

IN THE SEYCHELLES COURT OF APPEAL

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

Civil Appeal SCA 21/2014

(Appeal from Supreme Court Decision 12/2014

Hilda Chetty

Appellant

Versu
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Dan Ponan

Respondent

Heard: 04 August 2017

Counsel: Mr. Nichol Gabriel for the Appellant
Ms. Tamara Christen for the Respondent

Delivered: 11 August 2017

JUDGMENT

M. Twomey (J.A)

- [1] The Respondent was married and divorced to one Lindy Charlette, the step daughter of the Appellant.
- [2] It is the Respondent's case that as part of a matrimonial property settlement, the Respondent and Lindy Charlette agreed that land parcels S1946 and S270 registered in the sole name of Lindy Charlette would be sold and the proceeds transferred to the Respondent. This is supported by a written agreement between them (See Exhibit P1).
- [3] As the sale could not be realised before the said Lindy Charlette left Seychelles, the parcels were transferred by the latter into the name of the Appellant with the express direction that she transfer the same into the names of third party purchasers when these were secured.

- [4] In October 2010 and July 2011 the parcels were transferred to third party purchasers with the proceeds of the sales amounting to SR4, 450,000 being deposited in the Appellant's bank account at Nouvobanq.
- [5] Subsequently a loan of SR 46,000 and a donation of SR 50,000 were sought from and granted by the Respondent to the Appellant.
- [6] When the Respondent requested the transfer of remaining monies into a bank account at Barclays Bank, the Appellant refused to comply with the request.
- [7] It is accepted in the Appellant's Statement of Defence that the properties were transferred to her from her stepdaughter but that there was no agreement for the properties to be sold on and the proceeds transferred to the Respondent.
- [8] She further averred that it was the Respondent who requested a loan of SR 500,000 from her which she paid in cash to him in September 2011.
- [9] In contradiction to her Statement of Defence, the Respondent in her testimony admitted that there was an agreement to facilitate the Respondent obtaining his share of the matrimonial property but that in the process of the properties being transferred into her name first, she was "sort of being used" and therefore needed to be recompensed in the sum of SR1.5 million.
- [10] She further testified that there was no discussion between herself and the Respondent as to payment for her "services" or that the money in her account was for the Respondent.
- [11] She submitted that the agreement between the Plaintiff and his ex-wife was a back letter pursuant to Article 1321 (4) of the Civil Code and therefore void for non-registration. She further submitted that the agreement was also against public policy as it would amount to a breach of the Immoveable Property (Transfer Restriction) Act which prohibits the sale of land to non-Seychellois without government sanction and therefore in terms of Article 1108 of the Code would render the agreement invalid.
- [12] The Respondent in answer to the Appellant submitted in the court below that Article 1321 was not applicable in the circumstances given the fact that the agreement which was breached was not the sale agreement between the Appellant and Ms. Charlette but rather the agreement between the parties to this case in terms of the proceeds of sale from third parties.

[13] He also submitted that the agreement between himself and the Appellant was not against public policy as it did not concern land directly and did not breach the provisions of the Immoveable Property (Transfer Restriction) Act.

[14] The trial judge found in favour of the Respondent and awarded him a total of SR4, 404,000 including SR50, 000 for moral damages.

[15] From this judgment the Appellant has appealed on 5 grounds:

1. The learned trial judge erred in law in not properly considering and weighing the whole evidence before the court at the hearing of the case, in particular the evidence in regards to the legality of the transfer deeds of July and October 2011.
2. The learned trial judge erred in not taking due consideration of the legal force of the post-divorce settlement of the Respondent and his former wife which was a back letter and never registered.
3. The learned trial judge erred in law in failing to consider the fact that the Respondent is a non-Seychellois and therefore could not acquire immovable property in Seychelles unless sanction was granted by the Government.
4. The learned trial judge erred in dismissing the evidence of the Appellant's witness who was credible and straight forward in his testimony.
5. The learned trial judge erred when he made a finding that the Respondent had proven his case on a balance of probabilities.

[16] It seems to us from the grounds of appeal that the thrust of the Appellant's submissions is that she had no agreement with the Respondent to transfer monies from the sale of properties transferred to her by her step daughter. Her submissions are that neither the provisions of the law nor the evidence adduced support the Respondent's assertion and testimony that the money in her bank account were proceeds of a matrimonial home which she was holding on his behalf.

[17] Suffice it to say that we are of the view nothing could be further from the truth and there is little to be said in the circumstances either on the law or the facts. Nevertheless we outline below the conclusions of this Court:

[18] First, as pointed out above, the Appellant's Statement of Defence is at variance with her testimony.

[19] Secondly, on the facts, the Respondents' blatant lies are undone by the documentary evidence in Exhibit P. 6 a letter dated 1 February 2012 she wrote to the Respondent in which she states inter alia:

“Further to your request for me to release to you the proceeds of the sale of the two properties that I was holding in my name on your behalf, I hereby agree to release to you the said proceeds, provided you pay me a consideration of SCR1, 500,000 as a fair settlement for having held the properties in my name...” (Emphasis mine).

[20] Thirdly, it is also clear from her testimony that she is an untruthful and incredible witness. In her pleadings she states that the money was never the Respondent's, then states in her evidence that she is prepared to return the Respondent's money if she is paid remuneration for her services (P. 150 of the transcript of proceedings) and also that she asked for a loan and a donation from the Respondent (P.127 – 129 and 143-144 of the transcript). Why on earth would she need to do this if the money belonged to her and not the Respondent?

[21] Fourthly, her witness is even more incredible. Randolph Hoareau was a Senior Clerk of Nouvobanq and according to him he was asked to assist the Appellant who was a close friend with carrying SR500, 000 I cash from the bank. He carried the envelope and knew it contained SR500,000 because he “happened” to see the receipt the Appellant was holding. He carried the envelope containing the money from Nouvobanq to the Mauritius Commercial Bank across town where the Appellant's husband was waiting for her. He later observed the envelope being given to a gentlemen whom he identified as the Respondent. He observed all this through the window of the bank. He then later said the hand over took place in the car park of the Mauritius Commercial Bank.

[22] The trial judge who had the opportunity to observe his demeanour did not believe him. Even from our remove, we find his story incredible. It would be most unusual for a bank employee without permission from his superiors to accompany a client carry money in an envelope

across Victoria. We therefore do not find the evidence of the Appellant or her witness in any shape, sense or form credible.

- [23] Fifthly as to the provisions of the law relied upon by the Appellant, they are not relevant at all. The submissions of Counsel for the Respondent on this point are apt: there was nothing done against public policy as there was nothing in the matrimonial property agreement subverting the law. The proceeds for the properties to be sold were to be transferred to the Respondent as agreed with his ex-wife. If she chose to transfer the properties to her stepmother in order to facilitate the sale of the same third parties to realise the Respondent's share of the matrimonial property there has been no breach of the Act.
- [24] Further, the issue of back letter does not arise. It is trite law that a back letter against a registered agreement is not admissible as evidence unless the back letter is itself registered (See *Ruddenklau v Bottel* (unreported) SCC 4/1995, *Adonis v Larue* (unreported) SCA 39/1999 and *Guy v Sedwick* (2014) SLR 147.
- [25] However, similarly to the cases of *Aarti Investments Ltd v Padayachy and anor* (unreported) SC 5/2012 and *Ugnich and Lavrentia and anor* (unreported) SC 125/2012, in this case it is not the deed of transfer that is being impugned by the Respondent's oral testimony. It is the breach of the agreement between the parties owning the matrimonial property and the Appellant that is in question insofar as the Appellant is refusing to transfer the proceeds realised from the sale of the same to the Respondent.
- [26] The Appellant's brazen efforts to commit what can only be termed as daylight robbery cannot be countenanced by this court. We dismiss her appeal in its entirety and uphold the Supreme Court's decision including the total award of SR4, 404,000.00 together with interests and costs.

I concur:.

A. Fernando (J.A)

I concur:.

J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017