Georges & Anor v Guinness Overseas Limited

(2013) SLR 117

Domah, Twomey, Msoffe JJA

3 May 2013 SCA 02/2011

Counsel B Georges for the appellant
F Chang-Sam for the respondent

The judgment was delivered by

MSOFFE JA

[1] The facts of the case giving rise to this appeal are adequately set out in the judgment of the Supreme Court (Egonda-Ntende, CJ) dated 31 January 2011.

[2] The first appellant asserted that at all material times he was the beneficial owner of the land parcel V4801 situated at La Louise, Mahe. The second appellant was said to have been the lawful owner of the property prior to October 2003. For quite some time the first appellant was a Director of Seychelles Breweries Limited in which the respondent is a shareholder.

[3] Paragraphs 3–12 of the judgment of the Supreme Court capture in sufficient detail the spirit behind the filing of Civil Side No 285 of 2009 which is the subject of this appeal. In view of their importance, we take the liberty to reproduce the paragraphs verbatim as under:

> [3] The plaintiff no. 1 borrowed some money from Seychelles Breweries Ltd sometime prior to 2000. He

secured the said sum of money with a charge over V 4801. In 2000 the plaintiff no. 2 agreed to transfer to the defendant beneficial ownership of the land in question by a declaration of trust and a caution in favour of the defendant. In 2000 the plaintiff no. 2 executed an undated transfer in favour of the defendant. The parties sought to sub-divide and transfer a portion to the defendant but the Government refused sanction for the defendant to purchase only a portion of the land.

[4] The plaint further contends that the parties subsequently agreed that the whole parcel of land will be transferred to the defendant upon the plaintiff no. 1 being advanced more money on the following conditions:

(a) The plaintiffs would have an option to redeem the whole parcel by refunding all sums paid by the defendant.

(b) In the alternative to (a) the plaintiff's would have right to purchase back the said land at their convenience.

(c) That in any case should the defendant wish to sell the land first option to purchase would be offered to the plaintiffs who would pay for in foreign exchange for the lower portion and in Seychelles rupees for the upper portion.

(d) And lastly that the plaintiff no. 1 would continue to look after the property.

[5] The plaintiff no. 1 claims that in accordance with that agreement he provided a watchman to reside on the property. He has paid the watchman for

cleaning the place, paid electricity bill up to 2006 and water up to date. The plaintiff no. 1 has been advised that the defendant is selling this property to a third party in breach of the agreement between him and the defendant, hence this action.

[6] The defendant opposes this action. Firstly, it sets up a point of law that the right to redeem or right of first purchase, if such right existed, (which is denied), those rights are time barred and prescribed by law.

[7] The defendant admits that the plaintiff no. 2 was the legal owner of the land but denies that the plaintiff no1 was the beneficial owner thereof. The defendant avers that it purchased the land from plaintiff no. 2 whose shares were held by Bourbon Nominees Ltd. Plaintiff No. 2 owner the freehold of the land and Auberge Louis XVII (Pty) Ltd owned the leasehold interest in the land. All the shares of Auberge Louis XVII (Pty) Ltd were held by Bourbon Nominees Ltd. Bourbon Nominees Ltd, on 1 April 2000, declared in 2 separate documents that it was holding all the shares of plaintiff no. 2 and Auberge Louis XVII (Pty) Ltd as a nominee for Guinness Ltd. The documents were signed by plaintiff No. 1 and Annette Georges as directors of the Bourbon Nominees Ltd were holding the said shares as nominees for the defendant.

[8] Originally, the defendant was interested only in purchasing the lower part where the Auberge Louis XVII restaurant was. However, as the plaintiff no. 1 failed to pay his loans and became more indebted it was agreed that the defendant will purchase the whole parcel of land. On 16 October 2003 plaintiff no 2

unreservedly transferred and defendant unreservedly purchased the whole of the property. The defendant did not agree or commit itself to sell back the property to the plaintiff.

[9] The defendant denied that it ever agreed that the plaintiff no. 1 looks after the property and only became aware later on of an occupant of one of the houses on the property during an inspection of the property. The arrangement with the occupier of the house was without the authority, consent or knowledge of the defendant. The plaintiff did not have the authority and or consent of the defendant to connect water and electricity to the houses on the property. There was no agreement that the plaintiff no. 1 would meet those costs.

[10] The defendant states that it was always its intention to sell the property to any willing buyer and that it sold this property to Sans Souci Properties (Pty) Ltd and in so doing the defendant denies that it breached any of the plaintiffs' rights as it had unfettered right to dispose of the said property.

[11] In February 2009, the plaintiff lodged an application with the Land Register to enter a caution prohibiting the defendant from dealing with this land on the ground that he had a right of first offer to purchase the property. The defendant objected to this application. But prior to doing so and in spite of the fact that the plaintiff enjoyed no such right, the defendant offered the plaintiff no. 1 time to buy the said land but the plaintiff failed to do so within the deadline set by the defendant. Following the plaintiff's failure to purchase the said land the

> defendant sold it to Sans Souci Property (Pty) Ltd for the same price as it had offered it to the plaintiff no. 1.
>
> [12] With regard to the plaintiff no. 2, the defendant denies that it has any right to redeem or buy back the said property and put it to strict proof of its claims. The defendant prays that this court dismisses the plaintiffs' suit with costs.

[4] It is evident that before the Supreme Court the first appellant and or in the alternative the second appellant sought to exercise the option to redeem the parcel of land V4801 from the respondent by paying the price thereof and other incidental costs; in the alternative, an order that the respondent should offer the land to them before selling it to a third party; in the further alternative, an order that the respondent sell to them at market value the land, if the appellants wish to purchase it.

[5] The Chief Justice carefully considered the parties' respective rival positions in the matter. In the process, it is evident from paragraphs 15–22 of the judgment that he held the general view that the parties appeared to have agreed that the appellants may purchase back the property in question and time to do so was provided, and on all such occasions the appellants failed to do so. In other words, in his judgment the Chief Justice recognized the appellants' right to redeem the property but opined that they had been given more than enough time to do so but to no avail. In the result, the suit was dismissed hence this appeal.

[6] In this appeal the Chief Justice is sought to be faulted on the following grounds:

1) Not considering the legal basis for the formation of the Option to Redeem and in ignoring the law on the matter entirely.

2) His finding (at paragraph [18] that the letter exhibit D4 had modified the buyback option as agreed by the parties and that the right to redeem was now to be exercised prior to the registration of the transfer deed) in that he failed to appreciate (i) that the Appellants or either of them had no need to claim any buyback option pending the registration of the transfer deed as the property belonged to the second Appellant until such registration and (ii) that an option to Redeem only has application after the property has been sold and not prior to the sale.

3) Failing to appreciate that the parties had agreed to an option of one year being granted upon the sale of the property, which option was never modified subsequently since the property was old on the same conditions and for the same price as had been agreed then.

4) Failing to appreciate the fact that throughout the transaction leading to the sale of the property the first Appellant had always insisted on the right to repurchase the property and the Respondent had always agreed to that.

5) Not considering the evidence that the property had been left in the possession of the first Appellant after the sale and in not drawing from that fact the

conclusion that the intention of the parties in so doing was more indicative of the existence of an option to Redeem than not.

6) Failing to apply the provisions of the law as to the intention of the parties and fairness to the peculiar facts of the case and drawing appropriate conclusions therefrom.

7) Failing to appreciate the peculiar relationship between the first Appellant and the Respondent and the impact that this had on the intention of the parties as to the existence or not of an Option to Redeem.

8) Failing to appreciate the circumstances which led to the sale of the property to the Respondent and, in particular, to the sale of the upper portion to facilitate the transfer of ownership.

[7] It occurs to us that in a fair determination of this appeal the underlying consideration lies on two major points ie *the intention of the parties and the option to redeem.*

[8] In addressing the above points we will work on the premise that the parties in this case are agreed that the agreement in the whole matter was a valid contract in terms of art 1108 of the Civil Code of Seychelles which lists conditions that are essential for the validity of an agreement thus:

1) The consent of the party who binds himself,

2) His capacity to enter into a contract,

3) A definite object which forms the subject-matter of the undertaking,

4) That it should not be against the law or against public policy.

[9] Further to the above point we will also work on the premise that the agreement in this case had the full force of law in terms of the provisions of art 1134 of the above Code. In other words, art 1134 encompasses what Barry Nicholas in his book *The French Law of Contract*, Second Edition, at page 32 terms "the theory of the autonomy of the will" to the effect that "Agreements legally formed have the character of loi for those who have made them". That is, contracts are binding because they are an expression of the free will of the parties.

[10] In Seychelles the law is settled that in the interpretation of contracts the common intention of the parties should be sought. This is the essence of art 1156 of the Code. In other words, as was stated by this Court in *Chow v Bossy* SCA 7/2005, when interpreting a contract the first step is to determine the intention of the parties. It is also settled law that intention may be inferred from subsequent conduct – See *Lesperance v Vidot* SCA 25/2007. Coincidentally, this Court's decision in *Lesperance*(supra) also finds support in the statement in Beale, Bishop and Furmston *Contract Cases and Materials* (Fourth Edition) at page 183 that:

> It is the subsequent history which gives the best guide to the parties' intention at the material time.

[11] The intention of the parties may also be inferred from the words of a contract. Thus, as pointed out in *Cook v Lefevre* (1982) SLR 46, in the absence of clear evidence, it may be assumed that the parties used the words in the sense which they are reasonably

understood. On this, there is also a very useful guidance from the English case of *Scammel v Ouston* [1941] AC 251 - where at page 268 it was stated:

> The object of the court is to do justice between the parties and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, *looking at substance and not mere form. The test of intention is to be found in the words used.* If these words, considered however broadly and unethically and with due regard to all just implication, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract.
>
> [Emphasis added]

[12] The case of *Wilmot v W. & C. French (Seychelles)* (1972) SLR 144 at page 148 is also a good statement of the law that the way in which the parties have given effect to or acted upon a deed is one of the best pointers to its interpretation.

[13] Under art 1162, in case of doubt, the contract is interpreted against the person who has the benefit of the term and in favour of the person who is bound by the obligation. Therefore, in the event of a conflict between the true intention and the intention expressed in the contract document, the former prevails –See *Lefevre* (supra) and *Dogley v Renaud* (1982) SLR 187.

[14] The option to redeem is covered under art 1659 of the Code whereby the seller reserves for himself the right to take back the thing sold upon returning the principal price and making a refund provided in art 1673. Article 1673 distinguishes between options that are registered and those that are not. The inference here is that there can

be options to redeem that are oral or inferred or privy to the co-contractants only. That is why the Litec Code Civil 1982 at page 643 states that for its validity between the parties it is not necessary that the stipulation to redeem be written in the sale agreement itself.

[15] Briefly stated, the law as to options to redeem is as stated by the appellants in their heads of argument that:

a) The option to redeem usually proceeds from a debt situation but does not have to. The buyer is not interested in owning the property, only in being repaid. The property is held as security.

b) The seller transfers the property to the buyer, but reserves the right to take back the property against a refund of the price paid (Article 1763). It is the seller who reserves the option, not the buyer who gives it (Article 1659).

c) The option is usually reserved in the deed itself.

d) The option must be taken at or before the sale.

e) There are no formalities for redeeming the sale. All that is required is that the seller must inform the buyer of his intention before the period of prescription expires.

f) In Seychelles, unlike France, the law since 1964 provides that the buyer must give notice to the seller prior to the option to redeem expiring. If the buyer does not do so, the period within which the option can be exercised is extended until notice is given.

[16] The articles of the Civil Code have been impinged on by the Land Registration Act which seeks to ensure that the title to the land only passes when registered. However, the saving provision of s 3 of this Act preserves the application of art 1659.

[17] In essence, the option to redeem between contracting parties has legal effect whether it is written or not. It does not have effect as regards third parties unless it is registered.

[18] Paragraph 1 of art 1662 provides that if the seller fails to exercise his option to repurchase within the prescribed period, the buyer remains irrevocably the owner. However paragraph 2 thereto, which exists in Seychelles and therefore unique for that matter, provides that the buyer is bound to serve reasonable notice to the seller of the impending expiry of the option. Hence, notice must be served otherwise time does not start running. We may digress a bit here and state that, as shall be demonstrated hereunder, no notice was ever served by the respondent in this case. All in all, under the law, as stipulated above, all the appellants had to do was, and still is, signify the wish to repurchase.

[19] In this case, there is no serious dispute that the parties entered into an agreement to sell the property with an option to redeem in view of the clear words used in the respective documents and the oral evidence in the case. This is mainlyevidenced by the contents of exhibits P8 and P9. Under exhibit P8 the appellants offered to sell the whole plot with liberty to repurchase it. The respondent accepted the offer (vide exhibit P9) subject to “obtaining the sanction of the Government for such purchase”. At first the Government declined to give the sanction as evidenced by the contents of exhibit P11. Later it gave its sanction with certain conditions as reflected in the contents of exhibit P14. The appellants contemplated appealing to the

Government to review the conditions upon which the sanction was granted. Hence, on 17 January 2003 the first appellant wrote a letter to the Administration Manager of Seychelles Breweries Ltd, exhibit D4.

[20] In the judgment of the Chief Justice, as per paragraph 18 thereof, he opined that exhibit D4 modified the option to redeem as initially set out in exhibit P9, to become an option to buy back "prior to the registration of the transfer deed".

[21] In his submissions in the Heads of Argument Mr Chang-Sam, advocate for the respondent, generally supported the position taken by the Chief Justice in the case before him. In particular, Mr Chang-Sam concentrated his submissions in the Heads of Argument in the contents of exhibit D11 on the transfer of the property to Guinness Overseas Limited − a document which was witnessed by both the appellant and Mr Andrew J Richardson for Guinness Overseas Limited. Mr Chang-Sam maintained that this is an authentic document in which there is no express term of reservation in favour of the appellants.

[22] With respect, the positions taken by both the Chief Justice and Mr Chang-Sam are not entirely correct for the simple reason that in both law and fact these were not the only documents in the case. There were other equally important documents to be considered. Nonetheless, the finding by the Chief Justice (paragraph 18) is important in that it at least recognized that there had at some point (exhibits P8 and P9) been an option to redeem or to buy back the property. At any rate, in terms of art 1162 if there was doubt in the interpretation of exhibit D4 in its relevance in relation to exhibits P8 and P9 the document would still be interpreted in favour of the appellants.

[23] We have carefully looked at all the documents which are relevant in a fair determination of the case. In similar vein, we have addressed our minds to the oral evidence in the case. Having done so, it will be fair to say that the intention of the parties was all along clear that the appellants always reserved the option to redeem or to buy back the property. Exhibits P8, P9 and documents J19, J21 and J22 are very clear on this. J19 and J21 in particular, have all the elements of an option to redeem. By these two documents the appellants took the option and not the respondent giving it. The price is the refund of the sums paid by the respondent. It is also significant to mention here that the option was taken before the sale of the property.

[24] We appreciate that at the hearing of the appeal Mr Chang-Sam referred us to exhibit P21 (a), specifically paragraph two thereof, in which the respondent "categorically and unequivocally" denied that the appellants had any right of "first option" to redeem the property and thereby "decided to temporarily put on hold any negotiation or offer relating to the sale of the property for a period of fifteen (15) days from the date of receipt" of the letter by the appellants. In response, in his letter dated 26June 2009 (exhibit P22), the appellants accepted the offer to sell the property for the sum of GBP 550,000. In Mr Chang-Sam's view, by virtue of these documents the appellants were given reasonable notice and that the option to redeem was no longer an issue. However, in our considered opinion, we go along with the appellants' view under paragraph 5 of exhibit P22 that the time given was very short. In our view, the period of 15 days was unreasonable and oppressive in the circumstances of the case in view of the importance of the sums involved, the currency, and the general philosophy of the change of law in 1964.

[25] Further to documentary evidence, it is also clear from the oral evidence on record that the appellants never withdrew their intention to repurchase the property. In other words, this was a live issue all along as reflected in the evidence of Gabriel (the respondent's witness) thus:

> Q And this is exhibit D11, it is a transfer made by MYGS …
>
> A Yes
>
> …
>
> Q Could you look at the figures (of) consideration stated in D11…
>
> A This amount are the figures which are referred to in the correspondence…
>
> Q So basically it means that the money was not paid and this is why the property was (transferred)
>
> A Yes
>
> Q Was there any conditions attached to this that he had to (buy) back.
>
> A In there, there is none if I may say I don't know attested during the negotiations there was the talk and the understanding that he would buy back or would be offered to him the top part if we were selling the property. There was that conversation.
>
> Q When the transfer was made was that put as a condition?
>
> A No there is nothing in the transfer.
>
> …

Q You have just stated Mr. Gabriel that there was an understanding that Mr. Georges would buy back the property.

A Not the whole property but the top part of the property. This was at the initial stage of the conversation. Even at the latest stage it was still my understanding but when the deed was done this was not in the deed.

Q But in your letter (19 November) you said that only part of the property was going to be sold back to Mr. Georges.

A If remember well it was a loan taken on the property and then he will repay but at a stage I was made to understand that Mr. Georges has agreed that if he sell the whole property he will have the option to buy the top part.

…

Q So there is no mention of only part of the plot, it speaks of the plot as a whole, is that correct?

A Yes.

[Emphasis added]

[26] As already stated, pursuant to the decision of *Wilmot*(supra) and other cases cited above, the conduct of the parties and the way in which the said parties have given effect to a deed is one of the best pointers as to intention. It is evident from the record that after the transfer and for a period of five years thereafter the respondent did not take possession of the property. Instead, the property was left in the possession of the appellants as confirmed by the evidence of Mr. Gabriel thus:

> Q Mr. Gabriel do you know whether the (Respondent) ever physically took possession or occupied V4801 after they purchased it.
>
> A After we purchased the property was more or less with him as a caretaker.
>
> Q Mr. Georges was the one who carried on caretaking of the property?
>
> A He was keeping the property, he was cutting the grass …

[27] We think that the only reason for doing the above was that the parties recognized that the intention was that the appellants were to buy back the property and it was therefore in their interest to maintain and ensure the upkeep of the property in question.

[28] As mentioned above, Mr Chang-Sam heavily relies on the contents of exhibit D11. In our view, however, this document has its own shortcoming and difficulty in the case. No notice was given prior to the expiration of the option to redeem or to buy back. The failure to give reasonable notice offended the provisions of paragraph 2 of art 1662 which, for ease of reference, we quote as under:

> However, the buyer shall be bound to serve reasonable notice to the seller of the impending expiry of the option. Failure to do so shall extend the time of repurchase until the expiry of any subsequent reasonable notice.

[29] This paragraph was introduced by an amendment to the law of Seychelles in 1964 to ensure that sellers of property with an option to redeem do not lose the property until they have been given reasonable time of the expiry of the option. Apparently in his

submissions in the heads of argument Mr Chang-Sam did not address this aspect of the case.

[30] There is yet another aspect in the case which is worth discussing or addressing here. A look at exhibit P26 will show that the property has since been transferred to a third party. To be precise and specific, it was transferred to Sans Souci Properties on 5November 2009. In law, specifically art 1108 read together with Barry Nicholas (supra), this is a valid contract between the parties in that it is an expression of the free will of the said parties. It is also a valid contract in the sense that it creates rights and obligations between the parties capable of enforcement in law. However, to the wider world or public this is not a valid contract because the document has not been registered. In this regard, paragraph 2 of art 1673 read together with s 3 of the Land Registration Act are relevant. Yet again, for ease of reference, we quote them in full hereunder.

[31] Article 1673 paragraph 2 provides:

> When the seller takes possession of his property as a result of the exercise of the option to redeem he takes it free from all encumbrances and mortgages with which the buyer may have burdened it on condition that that option has been properly registered at the office of the Registrar-General before the inscription of the said encumbrances and mortgages. He shall be bound to execute the leases which were granted in good faith.

[32] And s 3 reads:

> Except as otherwise provided in this Act, no other written law relating to land registered under this Act so far it is inconsistent with this Act, but save as aforesaid

> any written law relating to land, provided by this or any other Act, shall apply to the land registered under this Act whether expressed so to apply or not:
>
> Provided that nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any law or as overriding any provision of any other written law requiring the sanction or approval of any authority to any dealing.

[33] So, in effect this means that in both law and fact in redeeming the property the appellants will not be bound by the above contract (exhibit P26). This is for the simple reason that the document has no legal force between the appellants and the parties therein because of non-compliance with the above specific legislation in the matter.

[34] At the hearing two specific questions were asked by the Court about the value of the property and the sums outstanding. We were assured that there is no dispute between the parties on these points.

[35] For the forgoing reasons, we are satisfied that the appeal has merit. We hereby allow it. We accordingly set aside the decision of the Chief Justice and substitute therefor the following. We give the appellants the option available in law to redeem the property. In the event that the option to redeem is not exercised by the appellants within six months of this judgment we order the Land Registrar, pursuant to s 81(1) to remove any caution or encumbrance registered against the said title in favour of the appellants. We make no order as to costs.