

IN THE SEYCHELLES COURT OF APPEAL

[Coram: M. Twomey (J.A), F. Robinson (J.A), L. Tibatemwa-Ekirikubinza (J.A)]

Civil Appeal SCA 36/2017

(Appeal from Supreme Court Decision CS 106/2016)

Irma Hortense

Appellant

Versus

Merna Songoire

Respondent

Heard: 05 December 2019

Counsel: Mr. S. Rouillon for the appellant

Mr. Guy Ferley for the respondent

Delivered: 17 December 2019

JUDGMENT

F. Robinson (J.A)

1. This is an appeal against the decision of a learned trial Judge of the Supreme Court who found that the signing of the transfer was obtained through fraudulent means. Consequently, the learned trial Judge made an order that the bare ownership of the Property shall be registered in the name of the respondent. He ordered the registration of the appellant as the owner of the usufructuary interest in the Property.

2. The appellant who is 87 years old, is the mother of the respondent. The appellant was the owner of the Property. Ex facie the appellant's pleadings, the appellant is challenging the validity of the transfer (notarial deed) witnessing the sale of the Property to the respondent.
3. The appellant claimed that the respondent took her to one of the respondent's friends, namely, one Shierley, the secretary of an Attorney-at-Law, Mr. Wilby Lucas, where the appellant appeared before Mr. Wilby Lucas, and was asked to "*sign some papers*". The appellant was unaware of what she was signing. She was unaware that she was selling the Property to the respondent and had no knowledge that the transfer was a fraud. The plaintiff essentially averred that Mr. Wilby Lucas did not read and explain the contents of the transfer to the appellant. The plaintiff averred that the title number of the Property, the description of the parties and the date of transfer which had been wrongly inserted on the transfer, had been changed at the time of registering of the transfer. The plaintiff also averred that the transfer is defective because the appellant did not receive any consideration for the transfer.
4. The appellant claimed the following reliefs from the Supreme Court —
 - "a. that the court declares that the transfer of Title No. H1609 to the Defendant is null and void for fraud;*
 - b. a declaration that there has been no sale of the property to the Defendant;*
 - c. an order for the rectification of the land register by ordering the Registrar of Lands to register Title No. H1609 back to the Plaintiff;*
 - d. an order for the Defendant to pay costs of this suit."*
5. The learned trial Judge, after a very brief review of Article 1108 of the Civil Code of Seychelles and some provisions of the Land Registration Act, held that the sale agreement conforms to form. Secondly, the learned trial Judge considered the claim of the appellant that she did not receive any consideration for the transfer. He found as a fact that the appellant has transferred the Property to the respondent without consideration,

under section 46 (1) of the Land Registration Act. In the light of his findings, the learned trial Judge concluded that the transfer satisfied the relevant provisions of the written law with respect to form. Thirdly, the learned trial Judge considered the question of fraud, with reference to Article 1116 of the Civil Code of Seychelles. After carefully reviewing the evidence, the learned trial Judge took the view that, "*the signing of the transfer document was obtained through fraudulent means*". However, the learned trial Judge did not declare the transfer null and void, but decided "*to give effect to the intention of the plaintiff as per the evidence*". He made an order that the bare ownership of the Property shall be registered in the name of the respondent. He ordered the registration of the appellant as the owner of the usufructuary interest in the Property.

6. The grounds of appeal of the appellant essentially question the appreciation of the evidence on record. At the hearing of the appeal, we drew the attention of Counsel for the appellant to the fact that the pleadings of the appellant were clearly not supported by the evidence.
7. Before we examine the issue raised at the hearing of the appeal, we consider the issue of whether or not the plaint is bad in law by reason of the non-joinder of Mr. Wilby Lucas, under section 112 of the Seychelles Code of Civil Procedure. The power of the court to order joinder of parties may be exercised not only upon application by a party or a person who wishes to become a party, but also by the court acting on its own initiative (*pro prio motu*).
8. Ex facie the plaint, the appellant claimed that the respondent and Mr. Wilby Lucas had acted in fraud of her rights. In that regard, Mr. Wilby Lucas is an interested party whose presence may be necessary in order to adjudicate upon and settle all questions involved in this case, in terms of section 112 of the Seychelles Code of Civil Procedure.
9. Thus, we hold the view that the failure to put Mr. Wilby Lucas into cause is fatal to the plaint. However, the dismissal of a plaint, under section 112 of the Seychelles Code of Civil Procedure, is an extreme measure, which is not contemplated by that section. After

anxious consideration we have decided not to remit this case to the Supreme Court to be dealt with in the light of our observations. We give reasons.

10. At the hearing of the appeal, we drew the attention of Counsel for the appellant to the following extracts from the record of proceedings:

"Q *Were you the owner of this house before?*

A: *Yes.*

Q: *What happened for you to stop being the owner of the house?*

A: *My daughter was standing by the door next to the table and told me that she will bring me to the office where I will make a transfer of the property on to her. [...]. I told her ok."*

[...].

Q. *So when did you find out that you had made a transfer of your property?*

A. *[...]. I do not know what the defendant had told Aubrey, What I just heard the defendant said is that this is my place I can remove you all by the arm and throw you all out. When she came back I was still sitting down there and she stood with the wall of the house there, and I told her that I will go and find a lawyer and remove the property which was on her name, and I told her if it would be like this we will even go before a Judge, then I did not speak to her again [...]. After that I ask my son-in-law if he doesn't know where I can go seek a lawyer as I need to seek an advise that is when my son-in-law told that he will brought me to Mr. Serge Rouillon and I explain my case to Mr. Rouillon.*

[...].

Q: *Did you consult Emmanuel before you transfer the land?*

A: *I did not consult any of the children as for the transfer of the land as the defendant told me that it didn't need to, and now everything is turning in me.*

[,,]

Q: *So you are saying that there has been no sale of the property.*

A: *No.*

CROSS-EXAMINATION BY MR GUY FERLEY

[..].

Q: *Your other relatives Aubrey, Kenneth, and your other children are not on good terms with Merna, yes or no?*

A: *Yes.*

Q: *And this is because you have transferred the land to Merna and they know about it now?*

A: **Yes no one knew about this agreement. I kept it as a secret and no one knew about it. For them to know, there must have been trouble cause, as I have kept this as a secret.**

Q: *So you accepted that you transfer the property to Merna and now because there is trouble in the family now you want to go back on the decision with it?*

A: *You know why, the defendant states that the land is solely for her and that they have nothing and she is going to remove them.*

Q: *This is why today you brought this case, because Merna, according to you is threatening to remove your other children?*

A: *Yes, because I do not have only her I have seven other children. **Now all my children have turn their back against me. Because***

I gave her and I did not told them anything. Now I found myself
in the middle just standing there." Emphasis supplied

11. In the light of the above interactions, we informed Counsel for the appellant that the appellant's evidence did not support her pleadings; she said that she gave the property to the respondent. It was also apparent ex facie the transfer that it was "*for no consideration*" (Exhibit P1). Moreover, no evidence was adduced before the learned trial Judge to the effect that the appellant had not received any consideration for the transfer. In the light of our observation, Counsel for the appellant conceded that the appellant had transferred the Property to the respondent without consideration. Therefore, the finding of the learned trial Judge that the transfer was effected without consideration was warranted by the evidence on record. It appears that the appellant wants the transfer to be declared null and void because of the family dispute. She admitted that, because she had given the Property to the respondent, all her children have turned against her.
12. We remark that Counsel must insist on being fully instructed before placing a plea of fraud on the record. Such a plea should never be drafted on insufficient material.
13. This is enough to dispose of this appeal.
14. In the circumstances, we dismiss the appeal, quash the orders made by the learned trial Judge and substitute therefor an order dismissing the plaint.

F. Robinson (J.A)

I concur:.

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M. Twomey (J.A)

I concur:.

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L. Tibatemwa-Ekirikubinza (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2019