# IN THE SEYCHELLES COURT OF APPEAL

**Jeremy Arnold** **Appellant**

**V**

**Edmond Mussard**
**Acting as executor of the Estate**
**of the late Odette Morel** **Respondent**

**SCA 31 of 2010**

**[Before: MacGregor PCA, Twomey and Msoffe JJA]**

---

**W. Lucas for the Appellant**

**N. Gabriel for the Respondent**

*Date of hearing: 28th November 2012*

*Date of judgment: 7th December 2012*

**JUDGMENT**

**Twomey, JA**

1. On the 18th August 1971 Jeremy Arnold, a British subject living in the British colony of Seychelles entered into an agreement as follows:

> "This option is made on the 18th day of August in the year of Our Lord one thousand nine hundred and seventy–one (1971) between France Mussard, Edmond Mussard, Philomene Mussard, Rosa Mussard now Mme Jacky Gemmel and Odette Morel hereinafter referred as the Heirs Mussard of the one part; and Jeremy Arnold of Cherington Butts, Cherington, Warwickshire or assigns hereinafter referred to as the Grantee of the other part, and herein represented by Robert Anthony Chaston, his duly appointed Agent and Proxy.
>
> Whereby it is agreed as follows:
>
> 1. That the Heirs Mussard grant to the Grantee an option to purchase all their rights, interest and title in a portion of land of the extent of six acres or thereabouts situate at Anse Banane, La Digue and adjoining the property of Mademoiselle Rosemary Rene of and

in consideration of the sum of twenty thousand rupees (Rs. 20,000/-).

2. That the Grantee will pay the sum of rupees two thousand (Rs. 2,000/-) upon the signature of this option by the Heirs Mussard.

3. That it is a condition precedent of this option that the Heirs Mussard are the freehold owners of the said property and hold it at their free ad absolute disposition free from all encumbrances, and will indemnify the Grantee against any claims, demands or liabilities of whatsoever kind which may arise or have arisen.

4.That as from signature of this option the Grantee or his Servant and Agents shall have the right to take possession of the said property, and may effect such improvements and alterations as the Grantee considers fit.

5. That this option shall continue for ninety (90) days form the date of signature hereof, whereupon it shall become null and void and the sum of Rupees two thousand (Rs. 2000/-) referred to above shall be forfeit, to the Heirs Mussard by way of penalty, and the benefit of any improvements made to the said property by the Grantee shall inure to the Heirs Mussard free from any compensation.

6. That upon the lawful exercising of this option within the time stated in five (5) above, the sum of Rupees two thousand (R2, 000/-) referred to above shall be treated as a pre-payment of part of the purchase price.

In witness whereof the parties have set their hands to this option in double minutes on the day, month and year first above written.

2. On the 11th November 1971, each of the five co-owners signed a receipt for Rupees 4000 “from Robert Anthony Chaston on account of Jeremy Arnold.” The property, subject of the above sale was never registered or transcribed in the “old land register” as per the provisions of *The Mortgage and Registration Act Cap.134);* the reasons why this never happened were not explained satisfactorily to the Supreme Court who “heard” the case in 2008. We emphasize “heard” in this instance, for reasons that will become clear later in this judgment.

3. The transferee, now Appellant, duly took possession of the land subject to the purported sale and erected buildings. He left Seychelles subsequently but continued to visit periodically. He appointed one Violette Cécile, née Radegonde, to caretake the property in his absence.

4. 37 years later, in a letter dated 6th March 2008, Edmond Mussard, Junior,the present Respondent, in his capacity as the Executor of the estate of Odette Morel, one of the original co-owners of the property, wrote to Violette Cecile giving her notice to vacate the land by 30th June 2008 on the basis that she was occupying the same without payment of rent and the consent of the owners and that a buyer had been found who was to purchase the property subject to the ejectment of persons living there.

5. The Appellant wrote to the Respondent informing him that he would resist such action as he was the owner of the land and was awaiting the completion of survey of the land for the transfer to be made to his name and that by operation of article 2262 of the Civil Code the matter was in any case prescribed.

6. Alas the matter did not end there, as is often the case with property issues in Seychelles. Mr. Lucas for the Respondent filed a plaint in the Supreme Court on the 6th of June 2008 praying ultimately that the Appellant be declared the rightful owner of the property and that the Land Registrar register the same in his name. The Respondent demurred and in the meantime Mr. Valabji, filed a motion on his behalf on 7th August 2008 before the Supreme Court claiming that Violette Cécile, and her relatives continued to occupy the property despite the letter asking them to vacate and were proceeding to renovate buildings on the property and that building work should stop and structures demolished.

7. The matters seem to have been consolidated and came before Renaud J on 16th March 2009. Counsel informed the court that the pleadings were complete and a hearing date should be fixed. The case gets a little murky after this and in terms of procedure most irregular to say the least. There is a manuscript on the court file; it would appear in the hand of the learned judge Renaud dated 6th May 2009 in which the following appears (verbatim) as far as we can decipher:

> "1. Parties submitted agreement dtd 18/8/71.
>
> 2. Agreed the parties will make separate written submission on interpretation of the said agreement – to be ready by 20.5.09.
>
> 3. To meet again 27/5/09 at 8.30 am for further consultation.
>
> ---
>
> 27/5/09
>
> -Rec'd sub'm from w. Lucas
>
> -Advised Counsels to exchange subms.

-Counsels to look up the laws

(1) Imm. Transf. Restr. Act.

(2) Civil law- prevailing at the time- ie 1971

(3) Ascrt. As to which civil law app. Prior 1976.

-meet again 17.6.09- 8.30

- Act 1589 CCivil. = Civ Code.

1/7/09

-Counsels to research and submit on "preu de bonne foi"

-Meet again 24/7/09 – 8.30 am

-On 24/7/09- to allocate hg. Date

24/7/09

Auth deposited by WL- Art 2228

- "Preu de bonne foi"
- Art 2219
- "prescription under Code Civil"

NB: Parties may submit evidence by affidavit CPC 168.

(signature of the judge) 24/7/09

Mr. Gabriel to be informed.

8. What followed is unclear as nothing is recorded but perusing the court transcript we note that an affidavit by Jeremy Arnold was sworn on 28th October 2009 and together with an affidavit sworn by Robert Chaston of 8th April 2008 were attached by Mr. Lucas for the Appellant together with a written submission, copies of authorities on which he relied for his written submission, letters and other documents. For the Respondent, an affidavit by Edmond Mussard was sworn on the 25th March 2010 and submitted. There is also a written submission by his Counsel, Mr. Gabriel, on file.

**The rules of civil procedure**

9. At the outset we state unequivocally that we take a very dim view of proceedings in this matter which are in complete contradiction to the Seychelles Code of Civil Procedure. Of late this Court has seen many irregularities of procedure and has even been criticised by a judge of the

Supreme Court for adhering to such rules, notably in the case of *The Estate of C. Grandcourt v C. Gill Civil Side SC174 of 1995*, *unreported*, in which the Court of Appeal is chastised for adhering to rules of civil procedure.

10. It is our sincere wish that such misplaced views are not adopted wholesale as they seem to have been in the present case. We do understand that there is pressure on the Supreme Court to expedite cases and minimise delays but to do so at the expense of procedure which may well ultimately result in further injustice and more delays is unacceptable. We state again that the Seychelles Code of Civil Procedure is not to be tampered with by judges in their haste to achieve the so-called "end". The "means" (procedure) are stated in legislation for a reason and they are to be followed until the Legislature sees fit to abolish them. They do not exist to be used according to the whims of some judges. They exist to further the administration of justice not to impede it.

11. In the present case there were several breaches of the Civil Procedure Code and the rules of evidence. These were not raised in the appeal but had they been they could have resulted in this case being remitted to the Supreme Court for a rehearing as it could be argued that no proper hearing ever took place. The transcript of the case is also sadly lacking. There does not seem to have been a stenographer present for at least four of the hearings, again opening the transcript to challenge. There is no explanation or transcript of why the matter was not taken in public or why evidence was adduced by affidavit or at the very least whether an order was made to introduce evidence in this way. It is our view that if this matter had been proceeded with in the regular manner, clarification on several issues would have been forthcoming and less mistakes would have arisen.

12. As it was, the learned trial judge proceeded to give judgment in favour of the Respondent on 11th October 2010. He found that contrary to the unchallenged averment of the Appellant that he had submitted the deed for registration but that "some part of Land Registry records ha[d] been destroyed by fire, "there is no record that the Office of the Land Registrar was destroyed by fire at any time." This is just one illustration where the irregularity in procedure resulted in difficulties. In this instance the learned trial judge substituted his own personal knowledge for that of the uncontroverted evidence on record. He also accepts the position adopted by Mr. Nageon, the notary contacted by the Appellant as a correct statement of the law applying to the contract dated 1971, which it isn't. Mr Nageon in February 1976 states:

> "As you know legislation has changed, non-Seychellois must obtain Government's sanction before purchase and co-owners must appoint a fiduciary…"

13. The learned judge also finds that the provisions of *article 2228 of the Civil Code* in terms of possession are not satisfied as the "plaintiff never lived on the said property [and] therefore never personally had physical control of it." This is again in contradiction to the uncontroverted evidence of the Appellant that after 1977 he did not return to the islands for several years and that his wife and himself "visited Seychelles and Anse Banane, periodically over the last 35 years" and that he had appointed Violette Cecile to caretake the property in his absence. He went on to find that "a promise to sell can only be effective if registered" and in the "absence of registration therefore the purported transaction between the Defendant and the plaintiff has no legal validity and is in the eyes of the law, null and void and of no effect." He also went on to find that by implication the Appellant had waived his right of prescription and that the Appellant's only rights in the property were by application of the provisions of *article 1590 of the Civil Code*, a return of double their deposit for the purchase of the property. Hence, he ordered judgment in favour of the Appellant in the sum of Rupees 40,000 with interests and costs.

14. The appellant has filed 6 grounds of appeal against this decision:

> 1. The learned judge was wrong not to interpret the transaction between the Appellant and Vendors within the ambit of the existing laws under the French Code Civil.
>
> 2. The learned judge was wrong not to interpret and to give effect that (sic) an option to purchase under the old law is equivalent to a promise of sale which does not need the process of registration since the payment was made within the time limit agreed by all the parties.
>
> 3. The learned judge was wrong to bring forward the date and period of the transaction which took place in 1971 when the Appellant was not required to seek Government sanction to purchase immovable property.
>
> 4. The learned judge was wrong to award the Appellant in terms of the current provisions of the Civil Code when it had already been determined that a promise of sale existed.
>
> 5. Even if the appellant would accept the award of damages double the sum paid to the vendors, it does not reflect the value of the property at the moment.

6. The learned judge was wrong to disregard the issue of prescription against the Respondent.

**The law**

15. The appeal raises several issues namely, whether an option to purchase can be assimilated to a promise of sale, the applicable law to the agreement concluded in 1971, the effect of the agreement, the effect of non-registration of the agreement and prescription.

We shall consider each in turn.

**The option to purchase**

16. There seems to have been some confusion as to whether the agreement was simply an option to purchase as opposed to a promise of sale and whether the payment of Rupees 20,000 was payment for the exercise of the option or payment for the property.

As regards the distinction between an option to purchase and a promise of sale it is important to bring the original provisions of *article 1589* into sight:

> “La promesse de vente vaut vente, lorsqu'il y a consentement réciproque des deux parties sur la chose et sur le prix.”

This provision was translated and forms part of Article 1589 of the Seychelles Civil Code:

> “A promise to sell is equivalent to a sale if the two parties have mutually agreed upon the thing and the price.”
>
> The agreement to sell is made up of three stages from which arises different consequences. The following passage from Pothier (*Oeuvres de Pothier, Traité de contrat de vente (2d ed. 1861*)) is illuminating:
>
> "476. “Une promesse de vendre est une convention par laquelle quelqu'un s'oblige envers un autre de lui vendre une chose..."Il y a une grande différence entre la promesse de vendre et la vente même.
>
> Celui qui vous promet de vous vendre une chose, ne la vend pas encore, il contracte seulement l'obligation de vous la vendre lorsque vous le requerrez..."

"478. Le contrat de vente est un contrat synallagmatique, par lequel chacune des parties s'oblige l'une envers l'autre, mais la promesse de vendre est une convention par laquelle it n'y a que celui qui promet de vendre, qui s'engage, celui à qui la promesse est faite ne contracte de sa part aucune obligation."

Planiol explains the confusion that may have arisen from Pothier:

1401 "Prenons donc la promesse de vente comme une convention unilatérale.Il n'y a pas encore de vente, puisqu'il n'y a pas encore d'acheteur. Il y a une obligation unique, contractée par le proprietaire qui seul s'estobligé en promettant de vendre… Ce n'est pas encore une vente, mais la vente se completera peut-être un jour par l'adhésion de l'acheteur si celui lui plaît."(Planiol Traité Elementaire de Droit Civil, Tome Deuxième, 1921

17. Hence a promise of sale as ably put by Sauzier J in *Abdou v Wistanley 1978 62,* consists of 3 distinct stages:

1. The first stage in this present case consisted of the buyer offering to buy the land without an acceptance of the offer by the co-owners. This offer is known as *pollicitation.*

2. The second stage consists of the offer being accepted by the sellers. At this stage it is still a unilateral promise to buy, *an option to purchase*.

3. The third stage consists of both parties binding themselves to this agreement, the promise to buy and the promise to sell. This is a bilateral agreement. At this stage the *Civil Code (article 1589)* stipulates that the promise is equivalent to a sale. As Planiol states:

1406 …" C'est donc cette promesse même, dès que le consentement de l'acheteur est venu s'y joindre, qui constitue le contrat de vente."

The third stage is that as contained in *article 1583 of the Code Civil*:

"Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé."

Its provisions are unchanged by the recodification in 1976:

"1. A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the

price has been agreed upon, even if the thing has not yet been delivered or the price paid."

18. In the present case we have no hesitation in saying that the agreement signed on 18th August 1971 contained an option or a promise to buy and that on the payment and acceptance of the Rupees 20,000 by the five co-owners the sale of the land was complete.

19. As for the ambiguity as to whether the sum of Rupees 20,000 was the deposit or the actual purchase price *article 1602* has direct application:

> "Le vendeur est tenu d'expliquer clareiment ce à quoi il s'oblige.
>
> Tout pact obscure ou ambigu s'interprète contre le vendeur."

They are the same provisions that applied after recodification in 1976:

> "The seller shall be bound to explain clearly what he undertakes.
>
> An obscure or ambiguous term shall be interpreted against the seller…"

In *Wilmot v W & C French (No. 33) SLR 1972 144* the court was asked to interpret a deed and to declare the rights of the parties to the deed. Sauzier J held that

> "the predominant consideration is the real intention of the parties. This forms the basis of the consent of the parties and therefore of the contract itself and in interpreting the contract the Court must find out what was the real intention of the parties. In the event of a conflict between the real intention of the parties and their intention as expressed the former must prevail."

He further went to find that

> "Even if extrinsic evidence is entirely discarded and the deed is interpreted solely within its four corners, *article 1602* of the Civil Code would come into play and the presumption which operates against the vendor would lead me to the same finding…"

20. In the present case the intention of the parties cannot be ascertained by direct evidence as they have all passed away. The Appellant and the solicitor who prepared the agreement and who are thankfully still alive averred in their respective affidavits that this was an option to purchase which was exercised by payment of the purchase price of Rupees 20,000. This is not contested in evidence. Even if it was, we find that it can clearly be seen from the agreement that this was indeed a promise to buy land at La Digue for Rupees 20,000. Had there been an ambiguity in relation to

this issue, which we hold there is not, by operation of article 1602 we would have had to hold that the ambiguity would have to be interpreted against the vendor.

**The law applicable in 1971 to the agreement.**

21. The Civil Code of Seychelles came into effect on 1st January 1976. Its *article 2* states:

> "1. No law shall be construed to have retroactive effect unless such a construction is expressly stated in the text of the law or arises by necessary and distinct implication.
>
> 2. Save as provided in paragraph 1 of this article, a retroactive provision shall not apply to vested rights which are immediately enforceable. However, the restriction of this paragraph shall not extend to a mere expectation of a benefit or to a claim which offends the rules of public policy."

In the light of the clear provisions above, the contract of sale was therefore subject neither to the amended *Immoveable Property Restrictions Act 1973* and its successors nor the Seychelles Civil Code's provisions in relation to the appointment of a fiduciary for co-owned property or *The Land Registration Act 1976*. It is worth pointing out that in 1971 when the agreement between the parties was concluded, *section 5 of the Immovable Property (Transfer Restriction) Ordinance 1963* provided that sanction of the Governor in Council was necessary for the purchase of property by aliens. The Appellant, a British subject living in a British colony fell outside this restriction.

**The consequences of the agreement.**

22. It is clear that the promise of sale was equivalent to a sale and that the property in question was vested in the Appellant in 1971.The fact that the document in this case was under private signature and not an authentic document is immaterial as regards the parties to it, viz *article 1322* of the Code Civil. Further, the agreement continues today to bind the parties and their heirs as a result of the provisions of *articles 1134 and 1122 of the Code Civil,* unchanged in the 1976 recodification:

> 1134 "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.
>
> Elles ne peuvent être révoquées que de leur consentement mutuelou pour les causes que la loi autorise.
>
> Elles doivent être exécutés de bonne foi."

(“Agreements lawfully concluded shall have the force of law for those who have entered into them”

They shall not be revoked except by mutual consent or for cause which the law authorises.

They shall be performed in good faith”)

1122 “On est tenu avoir stipulé pour soi et pour ses héritiers et ayants cause, à moins que le contraire ne soit exprimé ou ne résulte de la nature de la convention.”

(“A person shall be deemed to stipulate for himself, his heirs and assigns, unless the contrary has been agreed upon or results from the nature of the contract”).

**Non-registration of the agreement**

23. Had the agreement been registered it would have effected notice to third parties but the fact that it wasn’t registered does not affect the position of the parties privy to it. *Article 1328 of the Code Civil* stipulates:

> “Les actes sous seing privé n'ont de date contre les tiers que du jour où ils ont été enregistrés, du jour de la mort de celui ou de l'un de ceux qui les ont souscrits, ou du jour où leur substance est constatée dans les actes dressés par des officiers publics, tels que procès-verbaux de scellé ou d'inventaire.”

It is unchanged in the recodification of 1976:

> “The date of documents under private signature shall only have effect upon third parties as from when they are registered, or as from the death of the person who signed it, or as from the date on which their contents were confirmed in documents drawn up by public officials, such as minutes under seal or inventories.”

24. In 1971 land in La Digue was not on the Land Register. The registration of transfers of such land took place under The Mortgage and Registration Act 1927 (and its subsequent amendments until 1968). Unlike the Land Registration Act 1976, there is no prescribed form for the drawing up of deeds on that register. Section 12 of the Act provides for a register, the "Répertoire", in which is entered the name of every party affected by any deed or other transactions concerning immovable property or declaratory of such rights. In fact

to this day unsurveyed land on Praslin and La Digue remains on this register. Registration and transcriptionof deeds under the Act make them maintainable against third parties viz section 12 of the Act. In this case, there is no third party involved, the Respondent is the executor of the Estate of the late Odette Morel; hence, he is acting on behalf of the heirs of the co-owner. The lack of registration therefore does not affect the rights of the parties before the court in any way, viz section 22 of the Act:

> "Until transcription, the rights resulting from the deeds and judgments hereinbefore enumerated, shall not (except as hereinafter provided) be maintainable against third parties having rights secured according to law over the immovable property to which such deeds and other apply."

25. At this juncture we need to consider the position of *Ahwan v Accouche 1990 SLR 196* put forward by Counsel for the Respondent. We do this even though that case considered a promise of sale made in relation to property subject to the Land Registration Act and involved the new provisions of the 1976 Code. We need to highlight and comment on some of the findings by Georges J which has caused confusion subsequently. This was a case in which the second provision of *article 1589* was considered. The provision states:

> "...the acceptance of a promise to sell or the exercise of an option to purchase property subject to registration shall only have effect as between the parties or in respect of third parties as for the date of registration."

Applying the provision in that case, Georges J found that:

> "Article 1589 does not affect the contract as such but it makes the contract subject to registration. This means that a promise to sell can only be effective if registered. In the absence of registration therefore the purported transaction between the defendant and the plaintiff had no legal validity effect and is in the eyes of the law, null and void and of no effect."

With respect to the learned judge, this was an incorrect interpretation of the law. The confusion caused by the bad drafting of *article 1589* had been the subject of a decision of the Court of Appeal in *Hoareau v Gilleaux (1982) SCAR 158* before and should have been followed by the Supreme Court. *Hoareau* confirmed the view set out above that the words "as from the date of registration"

in *article 1589* only has effect as between third parties. Further, to give a different interpretation to *article 1589* would set its provisions in direct contradiction to the provisions of *article 1328* and challenge the integrity of the Code as a whole. In any case the new provisions of *article 1589* were not in force when this contract was agreed by the parties and as pointed out already cannot have retrospective application.

26. Having arrived at these conclusions we do not need to consider the issue of prescription in this case.

27. In the circumstances we make the following order:

We declare that the Appellant, Jeremy Arnold is the owner of the parcel of land at Anse Banane, La Digue. The Registrar of Deeds is hereby authorised by section 43 of the Mortgages and Registrations Act on the presentation of this judgment by the Appellant, to register Jeremy Arnold as the proprietor of the land entered in the Repertoire 13/192 and transcribed in volume 23, No. 344 of the Register of Mortgages and Registrations. The Appellant will be responsible for fees due for such registration and transcription but the date of the transfer shall be deemed to be 18th August 1971. No fines or penalties shall be borne by the Appellant, Jeremy Arnold for the registration of the deed as long as such registration takes place before the 7th January 2013. The Appellant is at liberty to have the land surveyed and registered under the Land Registration Act 1976 under the same conditions stipulated above.

This appeal is therefore allowed with costs to the Appellant.

M. Twomey

Justice of Appeal

I concur

F. MacGregor
President, Court of Appeal

I concur

J. Msoffe
Justice of Appeal

Delivered at Victoria, Mahé, Seychelles this 7th day of December 2012.