

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , A. Fernando (J.A) , M. Twomey (J.A)

Civil Appeal SCA 5 and 6 /2015 (Consolidated)

(Appeal from Supreme Court Decision 117/2007)

Suzarra Jorre de St. Jorre	1st Appellant
Hugues Albert	2nd Appellant
May Lavigne	3rd Appellant
Anna-Marie Jorre de St. Jorre	4th Appellant
Manyive Chang Sing Chung	5th Appellant
Versus	
Narcisse Stevenson	Respondent

Heard: 29 November 2017

Counsel: Mr. Charles Lucas of 1st – 4th Appellants
Mr. Kieran Shah for 5th Appellant
Mrs. Manuella Parmantier for Respondent.

Delivered: 07 December 2017

JUDGMENT

M. Twomey (J.A)

[1] The First Appellant is the niece of the Respondent and acting as agent and/or executor of her grandmother's estate transferred land belonging to or in which the Respondent had an interest to herself, her children, the Second to Fourth Appellants and to a third party, the Fifth Appellant.

[2] The learned trial judge Bernadin Renaud in a judgment delivered on 27 March 2015 found that the First Appellant had no power or authority to sell and transfer to herself and the other Appellants the properties and that she executed the same fraudulently and

illegally. He revoked all the transfers and ordered the First Appellant to pay the Respondent the sum of SR200, 000 as damages.

[3] We turn first of all to the appeal by the Fifth Appellant whose learned Counsel, Mr. Shah has submitted should have been put out of cause in the court of first instance given that the Respondent had clearly indicated that he was not suing her and was not claiming anything from her. He further submitted that there was no cause of action disclosed against her nor any averment made against her in the Plaintiff and in any case she was a bona fide third party purchaser for value.

[4] We indicated at the outset of the hearing of the appeal that these submissions had merit and Counsel rested on these skeleton heads of argument. Learned Counsel for the Respondent made no submissions in reply in this regard. It is trite that when no action is disclosed against a party *ex facie* the pleadings, the court has a duty to dismiss the case. In this respect we find favour with the submissions of Counsel for the Fifth Appellant and grant the appeal of the Fifth Appellant. Our orders follow.

[5] The First – Fourth Appellants have appealed on the following grounds:

1. *The learned judge failed to analyse and consider the evidence relating to “commencement de prevue” relating to the intentions of the Respondent and First Defendant (sic) on his intention to sell his share in the immovable property to her and her subsequent acts including sale and remittance of funds to her in Australia.*
2. *The learned trial judge erred in his analysis of the law which he applied retrospectively by relying on jurisprudent (sic) dated 1994 and 2010 for acts the (sic) occurred prior to these dates.*
3. *The learned trial judge erred in making the finding that Exhibit D8 was not of any evidential value.*
4. *The learned trial judge failed to appreciate the prevailing circumstances both personal and political at the material time which prompted the*

Respondent to dispose his share/ entitlement plus the principles of moral impossibility cementing the relationship between the First Appellant and the Respondent. Had he done so he would have come to a completely different conclusion and would have dismissed the case.

5. *The Respondent having made admissions on his signature, receipt of funds from the 1st Defendant (sic) through Gilbert Dyer and his telephone correspondence with the First Appellant were sufficient evidential value to warrant the dismissal of the claim (sic).*
6. *The learned trial judge was wrong to conclude that “With respect to the transfer of land title V478 to Mr. Rene Vidot, it appears for personal reasons the Plaintiff is not insisting on the annulment of that illegal transfer by the Defendant but is prepared to accept that he be paid moral damage by the First Defendant which sum is to be determined by the court”. In fact Rene Albert Vidot did testify and he corroborated the evidence of the First Appellant on the agreement to sell the Respondent’s land, the price, the proof and mode of payment through Mr. Gilbert Dyer.*
7. *The learned trial judge, having wrongly made the Order that all acts by the First Appellant was illegal, fraudulent and ab initio null and void relating to all transfers effected by the First Appellant to herself and to the Second, Fourth, Fifth and Sixth Defendants (sic) ought to have annulled the transfers made by the First Appellant to the Government of Seychelles and Rene Albert Vidot as well but failed to do so as an expression of prejudice or misinterpretation of the law against the other Defendants (sic).*
8. *The learned trial judge was wrong to order the First Appellant to pay moral damages and to give full account of the succession to the Respondent.*

[6] We have reproduced these grounds of appeal if only to show how grounds of appeal should not be drafted. While Counsel for the First to Fourth Appellants cannot be faulted for not giving particularity to the grounds of appeal, he has erred unfortunately on the

side of dense writing verging on the unintelligible. Infelicitous drafting has the potential not only to have unintended legal consequences but also to bewilder both the opposite party and the court to the point that submissions arising therefrom cannot be sustained.

[7] Nevertheless, we have in the interests of justice considered the grounds as we best understand them.

Grounds 1 and 3 – “beginning of proof in writing” to establish agency and or representation of the Respondent by the First Appellant.

[8] It is the First Appellant’s submission that the trial judge failed to consider the documentary evidence that had been adduced to support her averment that she had the Respondent’s authority to act on his behalf and to sell his interest in the land. She relies on a letter dated 5 March 1987 (Exhibit P 13) from Jacques Lucas, then the attorney for the First Appellant allegedly sent to the Respondent informing him that the family house was open to strangers, that no rent was being paid, that it was proposed to apply for partition of the property which he co-owned and that he should reply as quickly as possible to indicate whether he authorised the proposed partition.

[9] She also relies on an alleged authorisation by the Respondent dated 17 June 1983 (Exhibit D1) in which he purportedly gave permission to the First Appellant to represent him in a court action for the divisions of Parcels V389, V 478 and V484. She further relies on a receipt dated 15 February 1995 signed by one Gilbert Dyer for the sum of SR24, 000 for part payment of property sold to herself.

[10] In addition, she relies on the Respondent’s evidence that he received US\$ 500 as rent income for the houses on the property which she sent via Gilbert Dyer; and the evidence of René Vidot that he saw an envelope which contained dollars being handed to Mr. Dyer.

[11] On this issue, the learned trial judge found that the purported authorisation document was not notarised. He concludes after an analysis of the evidence, namely by comparing the signature on unnotarised authorisation (supra D1) to the one on the notarised document, D2, in which the Respondent acquiesced to the First Appellant being appointed executor

of the estate of her grandmother and his mother (Imelda Louis Albert née Stevenson) that no authority was given to the First Appellant to deal with the division of Parcels V389, V478 and V484 which he co-owned with his sister, the First Appellant's mother (Esther Griselda Edmée Jorre de St. Jorre).

[12] We have also examined the documents and can say without a doubt that the signatures are markedly and significantly different. When the question was put to Counsel for the First Appellant as to this difference, he stated that signatures change over time. We note however, that the signatures were made only about a year apart. We uphold the finding of the learned trial judge on this issue and do not believe that the document signed on 17 June 1983 was made by the Respondent.

[13] Since the documentary evidence does not emanate from the Respondent and is self-serving it does not constitute a writing providing initial proof as provided for in Article 1347 of the Civil Code. There is no proof of the agency of the First Appellant. In any case any general power of attorney would not have sufficed to permit the First Appellant to alienate the property given the provisions of Article 1988 of the Civil Code. Those grounds of appeal therefore have no merit.

[14] Having said this, we note that the First Appellant has been validly appointed executrix of her grandmother's estate on 24 July 1986. The issues shifts to the powers she held as executrix and whether these powers were sufficient to allow her to make the transfers she did.

Grounds 2 and 7- The duties and powers of an executor of a succession

[15] We have found it difficult to follow the submissions of Counsel for the Appellants on these grounds. We think we understand him to submit that case-law made *ex post facto* cannot apply to events in the past. While retrospectivity in criminal cases (except for the offence of genocide or an offence against humanity) is not permitted in Seychelles and is enshrined in Article 19(4) of the Constitution, the situation is different in civil law. There is indeed a general presumption under rule of law principles that statute and judicial decisions do not have retrospective effect on decided cases but that presumption against

retrospectivity is not absolute (See *Phillips v Eyre* [1870] LR 6 QB 1, *Maxwell v Murphy* (1957) 96 CLR 261.

- [16] As regards judicial decisions, recent authorities have reaffirmed the principle that a judicial decision which establishes a precedent has retrospective effect in the case being decided and in other cases which are pending or still to come before the courts (See *Cadder v Her Majesty's Advocate* [2010] UKSC 43 following the Irish case of *A v The Governor of Arbour Hill Prison* [2006] 4 I.R. 88; *Serious Organised Crime Agency (“SOCA”) v O’Docherty* [2013] EWCA Civ 518)
- [17] On the principle of non-retrospectivity, Mr. Lucas has sought to have the cases of *Parcou v Parcou* SCA 32/1994 and *Pillay v Rajasundaram* (2013) SLR 11 distinguished. Apart from the law as we have expounded above, we hasten to note that *Pillay* was set aside on appeal (see *Rajasundaram v Pillay* [2015] SCCA 12).
- [18] In any case that is a fallacious argument – the duties and obligations of an executor are provided for in the Civil Code and although may be interpreted by courts in particular circumstances on specific facts, will not dilute the essence of the provisions. The authorities above have sought to explain what the duties of an executor are. Counsel for the Respondent has submitted that an executor only has the duty to make an inventory and distribute the estate but is not permitted to alienate land on behalf of the heirs.
- [19] It is important to bring the relevant provisions of the Civil Code relating to executors and fiduciaries to light:

“Article 1027: The duties of an executor shall be to make an inventory of the succession to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will, as the case may be.

...

Article 1028: The executor, in his capacity as fiduciary of the succession, shall also be bound by all the rules laid down in this Code under Chapter VI of Title I of Book

III relating to the functions and administration of fiduciaries, insofar as they may be applicable.

...

Article 825: *The functions of the fiduciary shall be to hold, manage and administer the property, honestly, diligently and in a business-like manner as if he were the sole owner of the property. He shall be bound to follow such instructions, directions and guidelines as are given to him in the document of appointment by the unanimous agreement, duly authenticated, of all the co-owners or by the Court. He shall have full powers to sell the property as directed by all the co-owners, and if he receives no such directions, to sell in accordance with the provisions contained in articles 819, 1686 and 1687 of this Code and also in accordance with the Immovable Property (Judicial Sales) Act, Cap. 94 as amended from time to time.*

Article 826: *Where a fiduciary wishes to proceed to the sale of property, he shall communicate to all those entitled a formal notice of the intended sale. The sale shall not take place until six months after such notice has been issued. However, the Court, upon application by a party may, on reasonable grounds, grant permission to sell the property earlier or later than the period of six months or without notice.”*

Article 819: *In the case of immovable property held in co-ownership, unless all the co-owners agree to postpone the sale, such property shall be sold. If the co-owners do not agree to a private sale, or if one of them is subject to an incapacity such as minority or interdiction or is absent from Seychelles and is not represented therein by a duly appointed agent, the property shall be sold at a public auction. In this respect, articles 1686, 1687 and 1688 of this Code relating to licitation shall have application.*

Nevertheless, even if one or more of the co-owners is subject to an incapacity as aforesaid, or is absent from Seychelles, the property may be sold otherwise than by a public auction with the permission of the Court (Emphasis ours).

- [20] In *Parcou*, case number 38/1994 the Court of Appeal recommended that written consent of heirs be sought before an executor sells co-owned land. In *Rajasundaram*, the court interpreted the law to mean that fiduciaries had powers to sell or alienate property. That is subject of course to the caveats in the provisions of the Civil Code (supra) including the fact that the consent of the heirs must be obtained and failing that an order of the court must be sought.
- [21] The trial judge did not find evidence that such consent was sought from the Respondent apart from the self-serving evidence of the First Plaintiff. Even if we were to recognise that Exhibit D1 was genuine, the document only purports to show that the First Appellant was given authorisation solely to act in court actions in relation to the Respondent's property.
- [22] We do not find therefore that such consent was sought or given by the Respondent and these grounds of appeal also fail.
- [23] Mr. Lucas during his oral submissions also referred to the fact that the trial judge had in his judgment reproduced almost verbatim the closing submissions of Counsel for the Respondent and in so doing it could be inferred that he did not address his mind independently to the evidence in the case. He relied for this submission on the authority of *IG Markets v Crinion* (Court of Appeal, Civil Division) [2013] EWCA Civ 587 which in our view is not apposite as in that case Underhill LJ dismissed the appeal on a similar submission. In a situation akin to the present appeal he found that although there might have been an overall impression that the judge's decision was derived almost entirely from the submissions of Counsel and that it was procedurally bad practice for the judge to construct his argument the way he had without acknowledging that he had considered contrary submissions, this did not make the judgment defective or to infer that there had been injustice in the case. We endorse this view as it is in our opinion on all fours to the present appeal.

Ground 4- The personal and political circumstances in Seychelles at the time of the transfers.

[24] The Appellant seeks to avoid the application of the law by stating that the trial court should have taken into consideration the fact that the First Appellant and the Respondent were closely related and that there was proximity of trust and unity of purpose at the time of transfer coupled with the fact that the general atmosphere of land acquisitions and statutory tenancies under the Tenant's Rights Act (since repealed) that operated would explain why the transfers were made in the way they were. He seems to be submitting some type of defence of necessity.

[25] Whilst we appreciate the difficult political position that operated at the time, we are not prepared to accept that there was some type of moral impossibility on the part of the First Appellant to seek the consent of the Respondent for the alienation of his interests in the land. The transgressions of the First Appellant were too enormous. Not only was the Respondent not informed but he also did not receive proper payment for the transfers. We have in fact seen no evidence of any money he received for the transfers nor has there been any good faith demonstrated by the First Appellant in the transactions. This ground of appeal also has no merit.

Grounds 5 and 6 – Admissions by the Respondent and receipt of monies by him from the First Appellant and the evidence of René Vidot

[26] We have tried to find support in the evidence of the submissions made by Mr. Lucas. He submits that the documentary evidence, namely the letter from the lawyer Jacques Lucas (Exhibit P13, see above paragraph 8), that is the unnotarised document allegedly from the Respondent, giving the First Appellant authorisation to represent him in court in relation to the partition of the properties, and the notarised consent to the First Appellant being appointed executrix of Imelda Stevenson's succession together with the evidence of the Respondent is sufficient evidence to show that the Respondent was an untruthful witness and the claim was wrongly founded. We have already considered the documentary evidence and have not found in favour of the First Appellant.

[27] As concerns the testimony of the Respondent, the inconsistencies in his evidence are not in our view substantial enough to have caused the trial judge to come to a different conclusion as to his reliability as a witness. It is trite that an appellate court, on an appeal

from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact. It is different if it is sought to query whether the proper inference was drawn by the trial judge from the facts (see *Benmax v Austin Motors Co. Ltd* (1955) All ER 326). The same considerations are given by this Court in regard to the evidence of René Vidot.

[28] For these reasons we find these grounds are also without merit.

Ground 8 - moral damages and account of the succession.

[29] The Appellants submit that the award of SR200, 000 damages should not have been made in the circumstances and that the trial judge was wrong to order that the First Appellant give an account of the succession.

[30] As concerns the latter point, it is the law that the executrix of a succession has to render an account of their administration of the same (see Article 1029 of the Civil Code). The learned trial judge cannot therefore be faulted in any way for this order.

[31] In regard to moral damages, we need only cite Article 1149 of the Civil Code which provides in relevant part:

“2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss of any of the amenities of life.”

[32] The Appellants have failed to demonstrate why the learned trial judge should have disregarded these provisions of the law.

Our decision and orders

[33] We have given anxious consideration to the appropriate remedy in this case given the fact that his case was filed in 2007 and a decision only delivered in 2015 by the Supreme Court. As regards the Appellants, we note that the property in which the Respondent had a half share, that is, Parcel V484, was subdivided into Parcels V5113 and V5114 with the latter to be allocated to the Respondent as his share. This never materialised. Instead

Parcel V5114 was further subdivided into Parcels V8663, V 8664 and V8665. V8633 was subsequently again sub-divided into Parcels V8949 and V8950; and V8644 further subdivided into Parcels V8951 and V8952 and all transferred. V8655 was again subdivided into Parcels V 12298, V12299, V 12300, V12301, and V12302.

[34] With regard to the prescription of these transfers, Article 2262 -2265 5 of the Civil Code provide in relevant form:

“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.”

[35] In addition to these provisions of the Civil Code section 89(2) of the Land Registration Act provides:

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

[36] In view of the above provisions and with respect to the orders made by the learned trial judge in this case, we have already stated that we are not in agreement with the order made against the Fifth Appellant. She has produced a title which shows that she acquired

Parcel V8951 in 1996 for the sum of SR50, 000. She is therefore a good faith third party purchaser of Parcel for valuable consideration. Any action against her is in any case prescribed given that the suit was filed some eleven years after the transfer was made to her. The order of the learned trial judge in respect of that title is therefore set aside and the Registrar of Lands is directed to register Parcel V8951 in the name of the Fifth Appellant, namely Manyive Chang Sing Chung. That money will have to be reimbursed by the First Appellant to the Respondent.

[37] With regard to the other subdivisions of Parcel V5114:

1. Titles V8950 and V8952 were transferred to the Government of Seychelles for the sum of SR 15,000 on 22 May 1998 for a public road. The Respondent has indicated that he has no intention of seeking orders in relation to these transfers and we make none.
2. Title V8949 was transferred by the First Respondent to herself. This land has to be returned to the Respondent. On the evidence adduced, we do not find her a good faith third party purchaser. The Land Registrar is to register Title V8949 in the name of the Respondent.
3. The bare ownership of Title V12298 was transferred to the Second Appellant with the usufruct to the First Appellant on 12 October 2005 for a sum of SR25, 000. We do not find it proved to us that he is a good faith third party purchaser for valuable consideration. That property is to be returned and the Land Registrar is directed to register Title V12298 in the name of the Respondent.
4. Title V12299 was transferred to the Third Appellant on 23 August 2005 for the sum of SR25, 000. Similarly, we do not find it proven that either are good faith third party purchasers for valuable consideration. That property is to be returned and the Land Registrar is directed to register Title V12298 in the name of the Respondent.

5. Title V12300 was registered in the First Appellant's name. That land is to be returned to the Respondent and the Land Registrar is directed to amend the Register accordingly.
6. The bare-ownership of Parcel V12301 was transferred to the Third Appellant on 2 February 2006 with the usufruct in the name of the First Appellant. Similarly, we do not find it proven that either are good faith third party purchasers for valuable consideration. That property is to be returned and the Land Registrar is directed to register Title V12301 in the name of the Respondent.
7. Title V12302 was registered in the First Appellant's name. That land is to be returned to the Respondent and the Land Registrar is directed to amend the Register accordingly.

[38] In summary we make the following orders:

1. We order the Land Registrar to register Titles V8949, V8951, V12298, V12299, V12300, V12301, and V12302 in the name of the Respondent, Narcisse Harry Antoine Stevenson.
2. We order the Registrar to register Title V8951 in the name of Manyive Chang Sing Chung
3. The registration of Titles V8950 and V8952 in the name of the Government of Seychelles is maintained.
4. We order the Registrar to register any remaining subdivisions of Title V5114 in the name of the Respondent, Narcisse Harry Antoine Stevenson.
5. The First Appellant is to return the sum of SR50, 000, being the consideration obtained for Parcel V8951 to the Respondent with interest from the date of transfer.

6. The First Appellant is to pay the sum of SR 200,000 moral damages to the Respondent.

7. The First Appellant is wind up the succession of Mrs. Imelda Albert Stevenson and to give a full and complete account thereof within a year of this decision.

M. Twomey (J.A)

I concur:.

F. MacGregor (PCA)

I concur:.

A .Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 07 December 2017