

MONTHY v ESPARON

(2012) SLR 104

D Sabino for the appellant
F Bonté for the respondent

Judgment delivered on 13 April 2012

Before MacGregor P, Fernando, Twomey JJ

TWOMEY J:

In Seychelles many unmarried parties live together in partnerships colloquially called “en ménage, or “in concubinage”. They build homes together and raise a family. Relationships unfortunately do somehow turn sour and the partners separate. What then are the rights of these parties in property held in joint ownership at the dissolution of the relationship?

Whilst the Matrimonial Causes Act and Rules adequately provide for the exact situation for married parties, there is no specific legislation dealing with the rights of “en ménage” parties. This is surprising and most unsatisfactory given the number of people in such relationships - the Population and Housing Census 2010 show the percentage of married couples in Seychelles at 24.6% while the percentage of cohabiting but unmarried couples closely behind at 19.3%.

Fortunately, the laws of Seychelles are not silent on the matter. The prescient Civil Code provides several remedies and to these must we turn in such situations. Sauzier J in his landmark decision of *Hallock v d’Offay* (1988) 3 SCAR 295 attempted to bring justice to the situation even when the property was not held in joint ownership. A shame it was that his was a dissenting judgment.

In this case, the parties jointly purchased a house at Glacis, Mahé in January 1995 and started cohabiting, but theirs was a short relationship, the cohabitation ending barely 3 years later. That at least is admitted by both parties. Their versions however differ on the payments of the mortgage in relation to the house.

It was the appellant’s case that since the mortgage of R 250,000 was taken out in 1995 he had made all the payments to it. It was the respondent’s case that she has paid R 114,509.98 and that the appellant has only paid R 56,446.60 towards the mortgage. The parties vehemently and acrimoniously denied each other’s averments in court and the evidence adduced was long, convoluted and painstaking and resulted in the trial judge losing the carriage of the case before him, which may explain the dénouement of the case.

At the end of his judgment the trial judge made the following statements:

- a) I hereby declare that the plaintiff Ms Miranda Esparon is entitled to sole ownership of the property, namely, parcel of land Title H2557 situated at Glacis, Mahé, whereas the defendant Alexis Monthy is entitled to compensation in the sum of R 70,000 payable by the plaintiff in settlement of the defendant's share in the property.
- b) Further, I order the plaintiff to pay the said sum of R 70,000 to the defendant within four months from the date of the judgment hereof.
- c) As and whereupon such payment under paragraph (b) above, is made in full by the plaintiff either directly to the defendant or through his attorney, I order the defendant to transfer thenceforth all his rights and undivided interest in Title H2557 including all or any super structure thereon to the plaintiff.
- d) In the event, despite receipt of the said sum in full, should the defendant fail or default to execute the transfer in terms of order above, I direct the Land Registrar to effect registration of the said parcel Title H2557 in the sole name of the plaintiff, upon proof to his satisfaction of payment of the said sum R 70,000 by the plaintiff.
- e) I make no order as to costs.

It is against the said orders that the appellant brings this appeal. His counsel contends that the judge's orders are ultra petita and that he has acted ultra vires when depriving the appellant of his rights in land. He further contends that an order was made against the Land Registrar when she was not even a party to the suit and that the trial judge erred in rejecting his counterclaim. He further claims that the Land Registrar has already transferred the title in the sole name of the respondent without his client having received any funds.

Counsel for the respondent for his part argues that this appeal is largely frivolous and vexatious and is an abuse of the process of the Court. He contends that the prayer in his plaint had asked the Court for an "order against the defendant in terms of paragraph 9...with costs and any other order as that the property should bear her sole name upon repayment to the defendant of all moneys paid towards the said housing loan and the court deems fit in the circumstances" (sic) and since the orders of the Court are in line with the prayer they are therefore not ultra petita. He submits that the law permits the Court to decide matters as per the limits of the law and that therefore the trial judge was entitled to come to the conclusions and make the orders he did. He also resists any argument that the judge's order directing the Registrar to transfer the land in the sole name of the respondent did not make her a party to the matter. He further submits that the appellant's counterclaim was rightly dismissed.

I shall first deal with procedural matters. Section 71 of the Seychelles Code of Civil Procedure requires specific pleadings to be included in plaints, in particular a plain and concise statement of the circumstances constituting the cause of action and of the material facts which are necessary to sustain the action. It must also contain a demand for the relief which the plaintiff claims. Courts cannot grant relief not sought in pleadings (*Barbé v Hoareau* SCA 5/2001, *Léon v Volare* SCA 2/2004). If they do they are acting

ultra petita. In the case of *Charlie v Francoise* SCA 12/1994 this court succinctly articulated the position when it stated:

The system of civil justice does not permit the Court to formulate a case for the parties after listening to the evidence and to grant a relief not sought by either of the parties...

The respondent in her plaint prayed for the orders as set out above in terms of his paragraph 9. Paragraph 9 states –

The plaintiff avers that it is just and necessary that the defendant's name be erased from all property documents and that the property should bear her sole name upon repayment to the defendant all moneys (sic) paid towards the said housing loan and that the defendant be evicted for the house at Glacis.

These statements should have alerted both counsel for the respondent and the trial judge that such matters should not be set out in a plaint. An averment cannot be proved except by affidavit and one can only aver "such facts as the witness is able of his own knowledge to prove..." vide sections 169 and 170 of the Seychelles Code of Civil Procedure. Averring something in a court document necessarily needs supporting by affidavit. In any case a comparison of the respondent's pleadings with the orders made by the trial judge clearly shows that the matters they contain are ultra petita. Even at this stage we are not sure what the prayer of the respondent was.

In terms of the actual cause of action, a division of co-owned property, the order of the court is clearly ultra vires. Much as one might have sympathy for either party and it is certainly not the wish of this Court that the rights of the parties in co-ownership, rights now denied to the appellant, continue in a state of limbo, it was up to the respondent who wished no longer to remain in indivision to bring the correct suit to court. In cases of co-ownership there are three options available under the Civil Code to the joint owner who does not wish to remain in indivision: sale by licitation, partition or action de in rem verso (based on unjust enrichment). Vide *Edmond v Bristol* (1982) SLR 353. These remedies could have been availed of by the respondent.

Instead both the respondent and the trial judge erroneously dealt with the matter either as if it was a case of matrimonial property or matter of equity. At submission stage an exchange between counsel for the appellant and the trial judge showed how alive both were to these issues vide page 208 of the record of proceedings:

Court: If the Court dismisses the plaint, is that going to solve the problem?

Mr Sabino: There are legal means and measures. Our position is that the process she is using is inappropriate....

Court: So you want another round of litigations? This case has already been before the court for more than 11 years....

The Court then proceeded to give the orders it did. With respect, the trial judge was acting ultra vires in so doing. The plaint as it stood before him was not an action based

on any of the above-mentioned cause of actions; it seems to have been based on equity alone. Equity however, is only available in Seychelles when no other legal remedy is available (section 6, Courts Act). As there were three possible legal courses of action, the Court could not and should not have resorted to equity. The judge's order has only compounded the unjust enrichment of the respondent at the expense of the appellant. This case was begun in 1998 and the appellant ejected from his home since 1999. Although we are loathe to drag out this matter we cannot endorse a decision that is bad in law so as to put finality to the litigation. Rights in property are zealously guarded both by the Constitution and the Civil Code and remedies are provided for their infringement, but the guidelines, rules and regulations for settling disputes over ownership of property must be followed.

The appellant is a co-owner of the said parcel of land and will have to be compensated for the fact that he was unlawfully ejected and has not as a co-owner been able to enjoy his property. He has claimed in his appeal the sum of R 54,000 comprising of R 9000 for moral damage and the rest for the cost of renting alternative accommodation. We do not find this figure excessive and find them reasonable given the circumstances and the period of time since the appellant has not been able to enjoy his property. We therefore grant this prayer.

Finally, I now wish to deal with the transfer of the land by the Registrar. The appellant claims that his rights in Parcel H2557 have already been alienated in that the Land Registrar has already transferred sole title onto the respondent. From the record we are unable to establish conclusively what the circumstances which led to this event were. However the appellant should have been alive to the risk of this transfer happening and should have applied for a stay of execution pending appeal. No fault can be attributed to the Registrar as it would appear that the respondent moved as per order of the judgment and section 230 of the Seychelles Code of Civil Procedure makes it clear that unless there is an order or an application before the court "an appeal shall not operate as a stay of execution."

However as we are of the view that the order of judge was wrong in law, that order is quashed and the Registrar by notice of this judgment served on him should proceed to restore ownership of title to Parcel H2557 to both parties. We are relieved to know that the land in question has not been transferred to a third party.

We need to point out that fault has to be attributed to counsel for the respondent for bad pleadings in this case. The Seychelles Code of Civil Procedure exists for a purpose – to govern the methods and procedures in civil litigation. If they are not followed they may well result in the case being dismissed as should have been the decision of the judge in the Supreme Court when this matter came before it. The courts are not there to make the case for the parties. The parties are of course free to commence other actions should they wish to terminate their co-ownership in the land.

To avoid confusion we wish to state the orders we make clearly:

- i. We allow this appeal and quash the decision of Judge Karunakaran in its entirety including the award of R 70,000 he made in this case as the monetary value of the appellant's share in the property co-owned by the parties namely Parcel H2257.
- ii. We order the Registrar of Lands to restore ownership of Title H2257 to both parties namely Alexis Monthy and Miranda Esparon.
- iii. We order the respondent to pay the appellant the sum of R 54,000, of which R 9000 as moral damage and R 45,000 as compensation for him having to find alternative accommodation.
- iv. We order the respondent to pay the costs of this matter.