascertain that the sale of the property in question does not seriously prejudice the defendant in terms of Article 495A (1) of the Civil Code and that the price must be verified with the help of court appointed architect to ensure that the price asked for is just and not prejudicial to defendant.

It has to be pointed out that during the proceegins defendant Marianne Elsdon was authorised to file addistional pleas, she failed to do so.

In her note of submissions defendant stated that she "was never served" with the claim. The court observes that the claim was notified to the deputy curators appointed on her behalf by decree of the 29th of March 2019. They filed a reply on her behalf on the 16th of April 2019.

On the 20th of May 2019 a general power of attorney was presented before the Court, which power of attorney held that Marianne Elsdon appointed her son Christian Elsdon "to stand in judgement, either as plaintiff or defendant in my name with all the powers enumerated in the Civil Code and in the Code of Organisation and Civil Procedure"[12]. Following this information, the Court appointed Christian Elsdon as deputy curator to represent defendant instead of Dr Ellis and Mr Busuttil.

On the 20th of January 2020 defendant filed an application requesting the Court's authorisation to file additional pleas. By decree delivered on the 25th of March 2020 the Court acceded to the defendant's request and authorised her to file additional pleas.[13] Notwithstanding this authorisation defendant failed to file additional pleas.

Defendant's submission that she was not property served with the sworn application is not correct. Due to the fact that the sworn application was originally notified to deputy curators appointed to represent her interests the Court authorised defendant to file additional pleas. She failed to do so and she cannot now complain that she was not properly served.

Defendant also submitted that plaintiffs failed to inform the Court that defendant had filed two court proceedings, namely Sworn Application 308/2019MCH and Sworn Application 332/2021AF. Defendant claims that if she is successful in both actions, she will own at least 80% of 17 Ghar il-Gobon, Birkirkara, the property subject to this present claim. She also submitted that due to the

[9] Page 11 et seq of the proceedings.
[10] Page 21 et seq of the proceedings.
[11] Page 53 et seq of the proceedings.
[12] Page 105 of the proceedings.
[13] Page 161 of the proceedings.

mentioned proceedings, "the shares held by each co-owner is currently unknown"[14].

This Court already had an opportunity to voice its opinion in its decree of the 8th of March 2021 on the effects of Sworn Application 308/2019 if Marianne Elsdon's demand is upheld. The Court observed that

> "[…] l-mertu tal-kawża nru 308/2019 MCH jista' potenzjalment ikollu effett dwar min hu s-sid ta' kwart indiviż tal-immobbli mertu tal-kawża odjerna. Ifisser dan illi anke fl-aħjar ipoteżi għall-konvenuta odjerna fil-kawża imsemmija, l-atturi odjerni xorta se jibqgħu is-sidien ta' aktar minn ħamsin fil-mija (50%) tal-immobbli de quo u allura bid-dritt konsegwenzjali li jippromwovi l-kawża odjerna."[15]

On this regard of particular interest is the judgement delivered on the 6th of October 2021 whereby the Civil Court, First Hall rejected the demands put forward by Marianne Alsdon in the case Maria sive Marianne Elsdon vs. Catherine Saydon et (Appl 308/2019MCH). This judgement is now res judicata as no appeal has been filed. With this decision the shares which the parties to this case have inherited from their father are now definite and certain and no longer a point of contestation.

On the other hand, Sworn Application 332/2021AF was only filed on the 13th of April 2021 and which application was notified to Catherine Saydon (one of the defendants in that case) on the 16th of August 2021, thus after the current claim was adjourned for judgement. The submission by defendant in this regard is completely unfounded considering that the present court case was filed in 2019 and defendant decided to file a court case to attack the validity of Paolo Saydon's last will, after the present case was adjourned for judgment.

As with regards to submissions made by defendant regarding Article 495A (4), although no plea in line with this submission has been raised, the Court observes that at no point did the plaintiffs claim in their application or declaration that they did not know the co-owner or that she cannot be traced.

The final plea and submission which must be considered by this court is whether the price agreed on in the promise of sale agreement will seriously prejudice the defendant.

In terms of Article 495A what this Court needs to ensure is that the selling price is advantageous to all parties, both those who want to sell and those who do not want to sell.

The Court of Appeal (Superior Jurisdiction) in the case **Helen Zammit et vs. Madeleine Muscat** (Rik Ġur 327/16) decided on the 5th of October 2018 held that:

> "26. Illi dan l-aggravju tal-appellanti jirrigwarda l-preġudizzju serju li jissemma fis-subartikoli (1) u (6) tal-artikolu 495A tal-Kodiċi Ċivili. Il-liġi titlob li, fil-qies ta'

[14] Page 217 of the proceedings.
[15] Page 195 of the proceedings.

> preġudizzju bħal dak, **il-Qorti għandha tiżen kull fattur rilevanti magħdud il-valur tal-proprjeta' u l-prezz tal-bejgħ**. **Minn kliem il-liġi, allura, joħroġ ċar li l-prezz li jkun miftiehem huwa biss waħda minn għadd ta' ċirkostanzi li Qorti tista' tqis biex tara jekk il-parti intimata hijiex jew le se ġġarrab preġudizzju li kieku l-bejgħ awtoriżżat ikollu jsir. X'aktarx li, minħabba n-natura partikolari tal-proċedura taħt l-artikolu 495A, il-prezz miftiehem ikun l-aktar kwestjoni li tnissel in-nuqqas ta' qbil bejn il-komproprjetarji: imma l-prezz mhuwiex il-kejl waħdieni li l-liġi tirreferi għalih, għaliex kieku l-kliem tal-liġi kien ikun mod ieħor.** Kemm hu hekk, jidher li l-Qrati qiesu bħala preġudizzju gravi kundizzjonijiet f'konvenju li kienu jwarrbu l-għoti tal-garanzija tal-paċifiku pussess jew l-għoti ta' garanzija li l-ġid għandu l-permessi kollha tal-bini meta dan ma kienx il-każ;
>
> "27. Illi għar-rigward tal-preġudizzju serju jew gravi minħabba l-bejgħ li jkun se jsir, dan irid ikun ta' sura tali li jkun manifestament inikwu għall-parti mġarrba. Madankollu, biex Qorti tiddeċiedi jekk tilqax jew le talba għall-bejgħ ma huwiex biżżejjed li l-parti intimata tressaq stejjem li juru differenza fil-valur tal-proprjeta' fejn id-differenza fil-valur bejn il-prezz miftiehem u l-valur fl-istima tkun relattivament żgħira. Kif ingħad, **l-iskop tal-artikolu 495A mhuwiex biex jiġi assigurat bi preċiżjoni l-valur tal-proprjeta' fis-suq, imma li tara li l-bejgħ isir bi prezz xieraq li ma jġib ħsara lill-ebda proprjetarju**" (enfasi ta' din il-Qorti).

What defendant Marianne Elsdon filed before the Court at final submission stage were valuations of random plots and sites in Birkirkara selected from estate agents' websites.

Apart from the fact that these documents were filed without the Court's authorisation and were not admissible as evidence at that stage, the Court notes that such information should have been filed at the appropriate time during the proceedings and corroborated by witnesses. Furthermore, what is relevant are not the prices in the year 2020 but the prices in the year 2017, the date of the promise of sale agreement.

To verify the price of the property in question the Court appointed Architect Mario Cassar who certified that the value of the property in question in December 2017 was two million, four hundred and ninety five thousand euro (€2,495,000).[16] Given that the Court appointed architect came to a price which is less than that agreed upon, and given that the defendant did not contest the valuation, neither did she put forward any questions to the architect and nor did she request the appointment of additional referees; the Court therefore concludes that the price of the property as shown on the promise of sale agreement is not prejudicial to the interests of defendant.

While the Court took note of all other submissions put forward by the defendant, the Court finds that they are not relevant to the merits of this case.

What is relevant is whether defendant will be seriously prejudiced if the Court authorises the sale of property 16 and 17, Triq Ghar il-Gobon, Birkirkara and adjoining plot of land for the price mentioned in the promise of sale agreement.

[16] Page 177 of the proceedings.

> Since the Court finds that defendant will not suffer any serious prejudice if the sale of property 16 and 17, Triq Ghar il-Gobon, Birkirkara and the plot of land accessible from Triq Ghar il-Gobon and Triq il-Venerabbli Nazju Falzon, is authorised, the Court accedes to Plaintiffs' request."

5. Having seen the application of appeal filed by Christian Julian Carmel Elsdon as special mandatory acting for and on behalf of Maryanne Elsdon, whereby, while making reference to the records of the case and reserving the right to submit further proof and to make those submissions, according to the law, at this stage of the proceedings, he is requesting that, for the reasons contained therein, this Court accedes to the application of appeal. He therefore requests that this Court cancels, annuls and revokes both the decree of the 8th of March, 2021, as well as the judgement delivered by the First Hall of the Civil Court, on the 28th October, 2021, in both instances, in the aforementioned names and thus requests that this Court accedes to defendant's pleas to the plaintiffs' demands, with costs in both instances, against the plaintiffs.

6. Having seen the reply by the plaintiffs, as respondents, by means of which they requested this Court, to reject the appeal of the appellant, in its entirety and to confirm the appealed judgement, with the costs of both instances to be paid solely by the appellant. They also requested that the appellant be made to pay double costs in terms of Article 223(4) of Chapter 12 of the Laws of Malta, as they sustain that the appeal is frivolous and vexatious, having the sole intention of causing useless delays.

7. Having seen that following the amendments introduced by means of Act XXXII of the year 2021, the Court has been vested with the power to proceed with its judgement in terms of Article 152(5) of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) and after seeing the written pleadings, it is deemed that there is no reason to order the hearing of the cause, and shall thus proceed with its judgement;

8. Having seen all the acts of the case and the documents exhibited thereat;

Considers:

9. That basically in this case, plaintiffs instituted current proceedings in terms of Article 495A of the Civili Code (Chapter 16 of the Laws of Malta), with the purpose of having the Court order the sale of the property of the land measuring approximately 2653 metres squared in Birkirkara and the property bearing numbers 16 and 17, in Triq Għar il-Ġobon, Birkirkara, including the backyard, garden and relative airspace, accessible from said street as well as Triq il-Venerabbli Nazju Falzon, and from New street in Triq Tumas Fenech in Birkirkara, as described in the promise of sale agreement of the 19th of December, 2017, for the price of €2,600,000 and under the terms and conditions agreed to in the said promise of sale agreement, in that the plaintiffs wished to terminate the state of co-ownership with the defendant and proceed with the sale of the indicated property held in common.

10. The curators at the time representing the defendant rejected plaintiffs' demands on the basis of the following pleas: (i) that the plaintiffs were to prove the shares due to the respective parties; (ii) subject to the nomination of a technical architect and civil engineer, there should be verified that the price convened is fair and just and that the sale does not in any way prejudice the defendant; and (iii) that as the curators appointed to represent the defendant, they were not aware of the facts leading up to the case and thus reserved the right to submit further pleas at a later stage.

11. Having seen the declaration made by the parties before the First Court on the 20th May, 2019, whereby they agreed that the proceedings were to be conducted in the English language (fol. 103).

12. Despite the fact that by means of a decree given on the 25th March, 2020, whereby the First Hall of the Civil Court acceded to the mandatory's request of the 20th January, 2020, on behalf of the defendant, to file additional pleas, no such additional pleas were filed.

13. By means of a decree of the 8th March, 2021, the First Hall of the Civil Court refused to accede to the request made by the defendant to stay the hearing of the current proceedings until such time that the proceedings bearing

reference 308/2019 be determined, in view of the lack of circumstances necessary to merit such stay of the proceedings.

14. In terms of the judgement of the 28th October, 2021, the First Hall of the Civil Court upheld the plaintiffs' claims and rejected the pleas raised by the defendant, in that it authorised the sale of the property subject of this lawsuit, in the manner outlined above.

15. The mandatory of the defendant filed the appeal under examination, as defendant felt aggrieved by the decision of the Court of first instance, in that according to the appellant, the First Court should have arrived at a different conclusion on the basis of the evidence produced before it and should have acceded to defendant's pleas instead. The appellant raised as grounds of appeal, the following points:

(a) with respect to the defendant's request for the stay of these proceedings so that the proceedings bearing reference 308/2019MCH would be first decided, given the outcome of the latter proceedings could impinge on the outcome of the current proceedings. Appellant sustains that although the Court of first instance did mention the said proceedings, it erroneously mentioned the fact in the appealed judgement that, the proceedings bearing reference 308/2019 had been decided on the 6th October, 2021, had become *res judicata* and that no appeal had been filed, in view of the fact that the term

for appeal from a judgement had been extended to thirty days as can be seen from Article 226(1) of Chapter 12 of the Laws of Malta (as amended by virtue of Act XXXII of the year 2021). In fact, the defendant had filed an appeal in the case bearing reference 308/2019 on the 5th November, 2021. The appellant is also of the opinion that the first instance Court erred when it set a short time within which the contract of sale had to be published, when it set the 26th of November, 2021, as the date for the publication of the final deed of sale, when such date was within the period when an appeal could be lodged in the current case, thus such deed could not be published before the appeal under examination be determined. In view of the fact that there is still pending between the parties the case bearing reference 308/2019 MCH, which could impact the outcome of the share and thus the amount to be received by the parties to these proceedings, appellant insists that these proceedings should be stayed to avoid the potential prejudice her rights;

(b) the appellant also objects to the irregular manner in which they were made aware of the acts of these proceedings through the curators and also complains about the irregular manner by which they had been notified. The appellant further sustains that the plaintiffs were well aware of where to notify the defendant, as they knew that she resides at a fixed address in England;

(c) in terms of Article 495A of Chapter 16 of the Laws of Malta, the said sale is a forced sale in terms of the law, whereby the interests of one of the co-

owners could be seriously prejudiced through the application of the said provision of the law. The said prejudice cannot be remedied by the review of the judgement subject of the appeal before this Court, considering that there are two other pending judgements which could impact the outcome of this appeal;

(d) the First Court observed that the defendant could have easily contested the technical report prepared by Architect Mario Cassar by requesting the appointment of additional technical referees. The fact that the defendant is being assisted by the office of the Legal Aid, is clearly indicative that the defendant does not have the financial means to pay three additional technical experts, considering the first technical expert's fees amounted to €3,800, let alone three of them.

16. It should be stated right from the outset that, in so far as the main ground of appeal of the appellant is based on the stay of these proceedings pending the outcome of the case bearing reference 308/2019, those proceedings have now been determined by this same Court, by virtue of its judgement of the 17th March, 2022. The defendant in the current proceedings, initiated those proceedings against the current plaintiffs, claiming that they had forfeited their hereditary rights, in terms of the will of their father Carmelo Saydon. However, by means of the judgement of the First Hall Civil Court of the 6th October, 2021, the claims put forward by the plaintiff (defendant in the current proceedings),

were rejected, which judgement was confirmed by this Court on the 17th March, 2022 and thus a final decision has been reached on the matter of the will of the parties' father. It thus follows that all the arguments raised by the appellant relative to the stay of the current proceedings have been overcome and there no longer exists a potential prejudice to the rights of the defendant by the outcome of the said proceedings, in that it is now amply clear that the shares of the parties to this lawsuit deriving from their father's will has been determined in a final manner.

17. Although it is evident that the Court of first instance must have, through an oversight, stated that the judgement in the case 308/2019 was final, as no appeal had been lodged, whereas in effect an appeal had been lodged within the period of appeal, as extended in terms of Act XXXII of 2021, this matter has now been superseded and did not impact the appellant in any manner, given the appeal has been duly decided in terms of the law. Similarly, the fact that the First Court had appointed a day for the purposes of the publication of the contract of sale within the period allowed for an appeal to be lodged, did not have a negative effect on the appellant, as she still lodged an appeal which is the subject of the current review, in terms of the law.

18. Turning to the merits, there are three essential requisites for an action instituted under Article 495A to be successful: (a) that the object has been held in common for a period of more than three years; (b) that no action has been

taken with respect to the partition of property held in common; and (c) that the co-owners fail to reach an agreement between them with respect to the sale of a particular property. Undoubtedly, these three criteria have been met in the case under review. Finally, it is incumbent on the Court to authorise a sale proposed by the majority of the co-owners, unless the Court is satisfied that the dissident co-owner would be seriously prejudiced by the said sale, with the latter criterion being defined as being "*manifestly unfair*". (Vide judgement of this Court in the names **Nutar Richard Vella Laurenti et v. John Vella Laurenti et** decided on the 27th of January 2017). The appellant has failed to prove how the proposed sale would be of prejudice to her, to the extent that it would be "*manifestly unfair*". The only reference made in the appellant's application of appeal, is to the potential prejudice which she could sustain, with respect to the case 308/2019MCH which at that stage was still pending. Now, apart from the fact that the appellant mentions this matter as being of "*potential prejudice*", rather than constituting a "*serious prejudice*" in terms of the law, once the case bearing reference 308/2019 has been finally decided, thus establishing once and for all the respective parties' shares to their father's inheritance, there is no plausible reason to sustain the appellant's argument of "*potential prejudice*". It is thus evident that the first ground of appeal cannot be entertained.

19. With respect to the second ground of appeal put forward by the appellant, whereby she contests the irregular manner in which she was made aware of the acts of these proceedings, as rightly observed by the First Court, the sworn

application was originally served on the deputy curators appointed to represent her interests and notwithstanding the fact that the first instance Court authorised defendant, as duly represented by her nominated mandatory, to file additional pleas, she failed to do so. This precludes her from complaining about the method of service. The more so, it is a principle of law that a defendant is not allowed to raise new pleas of defence before the appellate Court, which had not been formally brought up before the First Court in the sworn statement of defence. Furthermore, the plaintiffs stated in their sworn application that they were aware of the defendant's address in Norfolk and of the son's address in Malta, but they were also seeking the appointment of curators to represent the defendant's interests, who did so, until the defendant's son assumed the acts of the case on behalf of the defendant, which actually happened at a relatively early stage of the current proceedings. There doesn't result any prejudice in this respect either. Consequently, the second ground of appeal is not justified and can be of no consequence whatsoever.

20. In so far as the third ground of appeal refers to the two pending appeals which could have a bearing on the outcome of the current proceedings, it is held that this ground of appeal in so far as it concerns the case 308/2019, is mostly a repetition of the first one and thus the considerations made by this Court under the first ground of appeal apply to this one too. Whereas the other pending appeal before this Court, bearing reference 31/2018MCH is also being decided today and frankly the appellant in no way explains how this other pending case,

could negatively effect her interests in the current proceedings. Furthermore, despite the fact that the Court order in terms of Article 495A of the Civil Code, authorising the co-owners to proceed with the sale of the property held in common, could be seen as a forced sale from the dissenting co-owner's point of view, it remains the duty of the Court to verify the details and conditions pertaining to the proposed sale, including the selling price, with a view of verifying whether the proposed sale is fair and reasonable, for the purposes of safeguarding the dissenting party's interests. After going through the promise of sale in question and the First Court's considerations, it is held by this Court of Appeal, that this exercise was held diligently by the Court of first instance and there seems to be no reason whatsoever to overturn its decision.

21. There remains to be determined the last ground of appeal, that concerning the First Court's observation that the defendant could have contested the technical referee's report through the appointment of additional referees and the appellant's financial considerations related to such an observation. Truth be told, the first instance Court observed that the defendant presented a number of random valuations of plots in Birkirkara, to sustain her contestation of the proposed selling price and further observed that the said documents were filed without the First Court's authorisation and at a late stage of the proceedings. Sure enough, said valuations could have been brought forward as part of the defendant's evidence, in such a way that the Court appointed architect could have been questioned in their respect. The defendant

could have submitted a valuation through her own architect to sustain her claims and could have questioned the Court appointed architect to contest his valuation. Failure to do so, left the First Court with no option other than to confirm that the valuation given by the Court appointed architect, being less than that resulting on the promise of sale agreement, was indicative that the price of the property, as resulting from the promise of sale agreement was not prejudicial to the defendant's interests. Thus, notwithstanding the financial constraints that the defendant may have, there existed other remedies at law, which the defendant failed to adopt, and can thus no longer complain about the outcome of the proceedings. It follows that this last ground of appeal does not merit further consideration and should also be rejected.

Decide

Therefore, for the reasons explained above, the Court disposes of the appeal filed by the defendant, in that it rejects the appellant's requests and confirms the appealed judgement of the Civil Court First Hall of the 28th October, 2021, in the above mentioned names, in its entirety, provided that the publication of the final deed of sale shall be made within three months from the date of this judgement.

The costs for the proceedings shall be borne in the first instance, as decided by the Court of first instance, whereas the costs relative to the appeal shall be paid by the defendant.

Giannino Caruana Demajo President	Tonio Mallia Judge	Anthony Ellul Judge

Deputy Registrar
rm