

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA), F. Robinson (J.A), L. Pillay (J.A)]

Civil Appeal SCA28/2016

(Appeal from Supreme Court Decision CS 124/2012)

Maria Adonis

Appellant

Versus

William Celeste

Respondent

Heard: 09 August 2019

Counsel: Mr Hoareau for the Appellant

Mr Georges for the Respondent

Delivered: 23 August 2019

JUDGMENT

Background facts and proceedings

1. The appellant (the plaintiff then) is the half-sister of the respondent (the defendant then). Mrs. Kate Anacoura, their mutual parent, was married to late Mr. Joseph Carosin Anacoura, who was the appellant's father. As the learned trial judge noted: "*[4] [i]t would seem that directly after the death of the Deceased war was declared between the Plaintiff and the Defendant*".
2. In her plaint entered before the Supreme Court, the appellant had sought a declaratory order to nullify an authorisation which was made by late Mr. Anacoura (the declaration of 10 July 2006) and to also remove the respondent from a portion of land comprised in title number S502 (hereinafter referred to as the "*Property*"). The Property is 402 square metres.

the the usufructuary interest, both of Cascade, Mahe, hereby declare that William Celeste of Pointe au Sel, Mahe, is the owner of the building, which is being used as a shop, including the two stores, which shop and stores are adjacent to the main building standing on the above-mentioned title, and that the said building used as a shop and the said stores have been built by William celeste with his personal finances xxxx and they are owned by him.

Dated this 10th day of July 2006.

xxxxxxxx

Joseph Anacoura

[...]"

6. While the appellant sought to nullify the above documents, the respondent sought the following prayers in his statement of defence: (a) an order dismissing the appellant's claim; and (b) a declaration that the shop belonged to him, and that he had the right to occupy the Property on which the shop stands.
7. It was common cause, in their pleadings, that the Property was originally owned by the appellant's father, late Mr. Anacoura. In November 2002, late Mr. Anacoura sold the Property to the appellant. In the same month, the appellant granted a usufructuary interest to late Mr. Anacoura, which was registered on the 26 December 2002.
8. In the judgment, the learned trial Judge after reviewing the evidence, found that the shop was constructed on Property belonging to the appellant, that that shop had already been built on the Property at the time of its acquisition by the appellant, and that the respondent had been in occupation of the shop. The court found that the respondent had built the shop with the permission of late Mr. Anacoura, and that he had built the shop in good faith.
9. The court thus dismissed the appellant's case with costs and ordered that her ownership of the Property be subject to a *droit de superficie* in respect of the shop in favour of the respondent. The learned trial Judge directed the land Registrar to enter

this declaration in the Land Register.

Grounds of appeal

10. The appellant challenged the judgment on four grounds. The appellant abandoned the fourth ground of appeal in the written submissions offered on her behalf. Grounds 1, 2 and 3 of the grounds of appeal read as follows:

- "1. *The learned trial Judge erred in law and on the evidence in relying on the registered declaration, dated the 10th of July 2006, as the said document was a hearsay document.*
2. *The learned trial judge erred in law in declaring that the Respondent has a "droit de superficie" in respect of parcel S502 in that the Respondent had not brought a counterclaim to that effect.*
3. *The learned trial Judge erred in law in holding that the "droit de superficie" had been established on the basis of oral evidence in view that the pleadings of the Respondent in respect of the "droit de superficie" had been restricted to a document dated the 6th of August 1997 and the deed of 10th of July 2006."*

Discussion

Ground 1 of the grounds of appeal

11. The first ground of appeal has merit. The registered document of 10 July 2006, (exhibit P7), which the learned trial Judge made reference to in para 2 of the judgment, is clearly a hearsay document, and does not come within any exception to the hearsay rule. In addition, we accept the submission of Counsel for the appellant that it is a document which ought not to have been registered under the Land Registration Act (CAP 107) because there is no provision under the Land Registration Act (CAP 107) which permits the registration of such a declaration.

12. Section 14 (1) (a) of the Evidence Act (CAP 74) provides:

"14. (1). Subject to this section, a statement contained in a document shall be admissible in any trial as evidence of any fact stated therein of which direct oral evidence would be admissible if -

(a) the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person, whether acting under a duty or not, who had, or may reasonably supposed to have had, personal knowledge of the matters dealt with in that information; [...]".

13. Clearly the registered declaration does not come within the ambit of section 14 of the Evidence Act (CAP 107) read with section 16 (1)¹ of it and as such could not be relied upon by the learned trial Judge. It cannot be said that late Mr. Anacoura was under a "duty" to make such a declaration. Nor can it be said that the declaration was or formed part of a record being kept by late Mr. Anacoura.

14. For the reasons stated above, we allow ground 1 of the grounds of appeal.

Ground 2 of the grounds of appeal

15. The second ground of appeal, i.e., that the learned trial judge erred by declaring that the respondent had a *droit de superficie* in respect of the Property despite the fact that he had not brought a counterclaim to this effect, specifically concerned the relief sought by the respondent that the court make an order that he had the right to occupy the portion of the Property where his shop was on.

16. Counsel for the appellant contended that this relief sought by the respondent was in effect a making of a claim in respect of the Property. In that regard, he contended that the respondent should have filed a counterclaim, which is substantially a cross-action; and not merely a defence to the appellant's claim. The respondent could only have sought and be granted the relief set out in prayer (b) by filing a counterclaim. Counsel

¹ "Any reference in section 13 or section 14 to a person acting under a duty includes a reference to a person acting in the course of any occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him".

for the appellant rested his submission on section 80 of the Seychelles Code of Civil Procedure.

17. At the hearing of the appeal, Counsel for the respondent acknowledged that the respondent's defence had no counterclaim, and that it was not specifically pleaded that the respondent had a *droit de superficie*. However, he contended that the statement of defence had a clear plea at para 3 and a clear invitation at prayer (b) on which the trial court could make a finding that the respondent had a *droit de superficie*.
18. Therefore, we hold that it was essential for the respondent to plead a counterclaim in accordance with section 80 of the Seychelles Code of Civil Procedure, which stipulates that:

"80 (1) Subject to subsection (2), where a defendant in any action wishes to make any claim or seek any remedy or relief against a plaintiff in respect of anything arising out of the subject matter of the action, he may, instead of raising a separate action make the claim or seek the remedy or relief by way of a counter claim in the action; and where he does so the counterclaim shall be added to his defence to the action.

(2) If, on the application of any party against whom a counterclaim is made, it appears to the court that it is in the interests of justice that the subject matter of the counterclaim be dealt with as a separate action, the Court may —

- (a) order that the counterclaim be struck out;*
 - (b) order that it be tried separately; or*
 - (c) make such order as it considers appropriate.*
- "*

(Our emphasis)

19. In *Robinson Louis v Dianna Laporte Civil Side 164/2011* [2018] SCSC 979 (17

October

2018) para 29, the Supreme Court quoted with approval the following extract from the English judgment of *Ammon v. Bobbett* (1889) 22 Q. B. D., at p. 548: "[a] counterclaim is substantially a cross-action; not merely a defence to the plaintiff's claim. It must be of such a nature that the Court would have jurisdiction to entertain it as a separate action.". We agree.

20. Further, in *Charlemagne Grandcourt and others vs Christopher Gill* (SCA 7 of 2011) [2012] SCCA 31 (07 December 2012), the majority judgment of the Court of Appeal, considered, *inter alia*, the question whether it was regular for the appellants' amended statement of defence which had not pleaded a counterclaim, to pray for rescission of contract and damages.
21. The majority judgment, applying section 80 of the Seychelles Code of Civil Procedure, held at para 17: "[...] *if he seeks rescission of contract and damages he has run afoul the rules of civil procedure. There is no point praying for remedies in a defence when the basis for the remedy is not set out in pleadings [...].*" It further added, in para 18, "*[a] prayer for a remedy in a defence does not by any stretch of the imagination amount to a counterclaim [...].*".
22. For the reasons stated above, we accept the contention of the appellant contained in ground 2 of the grounds of appeal and hold that the learned trial Judge erred in law in declaring that the respondent has a *droit de superficie* in respect of the Property, because he did not bring a counterclaim to that effect. We allow ground 2 of the grounds of appeal.

Ground 3 of the grounds of appeal

23. In relation to the third ground of appeal, Counsel for the appellant submitted that the respondent should be restricted to what he had pleaded. Counsel submitted that in

para 2 of the statement of defence, the respondent had restricted his claim to the existence of the *droit de superficie* solely on the unregistered document of 6 August 1997, (exhibit P4), and the registered declaration of 10 July 2006, (exhibit P7), made by late Mr. Anacoura.

24. In that regard he took issue with the following finding of the learned trial Judge at para 19 of the judgment: "*[i]n the circumstances of this case and on the unchallenged evidence of the Defendant that the Deceased had granted him the permission to build a shop on his land, I find that the Defendant had acquired a droit de superficie on Parcel S502 at cascade. This right survived the passing of the deceased and the transfer of the land to the Plaintiff*".
25. He contended that the learned trial Judge, in making this finding, relied on the oral evidence of the respondent to establish the *droit de superficie* as opposed to the respondent's pleaded case, and had thus formulated a defence for the respondent.
26. Counsel for the appellant contended that a *droit de superficie* cannot be established merely on the basis of the pleaded documents that the respondent had sought to rely on to prove the *droit de superficie*, the unregistered document of 6 August 1997, (exhibit P4), and the registered declaration of 10 July 2006, (exhibit P7).
27. In order for the appellant to claim that he had a *droit de superficie* on the basis of the unregistered document of 6 August 1997, (exhibit P4), para 2 of his statement of defence should also have averred that he was in actual occupation of the Property, and that, therefore, the Property was subject to an overriding interest (section 25 (g) of the Land Registration Act (CAP 107)).²

²"25. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register:-

[...].

(g) the rights of a person in possession or actual occupation of land; [...]."

28. Counsel relied on section 75 of the Seychelles Code of Civil Procedure (CAP 213) for the proposition that it was essential for the respondent to aver the material facts on which he was relying to establish a *droit de superficie* so as to inform the appellant of the exact case which she had to meet at the trial. He added that it was incumbent on the respondent to aver with certainty, precision and clearness all the particulars in support of his claim to a *droit de superficie*. This, he contended, the respondent had failed to do.
29. In support of his submissions, Counsel invited us to consider numerous cases dealing with the function of pleadings, namely, *Gallante v Hoareau* 1988 SLR 122, *Marie-Ange Pirame v Armano Peri* SCA 16 of 2005, *Tirant & Anor v Banane* 1977 SLR 219, *Tex Charlie v Marguerite Francoise* Civil Appeal SCA 12/1994 (12 May 1995), *Vel v Knowles* Civil Appeal SCA 41 & 44 of 1998 (9 April 1998) and *Re Wrightson* [1980] 1 Ch. at 799 in which Warrington J stated: "[t]he plaintiff is not entitled to relief except in regards to that which is alleged in the plaint and proved at the trial."
30. The written submissions offered on behalf of the respondent disagreed with the submission that the learned trial Judge had relied on his oral evidence to establish the *droit de superficie* as opposed to his pleaded case, and had thus formulated a defence for him. The respondent's written submissions contended that all that the statement of defence did was to raise the defence that the respondent built on the Property with the authority of the then owner. The document of 6 August 1997, (exhibit P4), was that authority. The rest of the oral evidence was, in his view, limited to explaining how the permission given by the document was in fact put into effect.
31. We remark that, at the hearing of the appeal, Counsel for the respondent did not take issue with the submissions offered on behalf of the appellant. However, he added that there was **abundant evidence on record** to establish that the respondent built on the Property with the authority of late Mr. Anacoura, and that he was in actual occupation of the Property. He added that the dismissal of the case by the learned trial Judge was
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enough, and that all the issues raised in this appeal were peripheral.

32. We accept the contentions of the appellant contained in ground 3 that the learned trial Judge formulated a case for the respondent when she found that the *droit de superficie* had been established on the basis of oral evidence. It is clear, as contended by Counsel for the appellant, that the pleadings of the respondent in respect of the *droit de superficie* had been restricted to the two documents dated the 6 August 1997, (exhibit P4), and the 10 July 2006, (exhibit P7), which do not create any "*droit de superficie*".
33. This court in *Cable and Wireless (Seychelles) Ltd v Innocente Gangadoo* (Civil Appeal SCA 14/2015) [2018] SCCA 29 (31 August 2018) para 44, approved the view expressed by Perera, J (as he then was) in *Adrienne v Pillay* (2003) SLR 68 that: "*a droit de superficie would be an overriding interest as envisaged in section 25 of the Land Registration Act (Cap107) where a person is in possession or actual possession of the land*". We have already found that the registered declaration of 10 July 2006, (exhibit P7), is a hearsay document, and that the learned trial Judge erred in law and in fact in relying on it. As correctly pointed out by Counsel for the appellant, the respondent's pleadings failed to aver all the material facts on which he was relying to establish a *droit de superficie*, namely that the respondent was in actual occupation of land. It is a fundamental rule of our system of pleading that every pleading must contain all the material facts on which a party relies for his claim or defence. "*The word "material" means necessary for the purpose of formulating a complete cause of action, and if any one "material" fact is omitted, the statement of claim is bad.*" (*Bruce v Odhams Press Ltd*. [1936 1 KB at p. 697]). The same principle applies to a defence.
34. For the given reasons, ground 3 should be allowed.
35. We note that in her plaint the appellant stated that she is prepared to pay the respondent the value of the shop. At the hearing, the appellant and the respondent agreed to have that part of the building which consists of the shop belonging to the

- respondent, valued by surveyors. Two valuations were submitted.
36. Mr. Lester Quatre, a quantity surveyor, valued the shop at 478,125/- rupees whereas Mr. Stanley Valentin, a quantity surveyor, valued the shop at 256,596/- rupees. According to Mr. Lester Quatre *"the shop building with a total floor area of approximately 75 square metres accommodates a shop, store and toilet"*. Mr. Quatre opined that the building had not been well maintained. His report reported, *inter alia*, that the roof has to be replaced. Mr. Valentin was of the same opinion. He concluded that *"the building is of age and major structural and finishing deficiencies were identified"*.
37. The learned trial Judge awarded the average value of the shop as derived from the two valuations, which is 367,360.50/- rupees. In the light of her finding that the respondent had a *droit de superficie*, the learned trial Judge found that, if the appellant does voluntarily decide to leave, he will have to be paid the sum of 367,360.50/- rupees which is the value of the shop and the value added to the land which showed that the learned trial Judge was alive to the challenging circumstance of the appellant and the respondent. We observe that the learned trial Judge also found that the respondent does not have the right to repair the shop. Neither the appellant, nor the respondent has challenged the award of 367,360.50/- rupees of the learned trial Judge.

Decision

38. For all the reasons given above, the appeal is allowed. We quash the judgment of the learned trial Judge and substitute therefor an order compelling the respondent to quit leave and vacate the shop *in lite* by the 15 December 2019, and ordering the appellant to pay to the respondent the total sum of 367,360/- rupees, by the 15 December 2019. Having regard to the evidence on record and to all the circumstances of the case, we decline to make any order as to costs.

F. MacGregor (PCA)

F. Robinson (J.A)

L. Pillay (J)

Signed, dated and delivered at Palais de Justice, Ile du Port on 23 August 2019