

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A), M. Twomey (J.A), F. Robinson (J.A),]

Civil Appeal SCA 32/2017

(Appeal from Supreme Court Decision CS 46/2013)

PTD Limited

Appellant

Versus

Keven Zialor

Respondent

Heard: 05 December 2019

Counsel: Mr Hoareau for the Appellant

Mr Georges for the Respondent

Delivered: 17 December 2019

JUDGMENT

F. Robinson (J.A)

[1] This an appeal against the judgment of a trial Judge of the Supreme Court, who declined to grant a mandatory injunction compelling the respondent (the defendant then) to remove the two buildings from the land comprised in title no. PR344 at Anse Volbert, Praslin. The land comprised in title no. PR344 is hereinafter referred to as the "*Property*". The respondent resides in one of the buildings, and operates a business from the other.

[2] The trial Judge also declined the respondent's counterclaim of acquisitive prescription of twenty years, but found that the respondent had the right, which the trial Judge called a "*droit de superficie*", to occupy 700 sq m of the Property for residential purposes only, the "*droit de superficie*" to expire at the death of the respondent and his wife.

Proceedings in the Supreme Court

- [3] It was undisputed at trial that the appellant is the registered owner of the Property.
- [4] Paragraph 3 of the plaintiff's plaint claimed that the defendant, without its consent and authority, illegally built or caused to be built two buildings on the Property. The plaintiff at paragraph 4 of the plaint, submitted that it wanted the defendant to remove the two buildings from the Property.
- [5] The plaintiff contended that the illegal construction of the two buildings on the Property, by the defendant, has denied, and continues to deny, the plaintiff the right to fully enjoy the Property. The plaintiff sought damages against the defendant in the sum of SCR 1 000 000/- (one million rupees) for the loss of full enjoyment of the Property.
- [6] In its plaint the plaintiff also sought a writ of mandatory injunction compelling the defendant to remove the two buildings from the Property and "*[a]ny order the court deemed just and necessary in the circumstances of the case*".
- [7] The defendant denied the plaintiff's claims. At paragraph 3 of the defence the defendant claimed that he had been in occupation and possession of the Property for more than twenty years, and that during the said period of twenty years the defendant's possession of the Property has been continuous and uninterrupted, peaceful, public, unequivocal, and that the defendant has acted in the capacity of owner of the Property. The defendant also denied that the plaintiff is entitled to the damages claimed.
- [8] The defendant averred that, because he had been in occupation and possession of the property for more than twenty years, acquisitive prescription applies and as such he acquired the right of ownership in the Property.
- [9] In his defence and counterclaim, the defendant prayed for the following orders —
- (a) that the plaint be dismissed;
 - (b) that the defendant is the sole owner of the Property;
 - (c) that the plaintiff pays the costs to the respondent;

(d) any "such other order that the court deems fit in the circumstances".

- [10] The plaintiff, in its defence to the counterclaim, denied every averment contained in paragraphs 1 to 6 of the counterclaim. In response to the defendant's claim relating to acquisitive prescription, the plaintiff contended that, *"the Defendant has not been in occupation and possession of the property for more than 20 years, and/or further that any possession of the Defendant has not been continuous, uninterrupted, peaceful, public, unequivocal and/or the Defendant did not act in the capacity as the owner of the Property"*.
- [11] Counsel for the plaintiff in his final submissions, contended that the defendant illegally built or caused to be built the two buildings on the Property, and that the plaintiff wanted the defendant to remove the two buildings from the Property, pursuant to Article 555 *alinéa 2* of the Civil Code of Seychelles.
- [12] In support of the contention of Counsel for the plaintiff that the plaintiff has proven its case on a balance of probabilities, Counsel contended that the plaintiff has proven that it is the registered proprietor of the Property, and that the defendant has illegally constructed the two buildings on the Property. In addition, Counsel argued that the evidence of the defendant confirmed that he did not have the consent of the plaintiff to construct the two buildings on the Property.
- [13] Counsel for the plaintiff also contended that the defendant had the burden of proving that he has acquired the portion of the Property on which he has constructed the two buildings. Counsel for the plaintiff argued that the defendant, who has only pleaded acquisitive prescription, on the basis of Article 2262 of the Civil Code of Seychelles, had not proven on a balance of probabilities that he acquired the portion of the Property on which he has constructed the two buildings by acquisitive prescription.
- [14] In order to establish acquisitive prescription, Counsel for the plaintiff contended that the defendant had to prove that he was, prior to 30 August 1993, in undisturbed possession of the portion of the Property on which he has constructed the two buildings. Further, Counsel submitted that, even if it were to be accepted that the defendant took possession

of the Property and began construction of the two buildings, this only occurred in 1995. The defendant would, therefore, not be able to establish acquisitive prescription because, in terms of the Civil Code of Seychelles, the running of prescription was interrupted in 2013, before the passage of the required twenty years.

[15] Counsel for the plaintiff also contended that the defendant has only pleaded that he has been in occupation of the portion of the Property for more than twenty years, and had not pleaded any material facts to the effect that the construction was effected in good faith. In that respect Counsel for the plaintiff contended that section 75 of the Seychelles Code of Civil Procedure applies.

[16] On the other hand, Mrs Aglae, Counsel for the defendant, submitted that the defendant has pleaded that he has been in occupation of the portion of the Property for more than twenty years, and meets the requirements for acquisitive prescription in terms of Article 2262 of the Civil Code of Seychelles. Mrs Aglae argued that the plaintiff had failed to prove its case and establish acquisitive prescription of twenty years. Counsel also contended that, because the respondent has been living on the Property, his prayers, contained in the defence and counterclaim, should be granted.

[17] The trial Judge, at paragraph 16 of the judgment, identified the following issues for determination —

"16 (a) Has the Defendant been in continuous, uninterrupted, peaceful, public and unequivocal occupation and possession of the property for more than twenty years, and that he acted as owner thereof?"

(b) Is the Defendant entitled to be declared as the sole owner of the property in issue?"

(c) Is the Plaintiff entitled to a writ of injunction and award of damages?"

[18] With respect to issues (a) and (b), the trial Judge found that the defendant had proven that he had been in continuous and uninterrupted, peaceful, public, unequivocal possession of *"that part of the property"*, and acted in the capacity of owner since 1995 when he began construction of the house on *"that part of the property"*. Thus, in the view of the trial

Judge, the defendant met the requirements of Article 2262 of the Civil Code of Seychelles, read with Article 2229 of the said Code.

- [19] The trial Judge also found that the defendant acted in good faith under the belief that he was occupying property that had been allocated to him by Mrs Jenny Pomeroy, who indicated to the respondent that she owned the adjoining land at the time of authorising him to build his house on "*that part of the property*". The trial Judge opined that good faith need not necessarily be pleaded if it is manifest from the evidence, particularly when bad faith is not pleaded.
- [20] The trial Judge also found that the appellant's representative had knowledge of the building and occupation of the portion of the Property by the defendant, yet failed to object to the construction and occupation. Reiterating that the occupation was uninterrupted since 1995, the trial Judge found that this period may be interrupted legally, which in this case happened, following the entering of the plaint, on the 21 June 2013, which was served on the defendant on the 18 October 2013. In the trial Judge's calculation, the occupation, by the respondent, amounted to eighteen years and six months, which is a shorter period than the twenty years required under Article 2262 of the Civil Code of Seychelles. The trial Judge, therefore, rejected the defendant's claim for acquisitive prescription.
- [21] With respect to issue (c), the trial Judge, nevertheless, refused to grant the plaintiff's injunction. He took several factors into account, including: evidence that the defendant and his family had been living on the Property since 1995; evidence that the defendant incurred costs in backfilling the portion of the Property and in constructing the house; the fact that the defendant and his wife, both at an advanced age, would suffer great hardship if relocated – outweighing any hardship the plaintiff may suffer; and evidence that the plaintiff waited eighteen years before attempting to remove the defendant. In the end, the trial Judge held that the defendant and his wife had established a non-transferrable "*droit de superficie*". This was restricted to only the 700 sq m on which the dwelling was built. He made no order regarding costs.
- [22] It is these findings and orders that the appellant now appeals.

The grounds of appeal

[23] The appellant has challenged the judgment on six grounds —

- "1. *The learned trial Judge erred in law and on the evidence in granting the respondent a droit de superficie on parcel PR344 in that:*
 - (i) *the defence of the respondent did not contain any pleadings in respect of the issue of droit de superficie;*
 - (ii) *the decision cannot be supported by the evidence;*
 - (iii) *the decision is contrary to the evidence adduced before the trial court; and*
 - (iv) *the decision was ultra petita as the respondent did not pray for a droit de superficie'.*
2. *The learned trial Judge erred in law in holding that the respondent built the house on parcel PR344 in good faith in that:*
 - (i) *the defence of the respondent did not contain any pleadings in respect of the issue of good faith;*
 - (ii) *the decision cannot be supported by the evidence;*
 - (iii) *the decision is contrary to the evidence adduced before the trial court.*
3. *The learned trial Judge erred in law and on the evidence in holding that the appellant or its representative knew and saw the construction of the respondent's structure and occupation thereof, but the appellant never raised any objection or protest, in that:*
 - (i) *the defence of the respondent did not contain any pleadings that the appellant had knowledge that the construction was on parcel PR344 at the time of construction or the appellant consented to the construction on parcel PR344;*
 - (ii) *the decision cannot be supported by the evidence; and*
 - (iii) *the decision is contrary to the evidence adduced before the trial court.*
4. *The learned trial judge erred in law and on the evidence in taking into account the balance of hardship in refusing to grant the mandatory injunction to evict the respondent in that:*

- (i) *the defence of the respondent did not contain any pleadings in respect of the issue of balance of hardship;*
 - (ii) *the decision cannot be supported by the evidence; and*
 - (iii) *the decision is contrary to the evidence adduced before the trial court; and/or*
 - (iv) *balance of hardship is not a factor to be considered in respect of the granting of a permanent or perpetual injunction.*
5. *The learned trial judge breached the appellant's right to a fair hearing – as protected by Art 19(7) of the Constitution – in basing his decision on the “droit de superficie” as –*
- (i) *it was not live and relevant issue at the trial;*
 - (ii) *the learned trial judge did not indicate to the appellant that it was an issue he would be considering;*
 - (iii) *the appellant was not granted the opportunity to address the learned trial judge on the said issue.*
6. *The learned trial judge erred in law and on the evidence in failing to hold that the respondent was not a credible witness”.*

[24] The written submissions offered on behalf of the appellant abandoned ground 6 of the grounds of appeal.

The relevant evidence

The evidence of Mr. Ferrari

[25] Mr. Lionel Ferrari, who is a French national, lives at Souyave Estate on Praslin. He is the general manager of Paradise Sun Hotel located at Anse Volbert, Cote D’Or, Praslin. He has occupied this post for less than four years. His appointment as the general agent of the appellant is undisputed.

[26] He testified that the respondent lives in a house situated on the Property; that the respondent has some other buildings on the Property; that the appellant did not grant permission and authorisation to the respondent to build any building on the Property; that the appellant has lodged this case because it wants the respondent to be evicted from the

Property; and that the appellant will not pursue its claim for damages against the respondent.

[27] When cross-examined, Mr. Ferrari stated that, when he was appointed as the general manager of the Paradise Sun Hotel, the respondent was already in occupation of the Property, but he did not know for how long the respondent has been in such occupation. He did not know of the date of purchase of the Property, but he knew that the Property had been purchased more than twenty years ago by the appellant.

[28] Mr. Ferrari described the location of the house of the respondent in terms of its distance from the Paradise Sun Hotel. He stated that the house is situated "*right in front*" of a public road, and that the said public road is situated between the appellant's house and the Paradise Sun Hotel.

[29] When re-examined, Mr. Ferrari stated that he did not know if the respondent has occupied the portion of the Property for more than twenty years.

The evidence of Mr. Fred Hoareau

[30] Mr. Fred Hoareau is the Deputy Land Registrar. He testified that the appellant owns the Property; that the Property was transferred to Paradise Tourist Development Proprietary Limited in 1974; that the Property was registered under the Land Registration Act in 1992; and that in 1992, the ownership of the Property was changed from Paradise Tourist Development Limited to PTD Limited, the new name of the company.

The evidence of Mr. Godfrey Hetimier

[31] Mr. Godfrey Hetimier, who is a resident of Anse La Blague, Praslin, was employed as a barman by the Paradise Sun Hotel from 1988 to 1996 when he resigned (but returned in 2006). Evidence tendered showed that Mr. Hetimier who worked on the Property, knew the respondent professionally and personally and was familiar with the Property in question.

[32] Mr Hetimier testified that the respondent's house is not far from where the Paradise Sun Hotel is located. At the time of leaving his job with the Paradise Sun Hotel in 1996, Mr Hetimier testified that the respondent's house and small food outlet had not been built on

the Property. He added that the area, where the respondent had built his house and the small food outlet, was previously overgrown with plants. In 1996, while he and the respondent were working at the Berjaya Praslin Beach Hotel, the respondent was staying at Moulinie Hironnelle Guest House with his mother, Isabelle Zialor and his wife. In 2006, when he worked with the respondent, at the Paradise Sun Hotel, the house had been built.

- [33] When cross-examined, he reiterated that, in 1988, he worked at the Paradise Sun Hotel. He worked at the said hotel for eight years. He explained that, in 1986, he worked in construction. When asked by Counsel, *"if all the witness come here and deponed that is to say that Zialor was in occupation of the house he is now occupying in 1989, what would you say"*, his response was that the respondent was not there in 1989. When he left the Paradise Sun Hotel in 1996, there was no building belonging to the respondent on the Property. He clarified that the respondent was on the Property either in mid-1997 or in early 1998.

The respondent on his personal answers

- [34] Mr. Keven Zialor, the respondent, was called on to provide his personal answers. The respondent stated that he has been living on Praslin for more than forty years. His mother lives on Praslin. In 1996, he was working at La Reserve Hotel. He could not remember the year he worked at the Berjaya Praslin Beach Hotel because it was a long time ago. He remembered he worked at La Reserve Hotel in 1996, because he had to look up the correct information in relation to this case. He worked at the Berjaya Praslin Beach Hotel before, but denied that he worked at the Berjaya Praslin Beach Hotel in 1996. When, further, pressed by Counsel that he was working at the Berjaya Praslin Beach Hotel in 1996, he answered, *"maybe yes or maybe no but I cannot recall"*.
- [35] He had learnt *"at the last minute"* that he had built his house and a small shop from which he sells soft drinks, on the parcel of land that, in fact, belongs to the appellant as result of coming to court. He built a small house in 1992, which he later extended. He denied the suggestion of Counsel that he had built the shop seven years ago. He built the shop when he left his employment with the Paradise Sun Hotel, where he worked for seven years. He

started working at the Paradise Sun Hotel for the first time on the 13 January 2003. The second time he worked at the Paradise Sun Hotel was after he had left La Reserve Hotel. He stopped working at the Paradise Sun Hotel on the 18 March 2010. After 2010, he backfilled a portion of the Property, where he built the shop.

[36] The respondent stated that he could not remember which month of 1992, he built the house. He stated that the Town and Country Planning Authority granted him permission to build the house, however the grant of permission is lost.

[37] The respondent instructed his Counsel about the time he had built the house. When asked by Counsel, "[h]ow come that your lawyer put to the last witness who was here Mr. Godfrey Hetimier and said "If all the witness came here and deponed that is to say that Zialor was in occupation of the house he is now occupying since 1989, what would you say?", his response was, "Mr. Godfrey will not know about my life he doesn't know and follow me to know what I do he just know me as a colleague". He was adamant that he had not instructed his Counsel that he had built the house on the Property in 1989.

[38] The respondent then explained the circumstances under which he came to build his house on the Property. We find it appropriate to record the interaction below —

"Q: Under what circumstances did you come to build that house on that parcel of land?

A: This small portion of land that Mrs Pomeroy gave me it is my mistake that this house got there she told me Keven this is my land you can built your house there.

Q: So you are saying that where you built your house it was Mrs Pomeroy who showed you were to build, yes or no?

A: I cannot say yes let me explain. When Mrs Pomeroy gave me that portion and told me to build my house here then she told me we will survey the land and we will get the deed and when she gave that portion of land I saw that there was a marsh there in the front so I built my house there at the front near the marsh and I thought that this portion belonged to Mrs Pomeroy.

Q: Did you build your house at the place where Mrs Pomeroy show to you and told you it was hers?

A: I made a mistake and place my house we had not surveyed the land

yet.

Q: You told the court that you did not build your house at the location which was shown to you by Mrs Pomeroy, yes or no?

A: The land had not been surveyed.

Q: Mrs Pomeroy shows you a location as to where to build the house, yes or no?

A: No.

Q: Did you build your house at that location shown to you by Mrs Pomeroy, yes or no?

A: Yes.

Q: You build your house at the exact location where Mrs Pomeroy showed to you and told you that you could build your house, right?

A: Yes

Q: But I thought earlier you were saying you did not do that you build it a little bit further in front?

A: It's the part of the business which is situated on the marsh".

[39] The respondent was, further, extensively examined in relation to the date he had built his house on the Property. We observe that the respondent's answers were all over the place, confusing and contradictory. The respondent appeared to have no knowledge about where he was working when he was told by Mrs Pomeroy that he could build a house on her land. However, his testimony was suggestive that Mrs Pomeroy had given him the land to build his house in 1992. He reiterated that Mrs Pomeroy showed him personally where to build his house. He denied the suggestion of Counsel that he had built the house in the late 1990's from about 1998 onward.

[40] When cross-examined, the respondent stated that he was in occupation of the land in 1992, and that everyone took him as the owner of the land because everyone has always seen him there. He only learnt very recently that the land belonged to the Paradise Sun Hotel, and that for over twenty years no one from the Paradise Sun Hotel approached him about this land. In addition, during the seven years that he worked at the Paradise Sun Hotel, no one approached him to claim the land.

[41] His mother and his father-in-law worked for Mrs Pomeroy. Mrs Pomeroy showed him the place where he has built his house. The respondent was adamant that he had been in occupation of the Property since 1992, and started building his house on the Property in 1992.

[42] When re-examined, he stated that Mrs Pomeroy told him to build his house where he had built it. Upon the suggestion of Counsel that, "[a]s a matter of fact you have admitted although you have changed now to the effect that you did not build at the location shown to you by Mrs Pomeroy rather you build on another location", his response was, "[l]ike I said the land had not been surveyed so I built it there". He denied the suggestion of Counsel that he commenced construction of the house around 1998. He reiterated that he commenced construction of the house in 1992.

The evidence of Mr. Yvon Fostel

[43] Mr. Fostel has been a land surveyor for the past 20 years. In 2011, he relocated the beacons of the Property at the request of the general manager of the Paradise Sun Hotel. He was asked to ascertain whether or not two buildings had encroached on the Property. His report (Exhibit P7) stated that the encroachment is within the Property. The encroachment is approximately 700 sq m.

[44] When cross-examined, he stated that, according to the report, in 2011, there were two separate structures. He denied the suggestion of Counsel that the shop is attached to the house. He reported that there is a public road located between the house and the hotel.

[45] When re-examined, Mr. Fostel stated that the house and the shop are close to the road, and that the encroachment is prime land. When he conducted the survey in 2011, there were two separate buildings on the Property, namely a house and a shop.

The evidence of Mr. Linton Delanie

[46] Mr. Delanie resides in Dubai. He knows the appellant. He is employed with the "Tohaussen Group" which has owned the appellant since the 1980s.

- [47] When he worked in Seychelles, he was permanently based at the Equator hotel. The group had three hotels, namely, the Equator, the Paradise Sun Hotel and the Auberge Club des Seychelles. He was the regional financial controller.
- [48] He went to the Paradise Sun Hotel once a month. He knows the respondent who was an employee of Paradise Sun Hotel. He first came across the respondent in the early 2000, when the respondent was employed by the Paradise Sun Hotel.
- [49] He does not recall the house of the respondent being situated on the Property in November 1993 to mid-1995, when he worked at the Paradise Sun Hotel. He became aware of the respondent's house, when the respondent's duty involved picking up certain staff early in the morning because the respondent lived near to the Paradise Sun Hotel.
- [50] When cross-examined, he stated that he came to know of the respondent during his employment with the Paradise Sun Hotel, but he could not be specific about when. He stated that it must have been in the early part of the year 2000.
- [51] When re-examined, he reiterated that he became aware of the respondent's house when the respondent's duty involved picking up certain staff early in the morning, and that the respondent did this job in the later part of the respondent's employment with Paradise Sun. He came to know that the house was actually built on the Property after a survey was done. He reiterated that in mid-1993 to November 1995, when he was going to Praslin, he did not see the house or any structure where the house of the appellant is presently located.

The evidence of Mr. Keven Zialor

- [52] The respondent testified that he did not build his house on the land showed to him by Mrs Pomeroy. He built his house near a marsh. He was then informed by the appellant that the land belonged to it. Had he known that the land belonged to the appellant, he would not have built his house on it. He stated that there was a possibility that Mrs Pomeroy did not know that the land, which she had given to him to build his house on, did not belong to her, because the land had not been surveyed at the time.

- [53] Nobody from the Paradise Sun Hotel had approached him with regard to the house, at the time that he was building it. He added that, during the time that he worked at the Paradise Sun Hotel, nobody told him that the land belonged to the Paradise Sun Hotel. He came to know only when this case was filed.
- [54] He stated that he obtained the land in 1996, when he worked at La Reserve Hotel. He started to build his house in 1995. It appears that he did not obtain Town and Country Planning Authority permission to build his house. He gave a sketch plan of the house to the district office, at Baie Ste Anne, which told him to go ahead with construction. After building the house, he started a small business selling fruits and juice. He gave up the business when the appellant told him the land belonged to it.
- [55] When cross-examined, the respondent stated that he started to build his house in 1995. So when it was put to him by Counsel that he had, *"said that [he] received that parcel of land from Mrs Pomeroy in 1996"*, his response was, *"I made a mistake"*. He then agreed to the suggestion of Counsel that he commenced construction of his house in 1995, and that he moved in his house in 1996. He also agreed with the suggestion of Counsel that he was permitted by Mrs Pomeroy to construct the house on the land in 1995.

The evidence of Mrs Kathleen Zialor

- [56] Mrs Zialor is the wife of the respondent. They have lived at Anse Volbert Cote D'Or for twenty-one years. She was there when the house was constructed. Mrs Pomeroy gave her husband the land as a wedding gift.
- [57] Since the construction of the Paradise Sun Hotel, they have had no notice or letters from the Paradise Sun Hotel with regard to the house.
- [58] When cross-examined, she reiterated that she had been living at Cote D'Or since 1996. The respondent took possession of the land in 1995. The construction started in 1995 and was completed in 1996. She could not remember the exact portion of the Property which was gifted to the respondent.

The evidence of Mr. Robert Athanase

[59] Mr. Athanase has been a police officer for several years. He knows that the respondent has lived at Paradise Sun at Cote D'Or for twenty to twenty-one years. Mr. Athanase had worked at Paradise Sun Hotel as a security officer. The respondent constructed his house at about 1995.

The evidence of Mr. Paul Lepathy

[60] Mr. Lepathy who is a police officer lives at Grand Anse Praslin. He knows the respondent, whom he helped to build his house at Cote D'Or, in 1996, twenty-one years ago.

[61] When re-examined, Mr. Lepathy stated that the house was constructed in 1995.

The appeal

Grounds 1, 2, 3, 4 and 5 of the grounds of appeal

A summary of the appellant's and respondent's contentions

[62] Grounds 1, 2, 3, 4 and 5 of the grounds of appeal, which address the issues of pleadings and the evidence, raise the following issues for consideration - whether or not the trial Judge —

- (a) erred in law and on the evidence in granting the respondent a "*droit de superficie*" over the appellant's land and the decision was *ultra petita* as the respondent did not pray for a "*droit de superficie*";
- (b) erred in law in holding that the respondent built the house on the Property in good faith;
- (c) erred in law and on the evidence in holding that the appellant or its representative knew and saw the construction of the respondent's structure and occupation thereof and never raised any objection;

- (d) erred in law and on the evidence in taking into account the balance of hardship in refusing to grant the mandatory injunction to evict the respondent;
- (e) breached the appellant's right to a fair hearing in basing his decision on the "*droit de superficie*" despite it not being raised by the respondent.

[63] In relation to the pleadings, the appellant contended that the effect of paragraphs 3 and 7 of the defence and counterclaim is clear. The respondent averred that he had been the owner of the portion of land on which he had built, by virtue of having acquired the said portion of land by acquisitive prescription of twenty years.

[64] The appellant contended that neither the defence nor the counterclaim contained any pleadings to the effect that —

- (a) the respondent had acquired title to the portion of land for value and in good faith; or
- (b) the respondent had acquired a "*droit de superficie*" on the portion of land by acquisitive prescription of ten years.

Rather the defence and counterclaim averred that the respondent had become owner of the portion of land by acquisitive prescription of twenty years.

[65] Further, in the defence to counterclaim, in order to meet the claim that the respondent had become owner of the portion of land by prescription of twenty years, the appellant averred that the respondent had, "*not been in occupation and possession of the property for more than twenty years, and/or further that any possession of the defendant has not been continuous, uninterrupted, peaceful, public unequivocal and/or the defendant did not act in the capacity as the owner of the said property.*" In that regard, Counsel for the appellant contended that there was no necessity to plead, as part of the defence to the counterclaim, the fact that the respondent had not acquired title to the portion of land for value, and that the respondent had acted in bad faith, in view of the fact that the defence

and counterclaim had not pleaded the issues of ten-year prescription, value and good faith.

[66] Further, Counsel for the appellant contended that jurisprudence has recognised the acquisition of a "*droit de superficie*" by prescription only in respect of structures or objects, *i.e.*, when the right of possession has been exercised over a period of time in respect of such structures and objects. He argued that when the evidence of the respondent is considered in its entirety, it is obvious that the respondent is claiming to have acted as the owner of the portion of land and not as a person who merely had a "*droit de superficie*".

[67] Counsel also contended that the respondent has not pleaded on appeal a ten-year acquisitive prescription of a "*droit de superficie*", but it is the respondent's case that the pleadings in his defence and counterclaim allowed him to make a claim for such a prescription. Counsel for the appellant contended that the Civil Code of Seychelles requires that prescription is pleaded in order for the court to be able to rely on it.

[68] In the light of his submissions, Counsel for the appellant contended that the trial Judge could not grant a relief or remedy not supported or based on the pleadings which is required under sections 71 (d) and 75 of the Seychelles Code of Civil Procedure. He contended that, because the respondent had not sought any relief from the court to the effect that he had a "*droit de superficie*", the determination by the trial Judge that the respondent had a "*droit de superficie*" over the portion of the Property was *ultra petita*.

[69] With regard to the contention of Counsel for the respondent that the respondent has acquired an overriding interest over the land which he occupies, by virtue of section 25 (g)¹ of the Land Registration Act, Counsel for the appellant contended that the respondent's submission misinterpreted that said provision.

¹ "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;

[...]."

- [70] With regard to the evidence tendered by the respondent, the appellant contended that it did not bring the respondent within the ambit of Article 2265 of the Civil Code of Seychelles.
- [71] On the other hand, Counsel for the respondent conceded that the trial Judge was unquestionably correct in denying the respondent's relief on the counterclaim because the evidence showed that he had occupied the land for less than twenty years.
- [72] He also conceded that the respondent's pleadings were restricted to the twenty-year acquisitive prescription and made no mention of a "*droit de superficie*". He submitted that jurisprudence in force prohibits the court from making a case for a party based on the evidence adduced when the case had not been pleaded. In this regard he accepted *Maria Adonis v William Celeste* (Civil Appeal SCA 28/2016) [2019] SCCA 32 (23 August 2019), which reaffirmed the principle that in our system, every pleading must contain all the material facts on which a party relies for his claim or defence as good law.
- [73] Nonetheless, the respondent urged this Court to find that any relief arising from facts led and found proved by the trial Judge could have been granted on the grounds that —
- (a) the pleadings were sufficiently wide to encompass the relief granted; and
 - (b) the evidence led and accepted supported the grant of the relief, or would have sufficiently served to grant the respondent other similar relief.
- [74] In that regard, Counsel for the respondent contended that, if the trial Judge had found that the facts supported the "*droit de superficie*", he could have declared that the respondent had established that right over the appellant's land. In the view of Counsel for the respondent, this is because a "*droit de superficie*" is a right emanating from Article 555 of the Civil Code of Seychelles, and because the appellant itself had asked the trial court to make any order it found just and necessary in the circumstances. Counsel added that a similar prayer was sought by the respondent in his statement of defence.
- [75] Counsel for the respondent also contended that, whether or not the respondent has acquired a "*droit de superficie*" over the appellant's land, he has acquired an overriding

interest over the land which he occupies by virtue of section 25 (g) of the Land Registration Act, for being in actual occupation or possession of the land in a capacity other than that of a squatter.

[76] In regard to the evidence, Counsel contended that the only way that the respondent could have acquired a "*droit de superficie*" over the land of the appellant would have been by prescription, and that, as found by the learned trial Judge, the respondent could thus only have acquired it under Article 2265 of the Civil Code of Seychelles. In support of the submission that the respondent has put in a case for acquisition of a *droit de superficie*, in terms of the ten-year prescription, Counsel contended that the respondent had established that he had (i) acquired title, (ii) for value, and (iii) in good faith as stipulated under Article 2265 of the Civil Code of Seychelles.

Analysis

[77] Before proceeding to consider the submissions, it is necessary to consider the relevant law.

[78] Section 71 of the Seychelles Code of Civil Procedure stipulates —

"71. The plaint must contain the following particulars:—

- (a) the name of the court in which the suit is brought;*
- (b) the name, description and place of residence of the plaintiff;*
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;*
- (d) **a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action;***
- (e) a demand of the relief which the plaintiff claims;*
- (f) if the plaintiff has allowed a set off or has relinquished a portion of his claim, the amount so allowed or relinquished".*

Emphasis supplied

[79] Section 75 of the Seychelles Code of Civil Procedure stipulates —

"75. The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted". Emphasis supplied

[80] Articles 551, 552, 553 and 555 of the Civil Code of Seychelles stipulate —

"Article 551. Anything that becomes united and incorporated with another thing shall belong to the owner in accordance with the rules established below.

Article 552 1. Ownership of the soil carries with it the ownership of what is above and what is below it. The owner may plant upon it any plants and may build any structures which he deems proper, with the exceptions established in the Title Easements or Real Rights over Land other than Ownership; subject also to any law relating to mines and to the security of Seychelles.

2. He may build on it any structure and may make any excavations which he will deem opportune and may take from these excavations any produce that it can yield.

3. These provisions shall not be construed to permit an owner to extract any minerals in, under or upon land or in rivers or streams, nor shall it be construed to allow an owner to search, prospect or acquire any rights whatsoever relating to petroleum existing in its natural condition in strata in or under any part of Seychelles. All such minerals and petroleum shall vest in the Republic. Matters dealt with in this article shall be subject to such laws as shall from time to time apply.

Article 553. All buildings, plantations and works on land or under the ground shall be presumed to have been made by the owner at his own cost and to belong to him unless there is evidence to the contrary; this rule shall not affect the rights of ownership that a third party may have acquired or may acquire by prescription, whether of a basement under a building in the ownership of another or of any other part of the building.

[...].

Article 555 1. When plants are planted, structures erected, and works carried out by a third party with materials belonging to such party, the owner of land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them.

2. If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of land.

3. If the owner elects to preserve the structures, plants and works, he must reimburse the third party in a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of such reimbursement, after taking into account the present conditions of such structures, plants and works.

4. If plants were planted, structures erected and works carried out by a third party who has been evicted but not condemned, owing to his good faith, to the return of the produce, the owner may not demand the removal of such works, structures and plants, but he shall have the option to reimburse the third party by payment of either of the sums provided for by the previous paragraphs.

5. Where an owner, who is subject to a condition subsequent, has caused plants to be planted, structures erected and works carried out, he shall be presumed to have acted in good faith, unless he actually knew when such acts were performed that the events, which was the subject of the condition, had already occurred. This rule shall not apply to a usufructuary or a tenant unless specific permission to plant, erect or construct had been given by the owner". Emphasis supplied

[81] Article 2262 of the Civil Code of Seychelles stipulates —

"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".

[82] Article 2265 of the Civil Code of Seychelles stipulates —

"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".

[83] In *Civil Construction Company Limited v Leon & Others* SCA 36/2016 [2018] SCCA 33 (14 December 2018), Twomey, JA, delivering the majority opinion of the Court of Appeal, opined —

"[t]hat Civil Code is 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".

[84] Counsel for the respondent conceded that the respondent's defence did not contain any pleadings in respect of the issue of a "*droit de superficie*". Nonetheless, he argued that the pleadings of the appellant were sufficiently wide to allow the trial Judge to make the findings and grant the relief he did. In the view of Counsel for the respondent, this is because Article 555 of the Civil Code of Seychelles is the "*foundational article of a 'droit de superficie'*". Counsel for the respondent went on to submit that, in the determination of a right which could come into existence under Article 555 of the Civil Code of Seychelles, a trial court - especially one specifically enjoined by the appellant to make any order it deemed just and necessary in the circumstances of the case - could grant any relief contained within a legal provision under Article 555 and borne out by the evidence.

[85] Counsel for the respondent even suggested that there was a clear absence of any specific pleading in the plaint as to the particular paragraph of this long Article 555 (which contains numerous alternative options), to strengthen his position. He referred to paragraph 11 of the appellant's Skeleton Heads of Arguments, to make the point that, "*the Plaint was brought, as admitted by the Appellant's Counsel in final submissions (at page G1 of the brief), in terms of Article 555*". It is not clear why Counsel would make such a submission and in this Court's view, Counsel is clearly misguided on this point.

[86] We reiterate that the allegations in every pleading must be, "*(i) Material. (ii) Certain*"².
With regard to materiality —

"[t]he fundamental rule of our present system of pleading is this: "Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be brief as the nature of the case admits" Order 18, r. 7 (I.)

This rule involves and requires four separate things:

² Odgers on Pleading And Practice Nineteenth Edition by G.F. HARWOOD & B.A HARWOOD at p. 80

- (i) *Every pleading must state facts and not law.*
- (ii) *It must state material facts and material facts only.*
- (iii) *It must state facts and not the evidence by which they are to be proved.*
- (iv) *It must state such facts concisely in a summary form³.*

"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 the defence. See Monthy v Seychelles Licensing Authority & Another (SCA 37/2016) [2018] SCCA 44, which referred to Order 18, r. 7 (1) for guidance. Order 18, r. 7 (1) is essentially similar to section 71 (d) of the Seychelles Code of Civil Procedure. See also Maria Adonis supra.

[87] In the light of the principles stated at paragraph 86 hereof, it is clear, as stated by Counsel for the appellant, that the pleadings set out in paragraphs 3 and 4 of the plaint and the relief prayed for at prayer (i) of the plaint, clearly showed that the appellant had based its claim on *alinéa 2* of Article 555 of the Civil Code of Seychelles. Further, we note that Counsel for the appellant has submitted in his final submissions (at page G1 of the brief), that, *"the Plaintiff's cause of action is based on paragraph 2 of Article 555 of the Civil Code"*.

[88] Thus, we identify the issue to be whether or not *alinéa 2* of Article 555 of the Civil Code of Seychelles is the foundational provision of the *"droit de superficie"*, which issue we consider first.

[89] On appeal, Counsel for the respondent submitted fervently that Article 555 of the Civil Code of Seychelles is the foundational Article of the *"droit de superficie"*. We note with dismay that Counsel for the respondent could not refer this Court to any doctrinal writing or jurisprudence or both in support of his contention. On the other hand, Counsel for the appellant contended that the *"droit de superficie"* has been established by jurisprudence

³ *Ibid* at p. 81

by way of rebuttal of the presumption raised by Article 553 of the Civil Code of Seychelles.

[90] It is undisputed that the concept of "*droit de superficie*" does not appear in the Civil Code of Seychelles. It is also undisputed that the "*droit de superficie*" has been established by jurisprudence⁴.

[91] The Court of Civil Appeal of Mauritius in the persuasive authority of *Purbhoo Vishwanee D. v Purbhoo Vishnu Dutt* 2019 SCJ 83 [Court of Civil Appeal of Mauritius], cited the following extract from the online version of JurisClasseur Construction – Urbanisme, Fasc. 251-30: LE DROIT DE SUPERFICIE, which defines the "*droit de superficie*" —

"1. – Définition – Le droit de superficie correspondant à un découpage de la propriété entre, d'une part, le tréfonds, et, d'autre part, le sol et les plantations, ouvrages et bâtiments qui s'y trouvent, voire entre le tréfonds et le sol, d'une part, et ce qui se situe sur le sol, d'autre part. La propriété du tréfonds et celle de la superficie y sont attribuées à des titulaires différents. Le droit de superficie constitue une dérogation au principe de l'accession posé par l'article 552 du Code civil selon lequel le propriétaire du sol est propriétaire du dessus et du dessous. La règle trouve sans doute son expression la plus marquée dans les articles 553 et suivants du Code civil. Aux termes de l'article 553, on peut acquérir par prescription, et à plus forte raison par convention ou disposition, la propriété d'une cave, d'une construction ou d'une plantation sur le sol d'autrui. Le droit de superficie est un droit de propriété qui porte sur tout ce qui s'élève au-dessus du sol, des bâtiments, plantations, ouvrages situés sur le fonds d'autrui. Il existe ainsi sur un même fonds deux droits superposés: un droit de superficie et un droit de tréfonds. Ce droit dédouble la propriété, en une propriété de la surface et une autre du dessous. Il se distingue des démembrements de la propriété, tels que l'usufruit ou la servitude qui ne confèrent qu'une partie des prérogatives attachées à la propriété. La superficie est une dissociation dans l'espace de la propriété, dont la convention seule en fixe l'étendue et la durée. Il peut être plus ou moins étendu car il peut porter sur la surface totale du terrain et tous les objets qui y sont établis, soit sur des objets qui n'occupent qu'une partie du terrain. Le droit de superficie peut également être limité dans sa durée. Il peut être perpétuel comme tout

⁴ "Art. 552. [...]. 1. La présomption d'après laquelle la propriété du dessus et du dessous n'est qu'une présomption simple, juris antum, susceptible de s'effacer devant la preuve contraire résultant d'un titre ou de la prescription. – Civ. 14 nov. 1888, D. P. 89. 1. 400. – Req. 8 nov. 1911. D. P. 1912. 1. 484. – Il en résulte que le propriétaire du sol peut renoncer à la propriété présumée du sous-sol. – Grenoble, 23 juin 1891, D. P. 92. 2. 309. Mais la présomption ne peut être renversée, et la propriété du sous-sol n'emporte pas présomption légale de la propriété du sol. – Req. 24 juin 1941, D. A. 1941. 293". PETITS CODES DALLOZ CODE CIVIL SOIXANTE-QUATORZIÈME ÉDITION 1974-1975

droit de propriété, mais sa durée est généralement liée à celle d'une convention. Le droit de superficie s'applique aux ouvrages, constructions, plantations situées sur le terrain. Mais la séparation entre la propriété du superficiaire et celle du tréfoncier correspond rarement à la surface du sol. Dans le cas d'un immeuble, par exemple, il s'agira généralement de la limite inférieure du sous-sol constitué d'ouvrages souterrains, tels que les parkings. Le droit du superficiaire peut totalement porter sur un ouvrage souterrain tel qu'un tunnel. Le superficiaire est celui qui est titulaire d'un droit de propriété sur les superficies ou le sous-sol. On l'oppose au tréfoncier qui est propriétaire du reste du fonds". Emphasis supplied

[92] In *de Silva v Bacarie* (1978-1982) SCAR 45, the Appellate Court stated, "[a] *"droit de superficie"* is a real right severed from the right of ownership of land and conferred on a party other than the owner of the land to enjoy and dispose of the things – constructions, plantations and works of all kinds – rising above the surface of the land".

[93] We have also identified a Supreme Court of Mauritius case, *Mr. & Mrs Radha Jugoo v William Lacharmante* 1996 SCJ 299 1996 MR 161, which in citing the definition of the *"droit de superficie"* found in *Planiol Traité de Droit Civil* 5th Edition, Volume 1, at para 3089, stated —

*"[t]he "droit de superficie" which is a derogation from the principle of "accession" to a land of all additions to that land must be established by the party who claims to have that right. **Indeed article 553⁵ of the Code Napoléon which sets the principle of "droit d'accession" contains the following rider: "si le contraire n'est prouvé"**.* Emphasis supplied

[94] *Planiol supra*, defined the *"droit de superficie"* as follows —

"Ce droit consiste à être propriétaire d'édifices ou de plantations reposant sur un terrain appartenant à autrui. En principe, tout ce qui se trouve sur le sol appartient au propriétaire du sol, par l'effet de l'accession. Le droit de superficie déroge à ce principe, en séparant la propriété des superficies de celle du sol".

[95] Counsel for the appellant has referred this Court to *Dalloz Encyclopédie Droit Civil* 2°. Ed. Verbo Superficie, §2. — *Légalité* —

⁵ Article 553 of the Code Civil Mauricien, which stipulates that: "Toutes constructions, plantations et ouvrages sur un terrain ou dans l'intérieur, sont présumés faits par le propriétaire à ses frais et lui appartenir, si le contraire n'est prouvé; sans préjudice de la propriété qu'un tiers pourrait avoir acquise ou pourrait acquérir par prescription, soit d'un souterrain sous le bâtiment d'autrui soit de toute autre partie du bâtiment.", is similar to Article 553 of the Civil Code of Seychelles.

"3. Le droit de superficie est un droit réel détaché de la propriété du sol. Les droits réels, en effet, ont été limitativement énumérés par le code civil or celui-ci ne mentionne nulle part, en terme exprès au moins, le droit de superficie. Son existence n'est cependant plus, depuis longtemps, contestée parce que certains textes du code civil l'impliquent nécessairement. **C'est d'abord et surtout l'article 553 qui, posant le principe du droit d'accession et la présomption que toutes constructions, plantations et ouvrages, sur un terrain ou dans l'intérieur, sont faits par le propriétaire et lui appartiennent, admet la preuve contraire, or s'il est possible de prouver que le propriétaire du sol n'est propriétaire des ouvrages, c'est donc que ceux-ci peuvent faire l'objet d'un droit distinct qui n'est autre que le droit de superficie**".

Emphasis supplied

- [96] As can be gathered from the above doctrinal writings and jurisprudence, the "*droit de superficie*" is the right which a person (the "*superficiare*") has on immovable property found on or under land belonging to another person (the "*tréfoncier*") who owns the land or under which the immovable property of the *superficiare* is found. Therefore, a person who has a "*droit de superficie*" on a property is the owner thereof without being the owner of the land on or under which the immovable property is situated.
- [97] In other words, the rule according to which the ownership of the soil carries with it the ownership of what is above and what is below it, posed by Article 552 *alinéa* 1 of the French *Code Civil* (Article 552 *alinéa* 1 of the Civil Code of Seychelles and the *Code Civil Mauricien*) contains a "*présomption simple*" posed by jurisprudence⁶, which allows the acquisition of "*propriété*" by the mechanism of accession. As stated in the persuasive authority of Mr. & Mrs Radha Jugoo *supra*, "*article 553 of the Code Napoléon which sets the principle of "droit d'accession" contains the following rider: "si le contraire n'est prouvé"*.
- [98] Moreover, the fact that a "*droit de superficie*" is different to the right created by Article 555 of the Civil Code of Seychelles is acknowledged by Twomey, C.J, in her book – *Legal Metissage in a Micro-Jurisdiction. The Mixing of Common Law and Civil Law in Seychelles*. At p. 83 of the said book, Twomey, C.J states —

⁶ Cass. Civ., 14 nov. 1888, DP 1889.1.400 ; Req., 8 Nov. 1911, DP 1912. 1.484 ; Cass. 1^{re} civ., 18 déc. 1967, Bull. Civ. I, n° 370 ; D. 1968.244 ; RTD civ. 1968, 394, obs. J. D. Bredin ; Cass. 3^e civ., 15 nov. 1977, Bull. Civ. III, n° 389 ; RTD civ. 1978.677, obs. C. Giverdon ; Cass. 3^e civ., 9 févr. 1982

"[t]his is the backdrop to courts using equity to create the *droit de superficif*, which is a real right and is distinguished from the limited right to compensation in art 555".

[99] For the reasons stated above, we accept the submission of Counsel for the appellant that the "*droit de superficif*" has been established by jurisprudence by way of rebuttal of the presumption raised by Article 553 of the Civil Code of Seychelles. We have no hesitation to hold that *alinéa* 2 of Article 555 of the Civil Code of Seychelles is not the foundational provision of the "*droit de superficif*", and neither is Article 555 of the said Code.

[100] Secondly, but still as part of the contention raised by the appellant that the trial Judge erred in law and on the evidence in granting the respondent a "*droit de superficif*" over the land of the appellant, we consider the contention of Counsel for the appellant that a "*droit de superficif*" can be acquired by prescription only in circumstances where the "*droit de superficif*" is exercised in respect of possession of structures ("*édifices et superficies*"). He referred this Court to Dalloz Encyclopédie Droit Civil 2^e. Ed. Verbo, Superficie, at para 23, which reads —

"23. La possession prolongée des édifices et superficies, distinctement du sol qui continue à être possédé par le propriétaire, conduit à l'acquisition de ces édifices et superficies par la prescription [...]. Cette solution, qui découle de la conception selon laquelle le droit de superficif est un droit de propriété, ne reçoit cependant que des applications pratiques assez rares, ne serait-ce que parce que la prescription portera le plus souvent sur la domaine tout entier. Elles ne concernent d'ailleurs pas la constitution d'une superficif complète, mais seulement limitée à certains objet. C'est le cas notamment des arbres bordant les routes et plantés sur le domaine public, dont la loi des 12-18 mai 1825 admet qu'ils peuvent appartenir à des particuliers. Aussi a-t-il été jugé qu'ils pouvaient faire l'objet d'une possession indépendante de celle du fonds et être acquis par prescription. C'est aussi le cas, prévu à l'article 553 du code civil, aux termes duquel un tiers peut par prescription acquérir soit la propriété d'un souterrain sous le bâtiment d'autrui, soit de toute autre partie du bâtiment". Emphasis supplied

[101] Counsel for the respondent did not address this Court in relation to this point. This Court finds the contention of Counsel for the appellant to be well founded. Indeed, having considered the evidence of the respondent, it is unequivocal that he is claiming to have acted as the owner of the portion of land and not as a person who merely had a "*droit de*

superficie". The respondent's evidence is that Mrs Pomeroy gave the portion of land to him, that the portion of land belonged to him, and that he was considered as the owner of the portion of land.

[102] Thirdly, but still as part of the contention raised by the appellant that the trial Judge erred in law and on the evidence in granting the respondent a "*droit de superficie*", we turn to the appellant's contention dealing with prescription in respect of the respondent's pleadings. Counsel for the respondent has admitted, in his Skeleton Heads of Arguments, that the respondent had not pleaded to having acquired a "*droit de superficie*" by way of acquisitive prescription of ten years, for value and in good faith. We observe that Counsel for the respondent essentially argued that the respondent had to establish that he acquired the "*droit de superficie*" by prescription, and that if the trial Judge had found that the facts supported the "*droit de superficie*", it could have declared that the respondent had established that right over the appellant's Property. We observe that the contentions of Counsel for the respondent did not take into account Articles 2223 and 2224 of the Civil Code of Seychelles. Articles 2223 and 2224 of the Civil Code of Seychelles stipulate —

"Article 2223 The court cannot, on its own, take judicial notice of prescription in respect of a claim.

Article 2224 A right of prescription may be pleaded at all stages of legal proceedings, even on appeal [...]".

[103] We aptly reproduce the excerpts from Dalloz Encyclopédie de Droit Civil 2^e Ed. Verbo Prescription Civile, referred to us by Counsel for the appellant in support of his contention, at notes 332, 333 and 334 —

"Art. 2. — CONDITIONS POUR QUE LA PRESCRIPTIONS PRODUISE SES EFFETS.

§ 1^{er}. — Nécessité d'invoquer la prescription

332. La prescription n'opère pas de plein droit et l'article 2223 du code civil interdit aux juges, d'une manière absolue, de suppléer le moyen résultant de la prescription. La règle est générale et s'applique, quelle que soit le délai (Civ. 31 Mai 1847, D. P. 47. 4. 379; 2janv. 1855, D. P. 55. 1. 13 ; 26 FEVR. 1861, d. p. 55. 1. 13; [...];

333. Le juge ne peut même pas suppléer d'office une prescription plus

courte qui serait acquise, alors que la partie ne se prévaut que d'une prescription plus longue qui n'est pas encore accomplie [...];

334. La règle selon laquelle le juge ne peut pas suppléer d'office le moyen résultant de la prescription s'applique d'ailleurs en toute matière et même lorsqu'il s'agit de courtes prescriptions". Emphasis supplied

[104] We observe that Counsel for the respondent did not plead prescription on appeal. We agree with Counsel for the appellant that, under the Civil Code of Seychelles, it is imperative that prescription is pleaded for a court to be able to rely on it because "***la prescription n'opère pas de plein droit***". The Appellate Court in *Prosper & Another v Fred* (SCA 35/2016) [2018] SCCA 41 (14 December 2018) observed that —

"[i]t must be noted that generally prescription must be pleaded and cannot be raised by the court itself (see Article 2223 of the Civil Code and Gayon v Collie (2004-2005) SLR 66".

[105] In addition, we also hold that when a party has pleaded a longer period of prescription which has not been acquired, the court cannot "***d'office***" rely on a shorter period of prescription which has been acquired.

[106] We turn to the issue of good faith raised in ground 2 of the grounds of appeal. The position of Counsel for the appellant is that the trial Judge erred in law in holding that the respondent had built the house on the Property in good faith. We mention that this issue does not arise for consideration in view of our finding that prescription must be pleaded. However, we consider this issue for context.

[107] Article 2268 of the Civil Code of Seychelles provides —

"Article 2268 Good faith shall be presumed. The person who makes an allegation of bad faith shall be required to prove it".

[108] Counsel for the respondent submitted that bad faith, in terms of Article 2268 of the Civil Code of Seychelles, proof of which rests on the appellant in terms of that Article, was never made out. The trial Judge was of the same opinion. He held that good faith need not necessarily be pleaded if it is manifest from the evidence. He also held that, "*[i]n any event, bad faith - proof of which rests on the Appellant in terms of the Article - was never made out*". We observe that the trial Judge's holdings are legally incorrect because

Article 2268 of the Civil Code of Seychelles, does not apply to pleadings and as such does not discharge the person, claiming to have acquired a right by acquisitive prescription of ten years, from averring "*good faith*" as a material fact. We accept the appellant's contention that bad faith was not made out because good faith was not a fact in issue in this case, and that, therefore, there was no need for the appellant to adduce any evidence of bad faith. We also accept the submission of Counsel for the appellant that, because the issues of good faith, value and acquisition of the "*droit de superficie*" by ten years acquisitive prescription were not pleaded, the appellant was not notified that these were facts in issue in the case and, consequently, did not adduce any evidence in respect of such issues. In this respect, we allow ground 2 of the grounds of appeal.

[109] We also accept the submission of Counsel for the appellant that the defence and counterclaim did not contain any averment of material facts with respect to —

- (a) the appellant having knowledge that the construction was on the Property at the time of construction;
- (b) the appellant consenting to the construction on the Property; and
- (c) the issue of balance of hardship.

[110] In *de Silva supra*, the Appellate Court allowed the appeal on ground 2 which contended that, "[t]he learned trial Judge erred in law in finding that the defendant has acquired a *droit de superficie*". Lalouette JA, stated, "[i]t may also be stressed that no *droit de superficie*" had been pleaded by the defendant in his plea; and although it may conceivably be thought that the allegation of "consent to build" might perhaps have been implied in the circumstances the acquisition of a "*droit de superficie*", the question was never argued in the lower court and all that the defendant was asking was simply a dismissal of the action against him. [...]. For these reasons the appeal should in my opinion be allowed on ground No. 2 [...]. In the said judgment, Sir Michael Hogan JA, stated, "I would, moreover, question the propriety of according such a right to the respondent in the present case, without amendment of the pleadings or otherwise

according to the appellant a better opportunity of meeting the proposition on which the trial Judge ultimately founded his judgment in favour of the respondent".

[111] In *Gallante v Hoareau* [1988] SLR 122, the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

"the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this reason that section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action".

[112] In *Tirant & Anor v Banane* [1977] 219, Wood J, made the following observation —

"[i]n civil litigation each party must state his whole case and must plead all facts on which he intends to rely, otherwise strictly speaking he cannot give any evidence of them at the trial. The whole purpose of pleading is so that both parties and the court are made fully aware of all the issues between the parties. In this case at no time did Mr Walsh ask leave to amend his pleadings and his defence only raised the question of plaintiff's negligence.

In Re Wrightson [1908] 1 Ch. at p. 799 Warrington J. said:

The plaintiff is not entitled to relief except in regards to that which is alleged in the plaint and proved at trial

In Boule v Mohun [1933] M. R. 242 on an issue of contributory negligence, which had not been pleaded in the statement of defence, the Court found against the defendant, but held that such issue could not in any event have been considered as it has not been raised in the pleadings".

[113] In *Elfrida Vel v Selwyn Knowles Civil Appeal No 41 and 44 of 1988*, the Appellate Court held —

"[i]t is obvious that the orders made by the trial judge was ultra petita and have to be rejected. It has recently been held in the yet as unreported case of Charlie v Françoise (1995) SCAR that civil justice does not entitle a court to formulate a case for a party after listening to the evidence and to grant a relief not sought in the pleadings. He was of course at pains to find an equitable solution so as to do justice to the Respondent but it was not open to him to adjudicate on the issue in

particular re-conveyance which had not been raised in the pleadings".

[114] In *Lesperance v Larue* SCA 15/2015 (7 December 2017), the Appellate Court reiterated the fact that a court cannot formulate the case for a party. At paragraphs 11, 12 and 13 of the judgment, the Appellate Court quoted with approval the decisions of the English Court and the principle enunciated by Sir Jack Jacob in respect of pleadings —

"11. In his book *"The Present Importance of Pleadings"* by Sir Jack Jacob, (1960) *Current Legal Problems*, 176; the outstanding British exponent of civil court procedure and the general editor of the *White Book*; Sir Jacob had stated: "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce

*any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. **Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice ...**"*

12. In *Blay v Pollard and Morris* (1930), 1 KB 628, Scrutton, LJ that: "Cases must be decided on the issues on record, and if it is desired to raise other issues they must be placed on record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course."

13. In the case of *Farrel v Secretary of State* [1980] 1 All ER 166 HL at page 173 Lord Edmund Davies made the following observation:- "It has become fashionable these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been many times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions ... for the primary purpose of pleading remains, and it can still prove of vital importance. That purpose is to define the issues

and thereby to inform the parties in advance of the case they have to meet and so enable to take steps to deal with it.”

14. In the case of *Nandkishore Lalbhai Mehta VS New Era fabrics Pvt. Ltd. & Ors.* [Civil appeal No 1148 of 2010] the Supreme Court of India said that **the question before the court was not whether there is some material on the basis of which some relief could be granted. The question was whether any relief could be granted, when the Appellant had no opportunity to show that the relief proposed by the court could not be granted. When there was no prayer for a particular relief and no pleadings to support such a relief, and when the Appellant had no opportunity to resist or oppose such a relief, it certainly led to a miscarriage of justice.** Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief”. Emphasis supplied

[115] In this respect, we allow grounds 1, 2, 3, 4 and 5 of the grounds of appeal.

[116] We turn to the submission of Counsel for the respondent that the respondent has the protection of the Land Registration Act, over and above that of the appellant. We find that the submission of Counsel for the respondent is clearly misconceived because, as correctly submitted by Counsel for the appellant, one cannot have recourse to section 25 (g) of the Land Registration Act, unless one establishes a "right" acquired legally. Therefore, we hold that, since the respondent has failed to establish any right over the Property, including the right to a "*droit de superficie*", the respondent cannot have recourse to section 25 (g) of the Land Registration Act.

[117] In the light of our findings, we shall not consider the issues raised in relation to the evidence.

Decision

[118] For the reasons stated above, we find that the trial Judge erred in law in granting a "*droit de superficie*" on the portion of the Property, in that the pleadings of the respondent did not contain any pleadings in respect of the issue of "*droit de superficie*", and that the decision was *ultra petita* as the respondent did not pray for a "*droit de superficie*".

[119] Therefore, we allow the appeal and quash the order made by the trial Judge to the effect that, *"the Defendant may only occupy not more than the 700 sq. m on which he had built his dwelling house and hitherto used to occupy, and that for residential purpose only. This is a droit de superficie which will ipso facto expires upon the death of the Defendant and his wife and this right is not transmissible to any other party"*.

[120] In view of our decision, we enter judgment for the appellant under Article 555 *alinéa* 2 of the Civil Code of Seychelles. We issue a writ of mandamus compelling the respondent to remove the buildings from the Property within one year of the date of this judgment, failing which the appellant shall be authorised to demolish them at the expense of the respondent.

F. Robinson (J.A)

I concur:. A. Fernando (J.A)

I concur:. M. Twomey (J.A)

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