IN THE SEYCHELLES COURT OF APPEAL

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

CivilAppeal SCA5/2014

(Appeal from Supreme Court Decision61/2009)

Elizabeth Gummery — Appellant

Versus

Allen Ernestine — Respondent

And

Cross-Appeal

Allen Ernestine — **Appellant**

Versus

Elizabeth Gummery — **Respondent**

Heard: 14 April 2016

Counsel: Frank Ally for Appellant

Pesi Pardiwalla for Respondent

Delivered: 22 April 2016

JUDGMENT

M. Twomey (J.A)

[1] The Appellant sued the Respondent for specific performance of a contract to sell land at Praslin, as per an agreement concluded by the Appellant's agent, Mr. Bernard Georges in February 1997.

[2] The contract price was for SR500, 000 and the Respondent duly paid SR250, 000 on 20th February 1997 and the balance of the purchase price in June 1998. As contended in the suit the Appellant has to date refused to effect the registration of the transfer of the land.

[3] In her defence, the Appellant averred that the suit brought against her by the Respondent in March 2009 was prescribed, that in any case Mr. Georges was never formally her agent and that although she had been informed that a purchaser was interested in her land it had been a condition of the sale that the purchase price would have to be transferred into her bank account overseas. That condition was never met and the agreement lapsed.

[4] The learned trial judge Karunakaran in a decision given on 21 January 2014, found in favour of the Respondent and directed the Land Registrar to register the Respondent as owner of the parcel of land, the subject of this suit.

[5] The parties appealed. In her notice of appeal the Appellant has filed the following grounds as summarised :

1. The learned trial judge erred in law in not finding the suit prescribed.

2. The learned trial judge erred in law in finding that Mr. Georges was an agent of the Appellant.

3. The learned trial judge erred in law in finding that there was a valid and binding contract of sale between the Appellant and the Respondent in respect of the suit-property.

4. The learned trial judge erred in not finding that it was condition of the sale that the purchase price would have to be paid into her account in the United Kingdom.

5. The learned trial judge erred in failing to take into account the evidence that the effluxion of time due to the respondent's failure to fulfil a condition of the contract would make the transfer of the land inequitable in all the circumstances of the case.

[6] In his notice of cross appeal the Respondent effectively filed one ground of appeal summarised as follows:

1. The learned judge erred in his ruling of 24th November 2011 that the documents between the Appellant and Mr. Georges were privileged but in any case their subsequent admission as exhibits during the trial were done without objection.

[7] It is salient to note that the evidence at trial is somewhat at variance with the parties' pleadings. Moreover although the evidence in this case was partly heard in March and November 2011 the judgment was not delivered until January 2014. This is unpardonable and has given rise to complications in this case which shall become evident in the course of our discussions.

[8] We proceed to consider the grounds of the appeal and cross appeal together as they succeed and fall on only one premise: Was there an agreement between the parties and what was the effect of such an agreement?

[9] Learned Counsel for the Appellant, Mr. Ally has submitted that Mr. Georges was never an authorised to sell the Appellant's land and that no promise of sale was ever concluded. The following excerpts of the transcript of proceedings is to say at the very least enlightening on this issue:

"*Q Did Mr Georges, or were you informed of any person (sic) who would be interested to buy?*

A After a while he did say he thought he knew there was somebody who would be interested to buy. And I replied with the conditions? And he said yes… (Examination in chief, transcript of Supreme Court proceedings P 89)

Q Did you tell Mr. B. Georges that you were willing to accept Rs. 500, 000?

A If paid in euros.

Q Did you tell him to the value of Rs 500,000? Did you agree to Rs500,000?

A Yes

Q And of course Mr. Georges informed you that there was a person who had made an offer of Rs 500,000?

A He did…

Q What about you telling him that you accept the sale of the land for Sr 500,000, was that by phone or by letter or by email or some other communication

A I don't know whether it was email or fax but it was one of those. (Cross examination, P transcript of Supreme Court proceedings P 98-100)

Q So the deal was done and the papers prepared by Mr. Georges, Mr. Georges had received your money in his account and Mr. Sauzier was appointed by a special power of attorney to sign the formality of the transfer that is what this thing was about. (Cross examination transcript of Supreme Court proceedings P .111)

A But the deal could not have been completed because the money was not in my account.

[10] In further support of the Respondent's submission relating to the agency of Mr. Georges are the letters attached to the pleadings of the parties. The production of these letters was not permitted but on a request by the Appellant for further and better particulars of the Respondent's Plaint they were attached to the Answer to the Request. As these form part of the record of proceedings the Court has notice of them and must take them into consideration (vide section 89 of the Seychelles Code of Civil Procedure).

[11] The two most pertinent letters are the following:

12th July 1996

Mrs. E. Gummery
27 Norris House Drive
Aughton, Nr. Omskirk
Lancashire
L39 5AH
England

Dear Babette,

I have an offer of SR500, 000 for Praslin – without advertising. This is from a Seychellois and the transaction can be speedy. I am comforted by the offer because we have something to go on. My feeling is to advertise this week to see whether we can get a better price. If not, we can decide whether to accept this or hang on to it. What say you?

Please let me know in due course.

With best regards
Bernard Georges

30th July '96...

Dear Bernard,

Thank you for your fax of the 2nd August 96.With regards to Praslin, I would like you to conclude the sale with the person who offered Rs. 500,000. It would be preferred if the purchaser picks up the costs associated with the sale of the land. Please advise me of this is a practical condition in this circumstance.

According to your letter it is possible to conclude the sale before you depart on the 12th August for 3 weeks, obviously this would be good news to conclude so quickly, but I would need to speak to you before your departure to discuss what to do with the money...

With kind regards,

Babette

[12] Given the exchanges above, we agree with the learned trial judge that there is ample evidence to show that the Appellant retained Mr. Georges to offer her land for sale. We find that he was her agent within the provisions of Articles 1984-1989 of the Civil Code. It is also clear from the evidence from both her pleadings and her testimonye that she agreed to sell the land to the Respondent.

[13] The Appellant stated that it was a condition of the agreement that the purchase price should be transferred to her bank account in England. That being the case, she cannot in the same breath deny that there was an agreement to sell. Either there was an agreement to sell or there was not. Whether there was condition precedent is another issue which we shall consider later in our decision.

[14] The agreement to sell or promise of sale between the parties in this case has given rise to difficulties in terms of its legal consequences necessitating an inquiry into the nature of the agreement. The starting point of our discussion shall be the provisions of the Civil Code in relation to contracts, the relevant sections for our purposes are the following:

Article 1101

A contract is an agreement whereby one or several persons bind themselves towards one or several others to give, do or refrain from doing something.

Article 1134

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 causes which the law authorises.

They shall be performed in good faith.

Article 1142

Every obligation to do or to refrain from doing something shall give rise to damages if the debtor fails to perform it.

Article 1165

1. Contracts shall only have effect as between the contracting parties; they shall not bind third parties and they shall not benefit them except as provided by article 1121...

Article 1583

(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.

Article 1589

A promise to sell is equivalent to a sale if the two parties have mutually agreed upon the thing and the price.

However, 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 from the date of registration.

[15] In his submission as to the prescription applicable to this claim Mr. Ally has submitted that, taken at its highest, this case only involves an obligation to perform. We are unable to agree for the reasons hereunder.

[16] Promises of sale are of two kinds: unilateral and bi-lateral (synallagmatic).

[17] In a unilateral promise of sale of property, the Promisor (here the Appellant) undertakes to sell property to a Beneficiary (here the Respondent) under certain determined conditions during a certain period. The Beneficiary of the promise acknowledges the commitment of the Promisor, but he does not promise to conclude the final contract. He has an option to give his consent or not.

[18] The unilateral promise differs both from a simple offer to contract *(pollicitation*) and from the final contract contemplated. It lies somewhere in between. It is more than a simple offer, but less than a final contract (See Alex Weill, Droit Civil – Les Obligations (Paris, Dalloz 1970)111).

[19] A subsequent retraction by the Promisor prevents a meeting of minds between the Promisor and the Beneficiary and hence the birth of a contract. There is no contract and only a breach of a promise to do something (*obligation de faire*) by the Promisor. In such cases, the right of the Beneficiary is a credit-right, a right *in personam.*

[20] Hence, an action by the Beneficiary for breach of a unilateral promise of sale can only result in an order for damages as provided by article 1142 of the Civil Code (supra) and cannot give rise to an action for specific performance. (See Cass. 3ème Civ, 26 juin 1996 pourvoi N°94-16.326, 3ème Civ 28 octobre 2003, pourvoi N°02-14.459 confirmed by 3ème Civ, 11 mai 2011 pourvoi n° 10-12.875).

[21] In contrast, in a synallagmatic promise of sale (which is formalised in Seychelles by the transfer document and registration and in France by a *compromis de vente* and the *acte authentique* and registration) the parties make mutual promises to conclude a certain contract at a later date (see Alex Weill, Droit Civil – Les Obligations (Paris, Dalloz 1970) 114-116). The Promisor undertakes to sell his property and the Promisee undertakes to buy the property.

[22] There is therefore meeting of minds and a contract. In such a situation the first limb of Article1589 (supra) applies in that the promise is equivalent to a sale. Insofar as the parties to this contract are concerned the promise of sale is indistinguishable from a contract of sale.

[23] Articles 1101 and 1134 (supra) have application in such circumstances – hence the parties are bound to give effect to the contract. Their obligations have the force of law. The Promisee in the circumstances can move for specific performance of the contract (see 3ème Civ, 13 octobre 1999, pourvoi N°97-21.779, 3ème Civ 25 mars 2009 pourvoi N° 08-11326).

[24] Logically since the Promisee has an interest in the property it follows that this is a real right. However, the second limb of Article 1589 (supra) replicated in section 46 of the Land Registration provides:

Section 46(2) The transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and filing the instrument.

[25] The apparent conflict between these two provisions has been resolved by case law. Both in terms of promises of sale (article 1589) and sales (article 1583) registration completes the sale.

[26] In the recent case of *Zena Entertainment v Lucas and ors* (unreported) [2015] SCCA 48 we summarised the law regarding the bindingness of agreements to sell and stated:

In Charlemagne Grandcourt and others v Christopher Gill SCA 7*/2011 we stated that the breach of the statutory provisions in the transfer documents in sales of property does not vitiate the agreement between the parties. In Hoareau v Gilleaux* (1982*) SCAR 158, a case which concerned a promise of sale under Article 1589 of the Civil Code, the Court of Appeal held that the sale was complete between the parties to the agreement but would be complete as between the purchaser and third parties in terms of section 46 of the Land Registration Act after registration. Similarly, in terms of Article 1583, the sale was complete as concerns the Appellant and the 1st Respondent and the Appellant is in rightful occupation of the property.*

[27] It is our view that right of the Promisee although only enforceable against third parties until they have had notice of it by registration is however a real right in terms of prescription as far as the Promisor is concerned. This is further underscored by the fact that a caution was entered by the Respondent against the land Title PR359 and subsists. That caution is described as an interest in land (*vide* section 79 Land Registration Act) and under section 25 (k) of the Act, the same is also an overriding interest in the land.

[28] We now turn to the issue of prescription applicable to the particular interest in land in the specific circumstances of this case. Article 1234 of the Civil Code has specific application and it provides:

Article 1234
Obligations shall be discharged:
By payment;

By a novation;

By a voluntary release…;

And by prescription, which is the subject of a special Title.

[29] The special Title referred to is that found at Title XX of the Civil Code. Its provisions make a distinction between realty and personalty namely:

Article 2262

All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.

Article 2265

If the party claiming the benefit of such prescription produces a title which has been acquired for value and in good faith, the period of prescription of article 2262 shall be reduced to ten years.

Article 2271 All rights of action shall be subject to prescription after a period of five years except as provided in articles 2262 and 2265 of this Code.

[30] As we are of the view that this matter concerns an interest in property we are of the view that it is Article 2262 that applies. The action by the Respondent against the Appellant is subject to a twenty-year prescription term and not five years as is submitted by Mr. Ally.

[31] We have given anxious consideration to the appropriate remedy in this case. We are troubled by the fact that the agent was not joined in this case. It would in our view have been helpful for the resolution of this case.

[32] The Respondent in the court below prayed for specific performance and was granted the same. Specific performance in Seychelles and France is a legal remedy under contract law. It is considered to be the first and foremost remedy of an aggrieved creditor, and it is one which a court is obliged to award if the creditor demands it. This is evident from the provisions of Article 1184:

> ...*The party towards whom the undertaking is not fulfilled may elect either to demand execution of the contract, if that is possible, or to apply for rescission and damages. If a contract is only partially performed, the Court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance. The Court shall be entitled to take into account any fraud or negligence of a contracting party.* (Emphasis ours)

[33] We are of the view that the execution of the contract in this case is possible subject to a qualification which justice demands.

[34] It is the contention of the Appellant that it was a condition of the Agreement that the purchase price be paid in pound sterling. Given her testimony that she lived in Liverpool at the time of the agreement and continues to do so, we are of the view that the Appellant is being truthful. In the circumstances, she had specified a condition precedent to the contract of sale. She did not however accept that Mr. Georges was her agent and at trial he was not permitted to testify as to his agency.

[35] The Court therefore remains in the dark as to whether this condition was ever communicated to the Respondent who cannot therefore be penalised for not having fulfilled it.

[36] It is neither the Appellant's fault that she never received full consideration for land she sold in 1998 nor the Respondent's fault that he was deprived of ownership of the land for the past eighteen years. The Respondent has however sat on his rights for a number of years while the value of land in Seychelles escalated. It would be inequitable to order specific performance of the contract and have land transferred in 2016 at 1998 prices.

[37] There are no legal provisions on this specific issue. We enquired from Counsel as to the value of the land today but we were unable to obtain from them a consensus. No valuation therefore has been made available to the Court. Rather than pluck figures from the skies we decided to be guided by analogy to the provisions of Article 1590 of the Civil Code in relation to deposits in promises of sale;

If the promise to sell is accompanied by a deposit, each of the contracting parties shall be free to withdraw; the person who has paid the deposit shall lose it, the person who has received it shall return double the amount.

[38] We cannot second guess the reason for the double figure formula used by the farsighted thinkers of the Napoleonic Code from which we have inherited our own Code. Acutely aware that we are a Court of last resort, we are of the view however that it would be fair in this case to make use of it. We therefore set aside the orders made by the trial judge and make the following orders:

1. The Respondent shall have the monies paid in 1996 and 1998 deposited into the bank account of the Appellant in England.

2. The Appellant shall transfer the land at Praslin namely Parcel PR359 to the Respondent on the payment by the Respondent of a further sum of SR500, 000 on or before the 22nd of October 2016 also payable in the Appellant's bank account in England.

3. Stamp duty will be paid by the Respondent on the value of the land assessed at SR1 million.

4. Should the Respondent fail to make such payment on the date specified the contract shall be rescinded and the Appellant shall have the Respondent's purchase price returned to him together with SR 344, 000 damages as claimed.

5. As this appeal is partly successful we make no order for costs.

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 on22 April 2016