IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , A. Fernando (J.A) , M. Twomey (J.A) .

Civil Appeal SCA CP 2, CP 3, CP 4/2016
Appeal from Constitutional Court Decision CP4/2012

Government of Seychelles	1st Appellant
The Attorney General	2nd Appellant
Versus	
Nelson Robert Poole	1st Respondent
Robert Marc Noddyn	2nd Respondent
Patrick Noddyn	3rd Respondent
Reem Limited	4th Respondent

Heard: 28 November 2016

Counsel: Mr. Jayaraj for Government of Seychelles and the Attorney General

Phillippe Boulle for 1st Respondent

Frank Ally for 2nd and 3rd Respondents

Basil Hoareau for 4th Respondent

Delivered: 09 December 2016

JUDGMENT

M. Twomey (J.A)

[1] This matter concerns three appeals: SCA2/2016, 3/2016 and 4/2016. The parties in all the matters are the same and therefore for ease of reference they shall be referred to as follows: The Government of Seychelles as the 1st Appellant, the Attorney General as the 2nd Appellant, Robert Nelson Poole as the 1st Respondent, Robert Marc Noddyn as the 2nd

Respondent and Patrick Noddyn as the 3rd Respondent and Reem Limited as 4th Respondent.

[2] The 1st Respondent, dissatisfied after the acquisition of his land, namely 415,219 square meters of land in 1983, began a protracted legal battle with the 1st Appellant in October 1993 to have his land returned.

[3] This was after a first court case instituted in 1985 for compensation under the Land Acquisition Act of 1977 in which he was awarded SR450, 845.

[4] In 1993, subsequent to the promulgation of the Constitution of the Third Republic of Seychelles and based on its transitional provisions relating to the continued obligation of the government to reconsider all cases of land acquisitions between June 1977 and the coming into force of the Constitution, the 1st Respondent applied to have his land returned to him.

[5] On 18 January 1996, he received a reply to the effect that the Government was unable to review the monetary compensation as the sum had already been determined by the Supreme Court. That 1996 letter made reference to the letter which had been sent to him on 16 February 1995. On 22 February 1996, therefore, the 1st Appellant filed a petition for certiorari and mandamus for the Government to review the decision.

[6] Both the defences of *res judicata* and time bar were raised by the 1st Appellant. The Court rejected the defence of *res judicata* but found in favour of the time bar, stating that the relevant date for calculating limitation of the suit was 16 February 1995 when the Appellant had turned down the 1st Respondent's application and not 18 January 1996 when he was turned down a second time.

[7] In 2000, the 1st Respondent initiated the present action praying for the return of his land and for compensation in the sum of sixty four million rupees for the lands which could not be returned. The same two defences were raised by the Appellants: *res judicata* based on the original defence and reinforced by events which had intervened and prescription based further on the time lag between the Constitutional Court decision of 1998 which the 1st Respondent had not appealed and the seventeen year time lapse until the filing of the

present suit in the Constitutional Court. This was accepted by the Constitutional Court. He appealed to this Court.

[8] In April 2015, this Court delivered a ruling allowing the appeal on the preliminary objections raised by the 1st Respondent. We found that that given the special and dedicated cause of action created by Article 14(1) (a) of the Constitution and the further wording that the State "shall continue to consider applications", the State's continuing obligation would not stop until the constitutional remedies of those applications had been provided. The matter could not therefore be *res judicata*.

[9] On the issue of time bar we decided that since negotiations with the 1st Respondent had not been terminated in good faith, negotiations had not been completed and he was still awaiting his remedy. The matter was therefore not prescribed and was ongoing. We sent the suit back to the Constitutional Court for consideration of the merits of the case.

[10] It is at this juncture that court procedures have gone awry and is now the subject of an appeal. The 1st Respondent amended his Petition before the Constitutional Court on 10th June 2016 adding the 3rd, 4th and 5th Respondents. The Court ordered substituted service on the 2nd and 3rd Respondents, namely Robert and Patrick Noddyn, by posting the notice of the suit at their last known address and by affixing a further notice on the notice-board of the court house.

[11] In relation to the 4th Respondent, Reems Limited, its director Gilbert Rassool was served but did not put up appearance. The court ruled that the matter insofar as it concerned the company would proceed ex-parte.

[12] On the date of hearing neither the 2nd, 3rd or 4th Respondents were in attendance.

[13] The Constitutional Court in its decision of 17th May 2016 ordered that parcels T1855 and T3094 should be returned whole to the 1st Respondent; that after extraction of the existing bus shelter, Parcel T3107 should also be returned as would parcel T3161 after extraction of the developed portions; T2102 would not be returned but compensation would be paid based on a joint report by three experts namely Sabrina Zoé, Hubert Alton and Daniel Blackburn.

[14] From this decision the Appellants have appealed on four grounds which may summarily be stated as follows:

1. The Constitutional Court erred in law and fact in ordering the return of Parcels T767 and
   T3094 when they were in the hands of third parties. Instead compensation for these parcels of land should have been ordered.

2. The Constitutional Court erred in law and fact in ordering the return of Parcels T3107 and T3095 since there are developmental plans for the parcels and they are used as a public amenity. Instead compensation should have been paid for these parcels.

3. The Constitutional Court erred in law and fact in ordering the return of Parcels erred in not accepting the value of the quantum of compensation valued by the 1st Appellant for the lands that cannot be transferred.

[15] By a notice of appeal dated 23rd June 2016, the 4th Respondent also appealed to this court on the following grounds as summarised below:

1. The Constitutional Court erred in law in hearing the Petition in the absence of the Appellant and in holding that the appellant had been served with summons since the Appellant had not been served with summons as required by law.

2. The Constitutional Court erred in law and on the evidence in failing to hold that as the Appellant was in possession of Parcel T3014 and was a bona fide purchaser of the said parcel for valuable consideration the transfer of Parcel T3014 to the appellant could not be cancelled under the provisions of section 89(2) of the Land Registration Act.

3. The Constitutional Court erred in law and on the evidence in failing to hold that the obligations on the government to return any parcel of land in terms of Part III of Schedule 7 of the Constitution did not apply to parcels not owned by the government at the time the petition was instituted.

[16] The 2nd and 3rd Respondents also appealed the decision of the Court on 20th July 2016 on the following summarised grounds:

1. The Constitutional Court erred in law in hearing the Petition in the absence of the Appellants and in holding that the Appellants had been served with summons since the Appellants had not been served with summons as required by law and since they were domiciled and resident outside Seychelles and substituted service outside the jurisdiction should have been ordered.

2. The Constitutional Court erred in law and on the evidence in failing to hold that as the Appellants were in possession of Parcel T767 and were a bona fide purchasers of the said parcel for valuable consideration, the transfer of Parcel T767 to the Appellants could not be cancelled under the provisions of section 89(2) of the Land Registration Act. And further in view of the fact that they had acquired such title for a period of over ten years.

3. The Constitutional Court erred in law and on the evidence in failing to hold that the obligations on the government to return any parcel of land in terms of Part III of Schedule 7 of the Constitution, did not apply to parcels not owned by the government at the time the petition was instituted

4. The Constitutional Court erred in law and on the evidence in failing to appreciate that Parcel T767 had been in the 4and 5th Respondents predecessor in title prior to the coming into force of the Constitution and had been used as a family home and not therefore subject to the scheme of Part III of Schedule 7 of the Constitution.

[17] It became obvious at the hearing of this appeal that the merits of the substantive appeal could not be addressed without the alleged procedural irregularities, namely the issue of service on 2nd, 3rd and 4th Respondents, being settled by this Court. We therefore heard submissions on this issue alone.

[18] We will first deal with the issue of service on the 4th Respondent. Mr. Boullé for the 1st Respondent submitted that insofar as the 4th Respondent was concerned, service was effected on its director, Mr. Gilbert Rassool. That, in his view, was effective service

given the provisions of section 38 of the Companies Act which provides in relevant part that:

"A company shall be considered as having notice of any matter if notice of it is given to, or received or obtained by, any director…"

[19] Mr. Hoareau for the 4th Respondent has submitted that service on a director of a company cannot be deemed effective service under the law of Seychelles. He referred to the appellation (heading) of the case, specifically the amended petition of the 1st Respondent, Robert Poole, in which the description of the 4th Respondent is as follows: *Reem Limited, a company incorporated in Seychelles represented by Gilbert Rassool, a director of the company*.

[20] In his submission, this indicates that it is the 1st Respondent who has effectively chosen who the 4th Respondent should be represented by for the purpose of the court case. In his view this is not permitted by the Companies Acts. He relies on section 34 of the Companies Act and rule 2 of the Third Schedule of the Companies Act which in his submission are qualified by section 34(3) of the Companies Act.

[21] These sections provide in relevant part:

"34 (1) The directors of the company shall have power to do all acts on its behalf which are necessary for or incidental to the promotion and carrying on of its business as stated in its memorandum…

Third Schedule, Rule 2: Implied Powers of Directors… To bring or defend in any proceedings in any court in the name or on behalf of the company, to intervene in the company's name or on its behalf in any proceedings brought by other persons…"

34 (3) Without prejudice to the generality of the foregoing, the directors of a company, <u>each director of a proprietary company and each managing director of any other company shall… have power to do the acts specified in the Third Schedule…"(Emphasis ours)</u>

[22] It is Mr. Hoareau's submission therefore, that in the case of a non-proprietary company it is the managing director who can act on behalf of the company. Notwithstanding, he has also argued that the proper place of service for a company is at its registered address. In this case, the 4th Respondent, Reem Limited, is not a proprietary company and it was not proper to serve Mr. Rassool.

[23] Neither the Companies Act nor the Seychelles Code of Civil Procedure specifically provide for service on companies. In the absence of such provisions, Mr. Hoareau has relied on the Rules of the Supreme Court of England (White Book) as is directed by section 17 of the Courts Act. He states that Order 65 Rule 3 of the White Book (1970 edn) provides that every company having a registered office may be served with any document by leaving it at or sending it by post to the registered office of the company.

[24] He has further referred the Court to section 55(1) (d) of the Interpretation and General Provisions Act which provides in relevant part:

"(1) A document or notice required or permitted to be served on …

(d) in the case of a body corporate, by leaving it at or sending it by post to the registered or principal office of the body corporate.."

[25] Given the provisions of section 55 of the Act, we are of the view that there was no need to resort to the laws of England. Further, we are not persuaded by Mr. Boullé's submission in which he has relied on section 38 of the Companies Act (supra). Rule 5 (b) of the Companies (Supreme Court Proceedings) Rules 1972 provides that in petitions made pursuant to the Companies Act, the Court may by order give directions:

"as to the manner in which service shall be effected on any party, including service by newspaper advertisement."

Rule 5 also makes a distinction between summons and notices.

[26] There is a world of difference between a notice under the Companies Act and a court summons. Notices in terms of the Companies Act refer to notices of meetings, resolutions

and incidental company matters. A court summons is a legal process commanding the defendant to appear before the court on a specific day and to answer specific complaints made by the plaintiff.

[27] It is also trite that parties who are affected by an application to a court be given a chance to make representations. Courts are not permitted to lock litigants out of the court process. The Seychelles Code of Civil Procedure provides extensively for summonses to be issued. These provisions are mandatory as is illustrated in section 30 of the Act, vide:

"When the plaint has been entered…the Registrar <u>shall</u> issue a summons…to each defendant." (Emphasis ours)

[28] Moreover, the same mandatory language is used in the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules which provides at Rule 8:

"After the petitioner has complied with the Rules, the Registrar <u>shall</u> issue notice on the respondents fixing a date and time for their appearance."

All these provisions uphold the constitutional right to a fair hearing and compliance with the rules of natural justice. In this suit, the observance of rights and rules is even more required given the potential expropriation of the person affected by a decision of the court who may wish to vindicate his constitutional right to property. More so when the 1st Respondent was himself expropriated.

[29] In regard to the 2nd and 3rd Respondents, it has been submitted on their behalf by Mr. Ally, that as heirs of the original owner of the land in question and as the new co-owners of the property concerned, no service was ever effected on them.

[30] The court transcript shows that in the proceedings of 28th July 2015, Mr. Boullé sought leave of the court to have an advertisement in the paper by way of notice both in Seychelles and Belgium. The Constitutional Court stated that the procedure sought for was unknown in the Seychelles Code of Civil Procedure and instead advised him to either apply for the appointment of the Curator of Vacant Estate to represent the

absentees or to apply for substituted service by affixing the notice of the suit on a conspicuous place where the Respondents were last residing. Mr. Boullé decided to go with the second option.

[31] It appears that this process was misconceived. It was in clear breach of the provisions of the Seychelles Code of Civil Procedure which distinguishes between substituted service and service out of the jurisdiction. Section 48 of the said Act clearly provides that leave for service out of the jurisdiction is permitted when the person out of the jurisdiction is a necessary or proper party to a suit brought against some other person served within the jurisdiction. These rules were not observed.

[32] Mr. Boullé has submitted that Counsel for the 2nd and 3rd Respondents was present at both the Constitutional Court hearing and at the incidental hearing in the Court of Appeal and should have made an application to set aside the judgment given *ex-parte* under section 69 of the Seychelles code of Civil Procedure.

[33] We are not however convinced of this submission given the fact that the record of transcripts bears out that the 2nd and 3rd Respondents did made such an application in both courts but were in a *kafkaesque* circularity referred to each court in turn only to be denied relief. We illustrate this process below if only to sound a warning to courts in such matters.

[34] At the hearing on 21st of July 2016 before the Court of Appeal of the motion to lead evidence on appeal, the issue of service was raised and Fernando JA, on 23rd August 2016 stated that the Applicants' remedy should have been granted, if at all, by the Constitutional Court.

[35] The Respondents then made an application in the Constitutional Court to set aside its judgment but the Court in its ruling of 4th of October 2016, stated that it was *functus officio* and the matter was *sub-judice* as it was pending before the Court of Appeal.

[36] Effectively the 2nd and 3rd Respondents were shut out. Counsel for 4th Respondent who was present at these hearings stated that he did not make a separate application on the

basis that as it had been refused for the 2nd and 3rd Respondent, there was no hope that his client would have been treated any different.

[37] We are therefore satisfied that the procedural points raised by the 2nd, 3rd and 4th Respondents have merit. They were not served. They did not have notice of the hearing of the Constitutional Court in which their interests were affected. The Court has ordered their expropriation from lands they owned and yet they were not heard.

[38] We cannot therefore consider the substantive merits of this case without hearing the Respondents' arguments in relation to the petition. We have in this regard considered sending this matter back to the Constitutional Court for rehearing. We are however also sensitive to the fact that the 1st Respondent has waited over 30 years to get his land back or compensation for it. We cannot cure an injustice by a further injustice.

[39] In the circumstances we are of the view that this is one instance in which this Court can exercise its discretion in terms of Rule 31 of Seychelles Court of Appeal Rules, 2005 which provides in relevant part:

Appeals to the Court shall be by way of re-hearing and the Court shall have all the powers of the Supreme Court together with full discretionary power to receive further evidence by oral examination in Court, by affidavit…

[40] We therefore order that the 2nd, 3rd and 4th Respondents be permitted to adduce evidence by filing affidavits in reply to the petition and submissions made by the 1st Respondent in the Constitutional Court. These affidavits have to be filed before this Court on or before 9th of January 2016. These affidavits will be considered by this Court at the hearing of the appeal on the substantive issues at its next sitting.

M. Twomey (J.A)

I concur:. **…….** S. Domah (J.A)

I concur:. **…….** A. Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016