IN THE SEYCHELLES COURT OF APEAL

Reportable
[2020] SCCA 18 December 2020
SCA 30/2018
(Appeal from CS MA 166/2016)
(Arising out of XP 104/2015)

In the matter between

NOELLA RADEGONDE **Appellant**
(rep. by Kelly Louise)

and

CHRISTOPHER HOAREAU **Respondent**
(rep. by Kieran Shah)

Neutral Citation:	*Radegonde v Hoareau* (SCA 30/2018) [2020] SCCA 18 December 2020
Before:	Twomey, Tibatemwa-Ekirikubinza, Dingake JJA
Summary:	Co-ownership, legal ownership/ beneficial ownership, fiduciary, Article 802 of the Civil Code
Heard:	7 December 2020
Delivered:	18 December 2020

ORDER

On appeal from Supreme Court (Govinden J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

TWOMEY JA (TIBATEMWA-EKIRIKUBINZA AND DINGAKE JJA concurring)

[1] The Appellant brought licitation proceedings in the court *a quo* to have property, namely Parcel V3269, she claimed to be in co-ownership in with the Respondent, sold by the court.

[2] The Respondent opposed the proceedings and brought a plaint in which he claimed to be the sole owner of the property notwithstanding having purchased the same with the Appellant and claiming to have solely paid off the loan for the property's purchase.

[3] In its judgment, the court *a quo* determined that the Respondent had indeed solely paid off the loan jointly taken out by the parties and in so doing reversed the presumption of joint ownership by both parties under Article 815 of the Civil Code. It also found that although the Appellant had lived in concubinage for a short period with the Respondent and could have claimed for any contributions to the household, she had not pleaded the same in her defence and had in any case removed all the movables purchased from a subsequent loan and left the house for good. It therefore declared the Respondent the sole owner of the property and ordered the Land Registrar to amend the Land Registry records accordingly.

[4] The Appellant has appealed this decision on two grounds, namely that:

> *1. The learned judge erred in his interpretation of Article 815 of the Civil Code and in holding that he is allowed under Article 815 to declare the Respondent the sole owner of Parcel V3269.*
>
> *2. The Learned Judge erred in holding that the Appellant had to bring an action and or counter-claim for de in rem verso in her Defence in order to defend her claim to her half-share ownership of Parcel V3269, as her claim to the co-ownership originates form the title deed itself and not any claims de in rem verso.*

[5] The two grounds of appeal are inextricably linked and I propose to deal with them as a single issue. It is the Appellant's submission that as she is a legal co-owner of Parcel V3269 by virtue of the transfer document dated 15 November 1999, she cannot be dispropriated of the same simply by a declaration of the Court resulting from its interpretation of Article 815 of the Civil Code.

[6] In this regard, it is apposite at this juncture to bring to light the provisions of Article 815 of the Civil Code. It provides:

> *"Co-ownership arises when property is held by two or more persons jointly. In the absence of any evidence to the contrary it shall be presumed that co-owners are entitled to equal shares."*

[7] It is clear from the provision above that co-ownership and indeed ownership is a presumption arising from the "holding of property." It is also clear that co-ownership can be rebutted. In the circumstances, Ms. Louise's submission that one cannot be dispropriated by the operation of the presumption is incorrect.

[8] Ms. Louise for the Appellants has also submitted that although the evidence adduced indicates that only one of the co-owners of the property had paid off the loan, on the authority of *Elizabeth v Mirabeau* (253 of 2002) [2006] SCSC 8 (30 March 2006), the court must nevertheless maintain the co-ownership of the parties in equal shares as both of them signed the transfer document. She further submits that based on the authority of *Monthy v Esparon* (2012) SLR 104, in cases of co-ownership arising from concubinage there are three options available under the Civil Code to a joint owner who does not wish to remain in indivision: sale by licitation, partition or an action in *de in rem verso*. As the Respondent has not availed of either of these options the court could not have made the determination it did.

[9] Mr. Shah for the Respondent, relying on the earlier case of *Esparon v Monthy* (1986) SLR 124, has submitted that the presumption under Article 815 is rebuttable and since the parties were not married, the Court had a discretion to determine the shares the parties in co-ownership of the property were entitled to. Relying on the authorities of *Dubel v Soopramanian* (CS 6/2006) [2008] SCSC 1 (22 January 2008) and *Laramé v Payet* (1983-1987) 3 SCAR 355, he further submitted that as the Respondent had by the evidence adduced managed to rebut the presumption of equality of shares under Article 815 by proving that the property was bought entirely from a bank loan which he alone repaid in full, a fact admitted by the Appellant, the court in accepting this evidence had the power to declare the Respondent the sole owner of the property.

[10] With regard to the issue of the trial judge holding that the Appellant had to bring an action in *de in rem verso* to defend her claim to a half share in the ownership of the property, Mr. Shah submits that the ground of appeal raised by the Appellant

misinterprets the judgment. He submits that as the Appellant had failed to prove a direct contribution into the purchase of the property, she would have been entitled to a share in the property under the principle of *de in rem verso* only if she been able to prove any contribution in kind she made towards its purchase. In any case she had not in defending the suit pleaded or brought any evidence of unjust enrichment and could not subsequently set up a different case to the one she had pleaded.

[11] In the consideration of the different submissions made by both Counsel, I find that the authority of *Elizabeth* (supra) relied on by the Appellant for her proposition that despite evidence that one party in co-ownership of a property has contributed to its purchase more than the other, the presumption of equal shares under Article 815 persists is misconceived. *Elizabeth* in my view was wrongly decided. Further it appears that Counsel for the Appellant is confusing legal ownership with equitable ownership. The point is clearly made in the cases relied on by the Respondent, namely *Dubel* and *Laramé* (supra).

[12] In *Dubel*, Perera ACJ (as he then was) who incidentally had also decided *Elizabeth* explained:

> *"The defendant … is seeking to rely on th[e] presumption [of Article 815] on the basis of indirect contributions allegedly made by her. Since no legal rights flow from a concubinage, considerations such as domestic services rendered, the fact that she was instrumental in approaching the S.H.D.C to obtain the land, and such other matters would not enter that equation. (Dingwall v. Weldsmith – (1967) S.L.R. 47).*
> *In Duprès v. Balthide (C.S. 220/94) delivered on 7th October 1996), the plaintiff who had been living in concubinage with the defendant, sought a declaration of her share in a property purchased and wholly paid for by the defendant while they were living together. She claimed that she had been paying maintenance of the family. The Court held that the claim must fail as it was based on property adjustment which had no place in concubinage, and as there had been no claim de in rem verso or unjust enrichment. It was also held in Esparon v. Monthy (1986) SLR 124 that the principles of division of property between married parties cannot be applied between parties living in concubinage. In Edmond v. Bristol (1982) SLR 353, the Court in similar circumstances held that the plaintiff*

(woman) was entitled to recover only such contributions to the extent of which the defendant had been unjustly enriched.
Hence the defendant will be entitled to recover her actual contributions, albeit indirectly towards the acquisition of the property…"

[13] The distinction being made is that a concubine who suffers a loss as a result of the role she played in the home is entitled to recover compensation under the principle of *de in rem verso*. She has a right *in personam* against the legal owner but not a right *in rem*. To put it simply, she can recover money but not shared ownership or sole ownership of the property. The presumption in Article 815 is not triggered in such cases, as the legal ownership in the property was not shared by both parties.

[14] In *Elizabeth,* both parties had legal ownership of the property and the plaintiff should have been able to rebut the presumption of co-ownership from the evidence she adduced (the unchallenged evidence of having paid off the house loans directly). The decision of the court in this respect is therefore curious and is not good law.

[15] The principles of Seychellois law with respect to the breakup of a *de facto* relationship and a subsequent claim in a share of the property by one partner against another who is the sole legal owner of the property is correctly stated in the cases, inter alia, of *Hallock v d'Offay (1983-1987) 3 SCAR (Vol 1) 295* and *Esparon v Monthy (*(1986) supra).

[16] In the present case, the situation is different as the parties in the relationship were in joint legal ownership of the property. Necessarily, the presumption under Article 815 and its rebuttal came into play. Having considered the evidence, the trial judge was entitled to come to the conclusion he did. He found that the presumption of equal shares had been rebutted to such an extent that the Appellant held no share at all in the property's legal ownership. She might have been entitled to some beneficial ownership but having studied the evidence on record, even that does not seem the least bit possible. It would appear that the Appellant has neither a legal nor a beneficial share in Parcel V3269. The decision of the learned trial judge in this respect cannot be faulted.

[17] The Appellant's submission in respect of the Respondent having necessarily to opt for one of the avenues under *Monthy* (2012) supra)) is also misconceived. By objecting to the

Appellant's application for a sale in licitation and by asking the court to establish his share in the property, he has triggered the consideration of the court for the rebuttal of the presumption under Article 815, which the Court exercised in his favour.

[18] In the circumstances this appeal is dismissed in its entirety with costs. The order of the learned trial judge is upheld.

Signed, dated and delivered at Ile du Port on 18 December 2020.

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Twomey JA

I concur

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Tibatemwa-Ekirikubinza JA

I concur

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Dingake JA