

IN THE HIGH COURT OF BELIZE A.D. 2023

ACTION No. 6 of 2018

BETWEEN:

DIANE LORI TABONY

Petitioner

And

AUGUST TABONY

Respondent

BEFORE THE HONOURABLE MADAM JUSTICE MARTHA ALEXANDER

Oral Submissions Date: 19 June, 2023

Delivery Date: 31 August, 2023

APPEARANCES:

Mr. Fred Lumor SC and Ms. Sheena Pitts, Counsel for the Petitioner

Mr. Andrew Marshalleck SC and Ms. Stacey Castillo, Counsel for the

Respondent

DECISION

INTRODUCTION

1. There are two applications before me. The respondent filed the first summons on 23 January, 2023 to amend his pleadings. By the summons,

he seeks leave to file a supplemental affidavit to be treated as pleadings in the matter, but limited to pleading foreign law applicable to the Marriage Contract (i.e. a pre-nuptial agreement) of the parties dated 24 October, 1986. The second summons was filed on 18 April, 2023 by the petitioner to strike out the 23 January, 2023 summons to amend.

2. I find that this is not a suitable case for granting the amendment sought so I dismiss the respondent's summons. I grant the petitioner's strike out application for reasons which are set out below.

BRIEF FACTUAL HISTORY

3. The parties are currently engaged in more than one matter before the court: (i) Action No. 6 of 2018 and (ii) Action No. 260 of 2019. By Action No. 6 of 2018, the petitioner sought a declaration of rights and the division of matrimonial property pursuant to section 16 of the Married Women's Property Act¹ and section 148(A) of the Supreme Court of Judicature Act.² A brief history of this matter is necessary to place the current summonses in their proper context and for their just disposal, as these parties have had a long sojourn before the courts.
4. The present summons to amend follows a previous application by the respondent for a trial of a preliminary issue on whether the petitioner could properly rely on the substantive laws of Belize in making her application for ancillary relief. In that previous application, he argued that the parties were married in Louisiana so the doctrine of *lex domicilii matrimonii* must apply (i.e. the state of Louisiana). He wanted the terms of

¹ The Married Women's Property Act, Cap. 176 of the Laws of Belize, R.E. 2011

² The Supreme Court of Judicature Act, Cap. 91 of the Laws of Belize, R.E. 2011

the Marriage Contract signed by the parties to determine how matrimonial properties are divided between the parties. He argued that the Marriage Contract was valid and subsisting under the laws of Louisiana, so its terms ought to be enforced by the Belizean courts. The respondent also filed an amended summons on 10 March, 2020 to strike out the petitioner's case.

5. These double-barrel applications were disposed of in a written judgment dated 25 July, 2022³ by the Honourable Madam Justice Sonia Young. In that decision, Justice Young addressed issues of jurisdiction, conflict of laws⁴, enforceability and foreign law. Justice Young found that the petitioner has a right to have her ancillary matters determined by the Belizean court, which has the jurisdiction to determine them. She, therefore, refused to strike out the petitioner's case.
6. In her decision, Justice Young stated that *"by submitting to the jurisdiction of the Belizean court for the divorce proceedings, the Belizean court has jurisdiction to deal with the originating summons"*⁵ of the petitioner. The kernel of the judge's reasons on the Marriage Contract was that, *"even if valid, [it] can not (sic) oust the jurisdiction of the Belizean court which both parties submitted to during the divorce proceedings."*⁶
7. Justice Young frontally addressed the issue of foreign law in that decision and determined it. She explored the state of the law and stated that foreign law is a matter of fact so it was necessary for the respondent to plead and prove it, if he wanted to argue that the Marriage Contract was

³ Action No 6 of 2018 delivered by the Honourable Madam Justice Sonia Young on 25 July, 2022

⁴ In that hearing of the amended summons of March, 2020 the issue of choice of law was raised and pronounced upon but it is not a part of the present application.

⁵ Action No. 6 of 2018 In the Matter of An Application by *Diane Lori Tabony* under Section 16 of the Married Women's Property Act, Cap. 176 of the Laws of Belize, R.E., 2011

⁶ *Supra* note 5, para. 90 delivered by the Honourable Madam Justice Sonia Young on 25 July, 2022

binding on the parties in these proceedings.⁷ She also pointed to the absence of expert evidence on foreign law. Given that it is a factual dispute, expert evidence is required for the court to consider and make a determination. She concluded that the lack of such evidence alone militated against the grant of the strike out order or of a proper determination of this limb of the preliminary issue. She then dismissed the strike out summons.

8. At paragraphs 69-89 of her decision, Justice Young adjudicated upon the issue of whether prenuptial agreements are enforceable in Belize. At paragraph 89, she concluded that Belizean courts, unlike our English and Australian counterparts, are not empowered to enforce prenuptial agreements “*until changes are made to its laws.*” There was no appeal of her decision.
9. The respondent now brings the present summons to amend the pleadings through use of a supplemental affidavit. He claims that the supplemental affidavit would be limited to pleading foreign law applicable to the Marriage Contract dated 24 October, 1986 between the parties.

SUBMISSIONS OF PARTIES

10. Counsel for the respondent submits that as the present matter involves property division between the parties, what he is seeking to do is to help the court determine the real issues in controversy between the parties. He is not seeking to re-litigate jurisdiction or other issues but wants to assist with the foreign law aspect only. The court will need help with the foreign law, specifically on how the Marriage Contract impacts the division of

⁷ Ibid paras 32-46, pages 10-13

matrimonial property. Counsel telegraphed that this will involve calling expert evidence on foreign law.

11. Counsel admits, further, that since Justice Young highlighted the deficiencies in the previous application before her, the respondent brings the present application to address those limited concerns. It is the petitioner's summons to strike out that ought to be dismissed since it seeks to prevent the court from having all the issues before it to properly dispose of the matter. Counsel for the respondent states that the court has the power to allow the amendment under order XXXI Rule 1 of the Supreme Court of Judicature Rules⁸ and that it will be just to do so.

12. Counsel for the petitioner rejects the attempt by the respondent to amend his pleadings. This is not the first attempt by the respondent to introduce the Marriage Contract as the relevant document for determining property division between the parties. The issue was dealt with by the previous judge having carriage of both matters; the respondent was unsuccessful and no appeal of that decision was made. The present application is, therefore, an attempt to re-litigate the same issues in the judgment of Justice Young. The petitioner argues that it is an abuse of process and ought to be struck out. Her counsel provides nine grounds to justify why the present application ought to be dismissed.

ISSUES

13. The issues that arise from the present applications are:

a. Whether the application to amend should be allowed?

⁸ The Subsidiary Laws of British Honduras, Belize City, R.E. 1963

- b. Whether the application ought to be struck out as an abuse of process?

Whether the application to amend should be allowed?

- 14. The respondent brings his summons to amend pursuant to order XXXI Rule 1 of the Supreme Court of Judicature Rules, which states:

[1] The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

- 15. He argues that the amendment will be *just*, as the court will be able to determine the real question in issue between the parties. The amendment is limited to pleading foreign law so will allow the court to assess the impact of the Marriage Contract on the division of the matrimonial properties of the parties. By allowing the amendment, the court will get the assistance of expert evidence on foreign law to better make its determination. Counsel for the respondent does not dispute that the Belizean court has jurisdiction to deal with the division of matrimonial properties but maintains that it needs assistance on the foreign law issue, specifically the impact of the Marriage Contract on any decision it will render.

- 16. Counsel for the petitioner raises nine objections, most of which focused on the jurisdiction issue that was determined by previous courts adjudicating

in the matrimonial matter.⁹ There is no dispute between the parties on jurisdiction, as both are *ad idem* on the Belizean court having the jurisdiction in matrimonial proceedings to grant ancillary reliefs.¹⁰ This issue will not be rehashed in this decision.

17. An examination of the jurisprudence reveals that the issue of amendments of pleadings lies in the discretion of the trial judge, which must be exercised in the interest of justice.¹¹ While amendments are allowed to clarify the issues in dispute, the exercise of the discretion is guided by the assessment of where justice lies. Moreover, the court's approach to amendments would usually be permissive, granting them at any stage of the proceedings.¹² So in exercising its discretion, a court will usually treat with amendments liberally, particularly where they are made before trial.

18. In ***Gloria Moo Young & Or v Geoffrey Chong and Ors***¹³ the Court of Appeal of Jamaica identified the following principles to guide the exercise of the court's discretion:

- i. An amendment can be permitted at any stage of the proceedings once it is *just* to do so.
- ii. An amendment will be granted, however late, where it will serve the purpose of determining the real question in controversy between the parties.

⁹ Action No. 6 of 2018 *Tabony v Tabony* delivered on 25 July, 2022 decided the issue of jurisdiction

¹⁰ Supreme Court of Judicature (Amendment) Act 2001, Act No. 8 of 2001 enacted 3 March, 2001

¹¹ *Gloria Moo Young & Or v Geoffrey Chong and Ors*. Civil Appeal No. 117/99 Jamaica

¹² *Easton v Ford* [1993] 4 AER 257 where an amendment to a defence prior trial was upheld as correct

¹³ *Ibid* note 11

- iii. In granting an amendment, a court will consider if it will create any prejudice, or can be granted without causing injustice, to the other side.
- iv. Each case will be determined on its own facts so before exercising its discretion, a court will look at all the circumstances, including the state of the evidence.

19. In my judgment, where the effect of an amendment is to have a court re-examine an issue that was decided previously, it is not a *bona fide* application nor is it fair to the other party. I agree that a court is entitled to have all the issues in controversy before it; and for that purpose should facilitate amendments at any stage. I do not agree with counsel for the respondent, however, that the present amendment will work to bring all issues in dispute before the court. In my view, an issue that has been disposed of by a court of coordinate jurisdiction, which has not been appealed, is no longer in dispute. Justice Young has already decided that pre-nuptial agreements are not enforceable in Belize. The issue involving the same Marriage Contract and same parties is *res judicata*. The proposed amendment is unnecessary since it raises no live issue.

20. Further, the amendment sought is not to clarify issues or to introduce issues that have never arisen before the court but to re-open a disposed issue. It is an attempt to shift the target after the decision has been made. In my judgment, the amendment will not serve to determine any real controversy between the parties nor will it be fair to re-litigate a decided question. Further, the existence of the Marriage Contract was always known by the respondent but never pleaded. The attempt to introduce it now, following a decision that pointed to the non-existent pleading, will

not be just to the other side or in the interest of justice. I disagree with counsel, therefore, that the amendment is necessary.

21. I also accept the argument of counsel for the petitioner that the respondent is seeking an order to introduce matters that are outside the scope of the powers of the High Court. He argues that the amended section 148A of the SCJA makes the law of Belize the applicable law to be used when the court makes declaration of title and rights to matrimonial properties acquired by spouses during the subsistence of the marriage. It means, therefore, that the court *must* operate within the confines of its statutory powers irrespective of the laws of the state of Louisiana or any other law. The statutory guidelines¹⁴ in Belize do not permit or vest any authority in the High Court of Belize to apply “a Marriage Contract” made in the state of Louisiana to inform or assist with distribution of matrimonial properties.

22. The issue of foreign law was determined previously by Justice Young. She was clear that the Marriage Contract, though valid in Louisiana, cannot simply be enforced here “*like an ordinary commercial contract.*” She stated that that is not the state of the law in Belize. She was clear, also, that once a petitioner has successfully invoked the jurisdiction of the Belizean court in divorce proceedings, a party can petition for division or distribution while these proceedings are ongoing. After reviewing the position in different jurisdictions, and the legislative silence in Belize on pre-nuptial agreements, she concluded that legislative changes are required. The statutory regime in Belize simply does not provide for a pre-nuptial agreement or a Marriage Contract to impact division of matrimonial

¹⁴ SCJ (Amendment) Act 2001, Act No. 8 of 2001

property: *“Notably, there is nothing within the Judicature Act which provides for ante-nuptial agreements or their variations.”*¹⁵

23. To date the statutory regime for ancillary reliefs in Belize has not been altered by the legislature to make a Marriage Contract a relevant factor for determining property division in a Belizean court.

24. I do not agree with the respondent’s position that Justice Young did not determine the issue of the Marriage Contract so a “do-over” is possible and/or he can fix deficiencies in his pleadings now that she has highlighted them. The foreign law issue and the enforceability of prenuptial agreements were fully ventilated and determined by that court. That preliminary issue received lengthy and detailed consideration by a previous court and was not appealed.

25. I find that the present application is not a good faith application for the purpose of bringing all issues in dispute before me nor is it in the interest of justice to grant it. In my view, the present summons seeking to amend to plead and prove foreign law is an appeal masquerading as an amendment application. An amendment application is not an appeal. If the respondent wanted to overturn the decision of Justice Young, he should have filed an appeal. It can hardly be said that to grant such an amendment in these circumstances will meet the justice of the case. Having not filed an appeal, the respondent does not get by his present summons to re-litigate an issue that was decided previously and by which he is bound.

¹⁵ *Tabony* dated 25 July, 2023, para. 74

Whether the application ought to be struck out as an abuse of process?

26. By reason of my findings above, the strike out application is upheld. The respondent having litigated this same issue before, albeit worded differently, is misusing the court's process.
27. The summons seeking leave to amend, limited to pleading foreign law and to file additional evidence, is dismissed with costs to the petitioner to be agreed or taxed by the Registrar. The strike out order is granted.
28. Costs should follow the event and I would order that costs be paid by the respondent to the petitioner.

DISPOSITION

29. It is ordered that:
- a) The respondent's summons to amend the pleadings dated 23 January, 2023 is dismissed with costs;
 - b) The petitioner's summons to strike out the amendment dated 18 April, 2023 is upheld; and
 - c) The respondent is to pay the costs of both applications to the petitioner to be taxed if not agreed.

Justice Martha Alexander
Judge of the High Court of Belize