(19)

IN THE SEYCHELLES COURT OF APPEAL

Gilbert Hoareau Appellant

v/s

Myriam Hoareau Respondent

Mr. R. Valabhji for the Appellant
Mrs. A. Derjacques for the Respondent

38/96.

Order;

The Appeal is allowed in its entirety and the judgment of the learned Judge Perera J, is hereby set aside. In place therefor we enter judgment dismissing the respondent's claim. The counterclaim being regarded as a seperate action is remitted to the Supreme Court to be re-heard with liberty to either of the parties to amend his/her pleading. The Appellant is entitled to costs both of the trial in respect of the claim now dismissed and of the appeal.

Reasons to be given later.

Dated this 3rd day of April 1997.

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A. SILUNGWE	E.O. AYOOLA	L.E. VENCHARD
JUSTICE OF APPEAL	JUSTICE OF APPEAL	JUSTICE OF APPEAL

(19)

IN THE SEYCHELLES COURT OF APPEAL

GILBERT HOAREAU APPELLANT

VERSUS

MIRIAM HOAREAU RESPONDENT

Civil Appeal No. 38 of 1996

(Before A.M. Silungwe, E. O. Ayoola, L.E. Venchard JJ. A.)

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Mr. R. Valabhji for the Appellant

Mr. A. Derjacques for the Respondent

JUDGMENT OF THE COURT

Delivered by Ayoola, J.A.

This is an appeal from the decision of the Supreme Court (Perera, J) whereby he ordered, in the main that, the appellant, Gilbert Hoareau, do transfer a parcel of land described as parcel H3362 together with the house standing thereon to the respondent, Myriam Hoareau; and dismissed the appellant's counter-claim. The respondent, who was plaintiff in the Supreme Court, is the daughter of the appellant. In 1987 the respondent purchased land known as parcel H2034. She transferred the bare ownership of the land to the appellant in March 1993, by a document dated 18th day of March, 1993 for a stated consideration of the price of R20,000 which sum was stated to have been paid. Earlier, the respondent had conveyed a usufruct to the appellant over the land. That usufruct terminated by merger with the bare ownership sometime in 1993. The appellant subdivided the property into parcels H3363 and H3362. Parcel H3363 was sold to one Vicky Lanza.

By her plaint dated 30th March 1993, the respondent claimed against the appellant a transfer of parcel H3362 (hereinafter referred to as "the property"). She averred, in effect, that the sale to the appellant was a simulation that no consideration was paid in fact either for the usufruct or for the bare ownership transferred; and, that the bare ownership was transferred to facilitate the subdivision of the land for its eventual sale to third parties, one of whom was the earlier mentioned Vicky Lanza. It was because of the appellant's failure to sell the property that she brought the action.

The appellant's defence was a denial of a simulated sale. By his defence he averred that: "The defendant became full owner of parcel H2034" and that "the sale was not subject to any conditions or reserves." He denied that he owed any fiduciary duties to the respondent and averred that his dealings with the land were in exercise of his right of ownership.

Perera, J who tried the case rightly identified the basis of the respondent's case which was that the sale to the appellant was a simulated sale. He held that in the case "there are no back letters nor anything in the nature of beginning of proof in writing." Being of the view that both could be dispensed with by reason of moral impossibility he relied on "the oral and documentary evidence arising from the relationship of the parties" and made a finding that there was no intention to transfer ownership to the respondent. He held, in conclusion that "the transfer of the bare ownership was a simulation and therefore not intended to transfer ownership to the defendant."

The main question on this appeal is whether the judge was right in his decisive view that the application of Article 1321(4) was unnecessary.

Our decision in Ruddenklau v Botel (Civil Appeal No. 4 of 1995) was brought to the notice of the judge. Not only did he refuse to follow that decision, as he would normally have been expected to do, but he took it upon himself to pronounce the decision erroneous. In Ruddenklau v Botel (supra) after a painstaking and anxious consideration of Article 1321(4) of the Civil Code of Seychelles ("the Civil Code") we came to the conclusion that back letters in terms of Article 1321(4) of the Civil Code in law to be of force or avail whatsoever must be in writing. It is profitable to quote in extenso what we said in that case:

> *"The learned judge rightly treated the case as one of simulation in which the apparent and ostensible agreement is destroyed, in effect, by a secret contract. A simulation is the concealment by the party of the true nature of their agreement behind the facade of a disguised transaction which the parties never intended to have the ostensible effect. The hidden agreement by which the parties agreed to conceal the true nature of the ostensible transaction as a sham is referred to in the Civil Code of Seychelles as a back-letter. The back-letter provides evidence of the simulation. As stated in a passage from Amos and Walton: The introduction to French Law (2nd Ed. p. 177):*
>
> ***"If the ostensible agreement is in writing, ... the back letter cannot, according to the general rules of evidence, be proved by oral testimony. There must be written proof or at least commencement of proof in writing supplemented by oral testimony."***
>
> *However, Article 1321(4) of the Civil Code of Seychelles ("the Code) provides that:*
>
> ***"Any back-letter or other deed, other than a back-letter or deed ... which purports to vary amend or rescind any registered deed of or agreement for sale transfer, exchange,***

mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease or charge of or on the immovable property to which it refers."

Thus, while the requirement of writing may in other cases be merely evidentiary pursuant to Article 1341 of the Code albeit subject to the exception provided by article 1347 of the Code, the requirement of writing in cases provided for in Article 1321(4) is formal. The consequence is that such secret contract is void by reason of the absence of writing. The true effect of the relevant paragraphs of Article 1321 is clearly put in Chloros: Codification in a Mixed Jurisdiction (p. 103) thus:

"The Code specifically declares null those back-letters which purports to vary a transaction involving immovable or commercial property. It also declares null any simulation of a registrable deed or agreement unless the back-letter which provides evidence of the simulation is also registered within six months of the making of the agreement."

In this case it is evident that the "back-letter" relied on by the respondent was not in writing and consequently was not and could not have been registered as required by Article 1321(4) of the Code. In the result the back-letter is "of no force or avail whatsoever." Therefore there was nothing that could in law be relied on as evidence that the transaction embodied in the deed of transfer (Exhibit P21) was a simulation or a sham. The ostensible transaction therefore ought to have been given effect to.

Before this appeal is parted with, it is pertinent to observe that it is difficult to fathom what useful purpose Article 1321(4) which, as has been seen in this case, is capable of producing harsh and unexpected results, is designed to serve. If the purpose is to effect publicity so that the secret transaction may come to the notice of third parties, then the provisions of Article 1321(1) of the Code would seem to have made Article 1321(4) superfluous since by Article 1321(1):

> ***"Back-letters shall only have effect as between the contracting parties: they shall not be relied upon as regards third parties."***
>
> *If, as is implied in the argument put before us by Mr. Shah, counsel for the respondent, Article 1321(4) of the Code is to ensure that the provisions are for fiscal purposes only, its clear the provisions have gone beyond what is necessary for that purpose. The clear and unambiguous provisions of Article 1321(4) are so sweeping that it will be a daring and unnecessary piece of judicial legislation to restrict the effect of the nullity they declare of back-letters which offend the provisions of Article 1321(4) to third parties only while making them valid as between the parties."*

We do not consider it necessary to add to or vary the view we held in Ruddenklau v Botel (supra). We are in no doubt that had the learned judge taken pains to understand the judgment; and to advert to the distinction between a requirement of writing which is merely evidentiary and one which is formal, he would not have misled himself into reaching a decision contrary to what we stated to be the law in Ruddenklau's case and what Professor Chloros who prepared the Civil Code understood to be the law in the work referred to in our judgment quoted above. Reference could also be made to pages 59 - 60 in Nicholas: French Law of Contract 2nd Edition where the author considered the distinction between formal and evidential requirements and wrote at page 59:-

> *"where the requirement is formal, the absence of the writing will make the contract void."*

and, at page 61:-

> *"In other cases the requirement of writing is only evidential in the sense that if the transaction has to be proved, the party seeking to do so must adduce written evidence."*

It is only where the requirement of writing is only evidential that beginning of proof in writing and oral evidence can be accepted in substitution for writing and the question of moral impossibility could possibly arise.

As rightly pointed out by learned counsel for the appellant, the learned judge embarked on an unnecessary research when he cited as authority comments on the French Civil Code, which does not contain provisions similar to Article 1321(4). Had the learned judge been more painstaking in his reading of the judgment in Ruddenklau's case; and, if he must, in making further research, he might, no doubt, had seen, as we did that the appropriate conclusion is that reached in that judgment. We need only observe that in making comments and pronouncements on the judgment of this court judges must guard against unwittingly appearing to show scant

regard for the need to avoid judicial anarchy which will surely introduce confusion and uncertainty into the legal system. A judge must not give the impression that he is upset by the reversal of his judgment by a higher court or that he needs to re-establish a view which he had been held to hold in error. Before we part with this issue, it is expedient to point out that although backletters may be in writing or oral, when the provisions of 1321(4) of the Civil Code are applicable backletters in circumstances provided for in that article, must be in writing.

Enough has been said to expose the error in the learned judge's conclusions. The correct conclusion is that on the strength of article 1321(4) there is nothing that can be relied on in law as a backletter which is the term used to describe the hidden agreement which makes the ostensible transaction a mere sham. The respondent's case based on the conclusion that the instruments of title of the appellant was a sham ought to have been rejected. In respect of the respondent's claim, the appeal must be allowed.

The learned judge also dismissed the appellant's counter claim. The two grounds on which he so did are:-

(i) that in terms of section 81 part of the claim made by the appellant could not be made by way of counter claim in the action as it was not in respect of anything arising out of the subject matter of the Act;
(ii) that those which could be admitted as counter claim were either prescribed or not proved.

The learned judge was right in his interpretation and application of section 81 of the Seychelles Code of the Civil Procedure. However reference to the decision in Village Management Ltd v Albert Geers SCA 3 of 1995 was unnecessary. In that case, the question was not whether the defendant's claim had been properly brought as a counter claim. In Village Management Ltd case the issue which has arisen in this case as to when a counter claim could be properly brought did not arise.

While we agree with the learned judge that part of the appellant's claim was not properly brought as a counter claim, the order dismissing that part of the counter claim is erroneous.

In regard to the part of the counter claim which the judge held was prescribed, we agree with learned counsel for the appellant that the judge did not properly direct himself on or consider the nature of the account relied on by the appellant and the effect of the credits given therein to the respondent. In this regard, there was inadequate consideration of the appellant's case by the learned judge before he held that it was prescribed.

The only part of the counter claim which the judge held was not proved though properly made and not prescribed was in regard to a sum of Rs. 1,000 allegedly paid as government fees on parcel H2034. Since the account presented as basis of the appellant's counter claim had not been properly considered and the item in question was part of that account, it is inexpedient to isolate that item for determination. The result is that the appellant's appeal against the dismissal of his counter claim must also be allowed.

For these reasons, the appeal is allowed in its entirety and the judgment of the learned judge, Perera, J., is hereby set aside. In place therefor we enter judgment dismissing the respondent's claim. As the counter claim is regarded as a separate action based on a single account, the appropriate order to make is that the counter claim be remitted to the Supreme Court to be reheard with liberty to each party to amend his/her pleadings. The appellant is entitled to costs both of the trial in respect of the claim which has been dismissed and of this appeal.

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A. M. SILUNGWE	E. O. AYOOLA	L.E. VENCHARD
Justice of Appeal	**Justice of Appeal**	**Justice of Appeal**

Delivered on this ..... day of ..... 1997.