

IN THE SEYCHELLES COURT OF APPEAL
[CORAM: F. Fernando (J.A), F. Robinson (J.A), G. Dodin (J.A)]
CIVIL APPEAL SCA 30/2016 & CROSS APPEAL SCA 32/2016
(Appeal from a Supreme Court Decision CS78/2015)

Wilfred Freminot and Edwina Freminot Appellants
both of Baie Lazare, Mahe, acting as joint Executors
of the Estates of Charlemagne Grandcourt
And Odrade Grandcourt

versus

Christopher Gill First Respondent
Land Registrar Second Respondent

Heard: 26 April 2019
Counsel: Mr. Serge Rouillon for appellants
Mr. Pesi Pardiwalla and Mr. Conrad Lablache for the first respondent
Mr. Joji John Assistant Principal State Counsel for the second respondent

Delivered:

JUDGMENT

F. Robinson (J.A)

Background to Appeal and Cross-Appeal

1. This is an appeal against the ruling of a learned Judge of the Supreme Court dismissing the plaint Civil Side No. 78 of 2015, (the "*Second Plaint*"), entered by the first and second appellants against the first and second respondents.

2. In order to understand the ruling of the learned Judge, we give here an abbreviated summary of the cases referred to by the learned Judge in his ruling sufficient to introduce our consideration of the issues which we have to decide. Those interested in the full story can find it clearly set out in the minority judgment of the Court of Appeal of Seychelles SCA Civil Side No. 7 of 2011, dated the 7 December 2012. In the first judgment of ***"Christopher Gill v The Estate of Charlemagne GRANDCOURT represented by its Executors Wilfred Freminot and Edwina Freminot and The Estate of Odrade GRANDCOURT represented by its executors Wilfred Freminot and Edwina Freminot"*** Civil Side No. 174 of 1995, (the *"First Judgment"*), the first respondent obtained judgment in his favour.

3. The first and second appellants appealed against the First Judgment. In ***"The Estate of Charlemagne Grandcourt represented by its executors Wilfred Freminot and Edwina Freminot and The Estate of Odrade Grandcourt represented by its executors Wilfred Freminot and Edwina Freminot v Christopher Gill"*** SCA Civil Side No. 7 of 2011, the majority judgment of the Court of Appeal of Seychelles set aside the orders made by the learned Judge, in the First Judgment, on the 7 December 2012, and made fresh orders as follows:
 - "1. *The Respondent, Christopher Gill is ordered to pay the sum of R200,000 with interest amounting to SR 176,784, the total award of SR376,784 to be paid to the Appellants on or before the 31st December 2012. This sum is to be deposited in the Court Registry.*

 2. *The Land Registrar is hereby authorised under section 75 of the Land Registration Act on the application of the Respondent and the filing of this judgment and production of receipt of payment of the judgment award to register Christopher Glaude Gill as the proprietor of Parcels T. 1393 and T. 1394."*

 2. *As this appeal is partly successful no award is made as to costs.*

".

(the *"Second Judgment"*)

4. On the 21 September 2015, almost three years after the Second Judgment, the first and second appellants filed the Second Plaintiff, the subject matter of this appeal. In "**Wilfred Freminot & Edwina Freminot both of Baie Lazare, Mahe acting as joint executors for the Estate of Odrade Grandcourt and Charlemagne Grandcourt v Christopher Gill & The Registrar General**" Civil Side No. 78 of 2015, the first and second appellants moved the court for:

- "a. a declaration that the attempted sale of the property land Titles T1393 and T1394 by the 1st Defendant to Takamaka Investments Limited dated 14th August 2015 in the land registry be declared null and void for fraud and collusion;
- b. a declaration that the registration of the sale of Titles T1393 and T1394 by agreement for the sale of T696 between Mr. Charlemagne Grandcourt to the 1st Defendant dated 4th February 1993 and finalized by the final registration of transfer of Titles T1393 and T1394 disguised as a transmission dated 31st December 2012 for the lack of sufficient stamp duty payment and a fraud on the revenue;
- c. a declaration that the sale of the property land Titles T1393 and T1394 by agreement for the sale of T696 between Mr. Charlemagne Grandcourt to the 1st Defendant dated the 4th February 1993 and finalized by the final registration of transfer of Titles T1393 and T1394 disguised transmission dated 31st December 2012 be rescinded for lesion and that the sale be declared null and void; and/or
- d. an order for the 1st Defendant to transfer the property back to the Plaintiffs at his own costs unless the 1st Defendant pays the full market price valued as at the date of registration of the transfer in 31st December 2012 upon three valuations by three valuers ordered by this honourable court; and
- e. an order of damages in the sum of R1,000,000/- against the Defendants jointly and severally for the obvious examples fraud and collusion in this case in an effort to permanently deprived the Plaintiffs of their right to the return of their property; and/or
- f. such other order as may be lawful, just and reasonable in the circumstances
- g. an order for costs jointly and severally in favour of the plaintiffs and against the Defendants."

5. The first respondent raised pleas in *limine litis* moving that the Second Plaintiff be dismissed for the following reasons:

- "(i) *The plaintiffs' claims for lesion is prescribed under article 1678 of the Code Civil of Seychelles as the agreement for the sale of the property (the Agreement) became effective as between the parties on 4 February 1993. The existence of the Agreement and the date that on which it became effective were confirmed by the Seychelles Court of Appeal in both its majority and minority judgments on 7 December 2012 in SCA 7 of 2011 and are final and binding on the parties (res judicata) (copy of judgment attached)*
- (ii) *The issues relating to the validity of the Agreement, and in particular the averments set out in paragraphs 4, 6, 7, 8, 9, 10, 11 and 12 of the Plaintiff (including the allegation and suggestion that Charlemagne Grandcourt acted under duress and lacked consent of the heirs, and any cause of action arising therefrom) have been disposed of by the Seychelles Court of Appeal in its judgments of 7 December 2012 in SCA 7 of 2011 and are therefore res judicata.*
- (iii) *The Plaintiffs' claim that the Defendants acted in collusion in fraud of the stamp Duty Act is incompetent and may not be entertained in the present proceedings. Further, the Plaintiff has no capacity or interest or locus standi to challenge the legality of 2nd defendant's exercise of her powers under the Stamp Duty Act in the instant case."*

6. The learned Judge after carrying out an examination of the averments contained in the First Plaintiff, the Second Plaintiff, and the majority judgment of the Court of Appeal, found:

- (a) *in relation to plea number (i), that "the issue as to when the Agreement for sale was concluded has been adjudicated upon by the Seychelles Court of Appeal and it is now a sale which took effect in 1993 and as such it is obviously prescribed by 5 years prescription which is applicable to lesion.*
"

- (b) in relation to plea number (ii), that the conditions of identity of persons and object have been met. In relation to the identity of class/"cause", the learned Judge went on to state:

"[19]... The cause of action in the first case concerned with various issues relating to the same immovable property. Although these causes of action are provided for in different provisions of the Civil Code of Seychelles and property law, the Plaintiff could have raised these issues at the time of filing its defence in 1995 when the selling price was within the knowledge of the Plaintiff at that time.

[20] It is trite that even matters which were not agitated at a previous hearing but being matters that could have been agitated then, cannot be re-agitated again in a new action as it may be considered to be an abuse of process and may be found to be res judicata."

- (c) in relation to plea number (iii), that "[28]... there is no sufficient and cogent evidence to support the allegation of deliberate fraudulent act on the part of either of the two Defendants".

7. The learned Judge accordingly upheld the pleas in *limine litis* on the grounds that the suit was *res judicata*; that the suit for "*lésion*" was time barred because of prescription; and that in relation to the issue of "*locus standi* to raise the issue of stamp duty, ... the pleading does not indicate any fraudulent intent in the transaction referred to."

Appeal and Cross-Apeal

8. The first and second appellants dissatisfied with the ruling of the learned Judge, have raised six grounds of appeal as follows:

- "1. *The learned judge erred in law in making a final finding of res judicata when the cause of action in the first suit and in this suit are completely different and the parties are different.*

2. *The learned judge erred in law in finding that the Appellants had the opportunity and should have taken that opportunity to apply for lesion in the original case when they are not the Plaintiffs therein.*
3. *The learned judge has erred in finding that the cause of action of lesion was available to the Plaintiffs in the original suit when the rights of the parties in respect of the properties was decided by the court of appeal on 7th December 2012 yet he ruled that the Plaint was prescribed.*
5. *The learned judge has failed to take into account that due to the fraudulent evasion of stamp duty on the registration of the sales where the full consideration for the sale has never been duly stamped the sale transactions from the court of appeal judgment of 7th December 2012 and the new attempted sale are unraveled and ineffective.*
6. *The learned Judge erred in law when he accepted the provisions of the Civil Code in this matter when dealing with other specific Acts-The Land Registration Act; the right to property under the Constitution and the Stamp Duty Act which overrides general Civil Code principles when dealing with registered land under the Land Registration Act stampable under the Stamp Duty Act.*
7. *The Learned Judge has learned has decided this matter prematurely on the plea in limine without looking at or hearing relevant evidence on all matters to be canvassed in the case especially the clear collusion and frauds committed by the Respondents on the face of the record and conflicts in their responses in the preliminary stages of the case."*

(sic)

9. The first respondent dissatisfied with the ruling of the learned Judge, has cross-appealed on the following grounds:

- "1. *The learned Judge erred in law by not finding that the Appellants' action in C.S.78 of 2015 was an abuse of the process of the court.*
2. *The learned Judge erred in law by not finding that the Appellants' claim in C.S.78 of 2015, alleging that the 1st Respondent and the 2nd Respondent (being also the Stamp Duty Commissioner) acted in collusion in fraud of the Stamp Duty Act, was incompetent and not maintainable in that proceeding.*

3. *The learned Judge also erred in law by not concluding that the Appellants had no capacity or interest or locus standi to challenge the legality of 2nd Respondent's exercise of her powers under the Stamp Duty in the transactions referred to in the plaint of C.S 78 of 2015."*

10. We shall deal with the grounds of appeal and cross-appeal separately.

Ground 1 of the grounds of appeal

11. Ground 1 of the grounds of appeal taken with the submissions of both Counsel, in this appeal, raise the following issue in law:

whether or not the conditions of identity of parties and identity of class/"*identité de la cause*" were present for the principle of *res judicata*/"*l'autorité de la chose jugée*" to apply.

12. We pause here to set out the written law dealing with *res judicata* under the Civil Code of Seychelles Act (the "*Seychellois Civil Code*"). Article 1351 of the Seychellois Civil Code provides:

*"The authority of a final judgment ("**chose jugée**") shall only be binding in respect of the subject-matter of the judgment. It is necessary that the demand relate to the same subject- matter; that it relate to the same class, that it be between the same parties and that it be brought by them in the same capacities."*

13. We observe that Article 1351 of the Seychellois Civil Code is translated directly from Article 1351¹ of the French *Code Civil*. In *Civil Construction Company Limited v Leon & Ors*², Justice Twomey, delivering the majority judgment of the Court of Appeal, observed that:

¹ "Art. 1351. *L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même ; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité."*

² (SCA 36/2016) [2018] SCCA 33 [14 December 2018] (unreported)

"[the Seychellois Civil Code] is to a large extent derived from and to a large extent translated directly from the French Civil Code. We have developed our own jurisprudence but often refer to authorities or doctrinal writings from other civilist traditions such as Mauritius or France when we lack local jurisprudence on a particular issue. These jurisdictions have almost identical Civil Codes and therefore the underlying doctrines are the same. They are therefore better persuasive sources than legal systems from countries that do not share the same underlying doctrines".

14. We observe that the law in relation to *res judicata* is set out in a number of French authorities quoted and acted upon in judgments of our courts including *Hoareau v Hemrick* SLR 1973 273, and *R. Natarajan Pillay v. Bank of Baroda Civil Appeal No: 28 of 2001*³.
15. In **R. Natarajan Pillay** (*supra*), the Court of Appeal remarked that Article 1351 of the French *Code Civil* is an exact replica of Article 1351 of the Seychellois Civil Code. The following extract from **Hoareau** (*supra*), where the learned Judge referred to French authorities, in relation to Article 1351 of the Seychellois Civil Code, may be aptly reproduced:

"The plea of res judicata is governed by art. 1351 of the Civil Code which reads:

"Art. 1351. L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même ; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité."

For the plea of res judicata to be applicable, there must be between the first case and the second case the threefold identity of "objet", "cause" and "personnes".

The "objet" is what is claimed. "La cause" is the fact, or the act whence the right springs. It might be shortly described as the right which has been violated. (See de Bertier de Sauvigny & ors. V. Courbevoie ltée. & ors., 1955 M.R. 215)."

³ (delivered on 18 December 2002)

16. The same view is expressed in the Mauritian jurisprudence. For example, in *Mohammad Abdel Negib Dowlut v Central Electricity Board* 2012 SCJ 392, the Supreme Court of Mauritius, citing French authorities, stated: "A party can successfully invoke "l'autorité de la chose jugée" if he establishes that the previous and the subsequent litigation involve, the

same parties acting in the same capacity, the same subject matter and are founded on identical grounds which constitute the cause of action, i.e that the requirements laid down in Article 1351 of the Civil Code hereunder reproduced and explained, are satisfied –

"Art. 1351. L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même ; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité."

17. Hence, for a judgment to have authority of *res judicata*/"*chose jugée*", under Article 1351 of the Seychellois Civil Code, the triple identities of persons, class/"*cause*" and object must be present. We read the following in *Dalloz – Répertoire Pratique Vol. 1 V° "chose Jugée", Note 82* in relation to Article 1351 of the French Civil Code:

"D'après l'article 1351 du Code Civil, le plaideur qui, au cours d'une instance, entend se prévaloir d'un jugement antérieur ayant force de chose jugée ne peut en invoquer l'autorité que dans la mesure où les deux litige présentent entre eux un triple identité de parties, d'object et de cause."

18. The learned Judge considered whether or not the threefold identities of persons, class/"*cause*" and object were present in order to decide whether or not the principle of *res judicata*, under Article 1351 of the Seychellois Civil Code, applies.
19. Upon a consideration of the pleas in *limine litis*, in particular pleas numbers 1 and 2, and the submissions offered by Counsel for the first respondent in *limine litis* in the court below, we have come to the conclusion that the learned Judge adopted the wrong perspective by treating pleas numbers (i) and (ii) of the pleas in *limine litis* as if they were

grounded on the principle of *res judicata* under Article 1351 of the Seychellois Civil Code. A careful reading of pleas numbers 1 and 2 shows that they raise issues in relation to the doctrine of issue estoppel and the procedural rule of abuse of process.

20. In the light of pleas numbers (i) and (ii) and the submissions of Counsel in *limine litis* raised in the court below, we are of the view that the learned Judge should have considered the

doctrine of issue estoppel and the procedural rule of abuse of process accordingly, as raised by Counsel for the first respondent. The learned Judge erred.

21. For the reasons stated above, we hold the view that the contention raised in ground 1 that "*the learned Judge erred in law in making a final finding of res judicata when the cause of action in the first suit and in this suit are completely different and the parties are different*" does not arise. Ground 1 fails.

Ground 2 of the grounds of appeal

22. It is wrong for Counsel for the first and second appellants to assume that the learned Judge had made a finding to the effect that the first and second appellants should have made an averment of "*lésion*" in their defence in the previous proceedings. The learned Judge, after reviewing the principles applicable to "*lésion*", the First Plaintiff and the majority judgment of the Court of Appeal, suggested that the first and second appellants should have made a claim against the original plaintiff in respect of any thing arising out of the subject matter of the suit: see section 80 of the Seychellois Civil Code (counter-claim).

23. It is apposite to reproduce the relevant extract of the learned Judge's ruling which found: "*... the cause of action in the first case concerned the enforcement of a sale agreement. The cause of action in the instant case is concerned with various issues relating to the*

same immovable property. Although these causes of action are provided for in different provisions of the Civil Code of Seychelles ... the Plaintiff could have raised these issues at the time of filing its defence in 1995 when the selling price was within the knowledge of the Plaintiff at that time.

24. In the light of the above, we find no merit in the arguments raised by the first and second appellants under ground 2 which must accordingly fail.

Ground 3 of the grounds of appeal

25. Upon due consideration of the pleadings, the majority and minority judgments of the Court of Appeal and the submissions of the first respondent in the court below and at this appeal, it is without question that the contract of sale between Mr. Grandcourt, the original defendant, and the first respondent was signed on the 4 February 1993. Hence, we are of the view that ground 3 is untenable and must fail for the simple reason that the right to sue for rescission on the ground of "*lésion*", under Article 1674 of the Seychellois Civil Code, is barred after five years.

Ground 5 of the grounds of appeal

26. We reproduce the written submission offered on behalf of the first and second appellants in support of ground 5:

"the learned Judge failed to take into account that the fraudulent evasion of stamp duty on the registration of sales where the full consideration for the sale was never stamped the sale transactions from the first suit judgment of are unraveled and ineffective.

The well-known concept that "fraud unravels all" comes into play and its central to several transactions on the facts pleaded."

27. Counsel for the first respondent submitted in essence, in reply to the submission of Counsel for the first and second appellants, that an action to challenge the legality of the determination of the second respondent in her capacity as the Stamp Duty Commissioner,

must be a public law action in terms of the procedure set out under the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, S I No 40 of 1995. In that regard, learned Counsel for the first respondent submitted that the Second Plaintiff is incompetent and should have been dismissed by the learned Judge. The submissions offered by the first respondent were adopted by the second respondent at this appeal.

28. The learned Judge viewed the crucial issue as being whether or not there was "*sufficient and cogent evidence to support the allegation of deliberate fraudulent act on the part of either of the two Defendants*", hence in our opinion adopted the wrong approach to the issue.
29. We pause here to state that the Second Plaintiff contained a discursive accounts of events. This is a method of pleading which is to be thoroughly discouraged.
30. The challenge of the first and second appellants against the second respondent, in her capacity as the Stamp Duty Commissioner, under the Stamp Duty Act, was founded on jumbled allegations of fraud or bad faith. Upon a consideration of the Second Plaintiff and the submissions offered by Counsel for the first respondent in support of the pleas in *limine litis* in the court below and at this appeal, we come to the conclusion that the contentions of the first respondent, adopted by the second respondent at this appeal, are well founded: see *Platte Island v Sinon* (2011) SLR 381.
31. In the light of the above, we conclude that the contentions raised by the first and second appellants in ground 4 are untenable and must fail.

Ground 6 of the grounds of appeal

32. After having given due consideration to the contentions raised by Counsel for the first and second appellants in ground 6, we state that we are unable to understand the contention being raised in the said ground. We opine also that ground 6 is not critical to

the determination of the appeal. Hence, we are of the view that ground 6 is untenable and must fail

Ground 7 of the grounds of appeal

33. We hold the view that the contention raised in ground 7 is misconceived and must fail because, as correctly submitted by Counsel for the first respondent, the alleged fraud or illegality relating to the determination of the applicable stamp duty has no incidence on the rights of the first and second appellants or bearing on the validity and enforceability of the contract of sale between late Mr. Charlemagne Grandcourt and the first respondent.

Ground 1 of the grounds of cross-appeal

34. It was submitted by Counsel for the first respondent, under ground 1 that the learned Judge should have found that the Second Plaintiff constituted an abuse of process on the ground that the first and second appellants should be barred from pursuing in subsequent proceedings issues that ought to have been pursued and determined in former proceedings.
35. The written submissions offered on behalf of the first and second appellants which contained a discursive accounts of events, offered no serious contentions in reply to ground 1. Counsel submitted in reply that: *"what the 1st Respondent wants is for the courts not to hear their case at all despite all the evidence of fraud and collusion and connivance to defraud revenue"*.
36. We have found that the learned Judge adopted an incorrect approach to the construction of the doctrine of issue estoppel and the procedural rule of abuse of process. We note that, although the learned Judge misdirected himself as to the correct approach to the construction of the procedural rule of abuse of process, he viewed the proposition of the first respondent as to whether or not the subsequent proceedings may be dismissed as an abuse of process if the contentions sought to be advanced are contentions which, if they

were to be advanced at all, ought to have been advanced in earlier proceedings. The learned Judge rightly stated:

"[20] It is trite that even matters which were not agitated at a previous hearing but being matters that could have been agitated then, cannot be re-agitated again in a new action as it may be considered to be an abuse of process"

37. In view of this finding the learned Judge should have come to a finding that there was an abuse of process. On the basis of the above, we hold that there was an abuse of process.
38. We allow ground 1.

Ground 2 of the grounds of cross-appeal

39. We have already held, in relation to ground 5 of the grounds of appeal, that an action to challenge the legality of the determination of the second respondent in her capacity as the Stamp duty Commissioner, must be a public law action in terms of the procedure set out under the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, S I No 40 of 1995. Hence, we agree that the contention raised in ground 2 is well founded.

We allow ground 2.

Ground 3 of the grounds of cross-appeal

40. As we have held that an action to challenge the legality of the determination of the second respondent in her capacity as the Stamp duty Commissioner, must be a public law action in terms of the procedure set out under the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, S I No 40 of 1995, we conclude that ground 3 is well founded in that the first and second appellants had no locus standi to challenge the legality of the second respondent's

exercise of her powers under the Stamp Duty Act in the transactions referred to in the Second Plaintiff.

41. We allow ground 3.

Decision

42. We make order dismissing the appeal and allowing the cross-appeal. In the circumstances of the case, we make no order as to costs.

F. Robinson (J.A)

I concur

A. Fernando (J.A)

I concur

G. Dodin (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019

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