

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

[2020] SCCA ...  
SCA 39/2017

In the matter between

**NATHALIE WELLER**

**First Appellant**

**MICHELLE WARD**

**Second Appellant**

*(rep. by Miss T. Christen)*

and

**LINDA KATZ**

**Respondent**

*(rep. by Miss A. Benoiton)*

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**Neutral Citation:** *Weller & Anor v Katz* (SCA 39/2017) [2020] SCSC 21 August 2020

**Before:** Fernando President, Robinson JA, Burhan AJA

**Summary:** Validity of promise of sale – Second Appellant is bound by pleadings and cannot be allowed to raise new issues without due amendment having been made - Court is bound by the pleadings of the parties as they are themselves - If appeal were to be entertained on the existing pleadings, it would lead to a miscarriage of justice – Appeal dismissed

**Heard:** 5 August 2020

**Delivered:** 21 August 2020

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**ORDER**

The appeal is dismissed with costs.

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**JUDGMENT**

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**ROBINSON JA**

[1] Natalie Weller (born Hoarau), Michelle Ward (born Hoarau), Linda Dawn Katz (born

Hoarau) and one Deborah Lorraine Gaitanou (born Hoarau) are siblings.

- [2] Mr Gabriel Richmond Brendan Hoarau, who passed away on the 12 December 2009, (hereinafter referred to as the "*Deceased*"), was their father.

### **Proceedings before the Supreme Court**

- [3] Linda Katz filed two actions, namely Civil Side No. 11/2015 and Civil Side No. 12/2015, against Michelle Ward and Nathalie Weller in their capacities as the joint executors to the succession of the Deceased (hereinafter referred to as the "*Joint Executors*"). The learned Chief Justice made an order, on the 5 October 2015, consolidating the two actions into one action, entitled Civil Side No. 11/2015.

#### ***The Transmission action***

- [4] In her plaint in Civil Side No. 11/2015, lodged on the 4 February 2015, against the Joint Executors, Linda Katz averred that, on the opening of the Deceased's succession, the succession *inter alia* consisted of immovable property situated in Seychelles or rights or entitlements to the said property, namely parcel T1985, situated at Anse Bazarka, Mahe, Seychelles.
- [5] Parcel T1985 has been sub-divided into, and is now registered as, the land comprised in title numbers T3356, T3357, T3358, T3359, T3360 and T3361 (hereinafter referred to as the "*Land*").
- [6] Linda Katz together with Michelle Ward, Natalie Weller and Deborah Gaitanou are entitled to the entire estate of the Deceased.
- [7] The Deceased and Linda Katz entered into a written agreement, dated the 25 April 2002, wherein the Deceased agreed to sell and transfer to her a parcel of land of about two acres to be distracted from parcel T1985 situated at Anse Bazarka, Takamaka, Mahe, subject to a number of conditions, exhibit P17.
- [8] Linda Katz contended that because the estate has no other assets and no debts to settle, save her claim for the parcel of land of about two acres to be distracted from parcel

T1985, the Joint Executors are obliged by law to transfer the Land to the Deceased's heirs by way of transmission so that the heirs could exercise their rights and comply with their obligations as co-owners under the law.

[9] Linda Katz prayed for a judgment as follows —

*"(i) to order [the Joint Executors] to distribute the Land or the remainder thereof in accordance with the rule of intestacy and as per the terms and conditions set out in the judgment of the Supreme Court in Civil Side No. 333/2014, and consequently to register the Deceased's Heirs as co-owners of the Land or the remainder thereof in the proportions set out in the said judgment; or*

*(ii) to order that the Land or the remainder thereof be transferred by way of transmission to the Deceased's Heirs in the proportions set out in the said Judgment of the Supreme Court in Civil Side No. 33/2014, and for the Registrar-General to make the necessary entries and registration under the Land Registration Act for the said transfers by way of transmission; and*

*(iii) to order that pending the said distribution or transfer by way of transmission that the Defendants be restrained and prohibited from selling, transferring or disposing in any manner whatsoever any immovable property comprised in the Deceased succession to any third party or any heir of the Deceased without carrying out the distribution in accordance with the law.*

*(iv) to order [the Joint Executors] to pay cost to the Plaintiff."*

[10] The Joint Executors claimed in their statement of defence that the majority of heirs have decided to sell the Land and share the proceeds of sale under their respective entitlements under the judgment in C.S. No. 33/2014, exhibit P5, (see paragraph 22 (iv) and (v) hereof).

[11] The Joint Executors prayed for an order dismissing Linda Katz's plaint with costs.

***The Promise of Sale action***

[12] Linda Katz's plaint in Civil Side No. 12/2015, lodged on the 5 February 2015, against the Joint Executors concerned the agreement reached between the Deceased and Linda Katz on the 25 April 2002, exhibit P17, the terms of which are as follows —

*"(i) AN AGREEMENT made this 25<sup>th</sup> day of April 2002.*

*BETWEEN*

*MR GABRIEL RICHMOND BRENDAN HOARAU of Anse Bazarka, Mahe, Seychelles, hereinafter referred to as the "Vendor"*

*AND*

*MRS LINDA DAWN KATZ presently of Victoria, Mahe, Seychelles, hereinafter referred to as the "Purchaser"*

*WHEREAS*

*The Vendor is agreeable to sell, subject to permission of the subdivision being granted, a parcel of land of the approximate extent of two acres to be extracted from parcel T1985 situated at Anse Bazarka on the following terms:*

*The purchase price is Pounds Sterling Twenty Thousand (20,000/-). A deposit of Pounds Sterling 5,000 will be paid on signing of this Agreement and the balance of pounds Sterling 15,000 will be paid forthwith upon the signature of the instrument of transfer of the parcel.*

*The Vendor will*

*be responsible for effecting the subdivisions, as clearly shown on the attached plan, from the seashore to the point marked "Road" and be responsible for the payment of all charges relating thereto;*

*be responsible for the payment of all fees and charges relating to this agreement, the transfer of the subdivided parcel and all payments of legal fees of his advisors and regulation charges, save for stamp duty thereon which will be paid by the Purchaser*

*An instrument of transfer shall be properly executed forthwith upon the final survey of the land effecting sub-division of the said parcel*

*It is hereby agreed that the Purchaser will have the right to connect up to and use the water supply on the adjoining land of the Vendor where there is one big reservoir only for one dwelling. The Purchaser will be able to draw water from the Vendor's property for use of any other dwellings she may effect on the parcel to be transferred to her, but she will have to provide her own reservoir's therefor.*

*The road access through the parcel to be transferred to the Purchaser may be used by the Vendor for the remainder of parcel T1985 or subdivisions thereof.*

*Easements will be registered at the same time as the transfer of the said parcel is registered in order to give effect to the provisions of the two preceding paragraphs.*

*The Purchaser will have also the right to use the beach abutting onto parcel T1985*

*[...]."*

[13] Linda Katz claimed that upon the signature of the agreement reached on the 25 April 2002, exhibit P17, she paid the Deceased the deposit by cheque. The Deceased misplaced the cheque, and she then paid the Deceased the deposit through the Deceased's Legal Counsel, Mr Bernard Georges, Attorney-at-Law.

[14] According to Linda Katz, in anticipation of the entry of the promise of sale on the 25 April 2002, exhibit P17, the Deceased, according to his obligations under the said promise of sale, took appropriate action for the survey of parcel T1985 for the distraction of a parcel of land of about two acres from parcel T1985.

[15] However the Deceased failed to complete the survey of parcel T1985 and the sale and transfer of the parcel of land to her. Upon his demise, Linda Katz requested the Joint Executors to comply with the Deceased's obligations under the promise of sale by a letter of 28 April 2015. The Joint Executors did not comply with the Deceased's obligations and breached the promise of sale.

[16] She contended that the promise of sale action arose was breached on the part of the Deceased and the Joint Executors.

[17] Therefore, Linda Katz prayed for a judgment —

*"(i) Declaring that the Agreement - [agreement reached on the 25 April 2002, between the Deceased and Linda Katz] - is valid and enforceable;*

*(ii) To order the cancellation of the survey of land parcel T 1985 into land parcels T3356, T3357, T3358, T3359, T3360 and T3361;*

(iii) *To order the survey of land parcel T 1985 or the land that comprised thereof to distract the Agreed Plot [a parcel of land of about two acres to be distracted from parcel T1985] and the road therefrom;*

(iv) *To order the Defendants to execute the document to transfer the Agreed Plot and the said road under the Land Registration Act to the Plaintiff for the sum of British Pounds sterling twenty thousand (20,000/-) and the right of way in favour of the remainder of land parcel T1985;*

(v) *To order the Plaintiff to pay the Defendants the balance of the purchase price in the sum of British Pounds Sterling fifteen thousand (15,000/-) and to grant the said right of way;*

(vi) *In the alternative, that the Defendants pay the Plaintiff damages in the sum of United States dollars ninety three thousand four hundred and five (US\$93,405/-) and Seychelles rupees two hundred thousand (SR200,000/-) with continuing interest;*

(vii) *make an order of inhibition on the land comprised in title nos. T3356, T3357, T 3358, T3359, T3360 and T3361 preventing any dealings with the Land; or*

(viii) *Issue a prohibitory injunction against the Defendants prohibiting the Defendants for doing any act and/or from omitting to do any act, which would prevent the Plaintiff from becoming the proprietor of the Agreed Plot;*

(ix) *to order the Defendants to pay cost to the Plaintiff; and*

(x) *that this Honourable Court makes any order it deems fit in the circumstances."*

[18] In their statement of defence, the Joint Executors pleaded five preliminary points of law. The record established that they relied upon and submitted on only three of them. The points they relied upon were as follows — (i) the action of Linda Katz was prescribed in law (ii) Linda Katz's plaint did not disclose a reasonable cause of action (iii) the transaction between Linda Katz and the Deceased contained in the agreement reached on the 25 April 2002, exhibit P17, amounted to a disguised donation.

[19] With respect to the merits of Linda Katz's action, the Joint Executors, in their statement of defence, denied the execution, entry and validity of the agreement reached on the 25 April 2002, exhibit P17, on the grounds that —

- (i) the Deceased did not execute it and/or
- (ii) the agreement reached on the 25 April 2002 was bogus, forged and fraudulent and/or
- (iii) the Deceased was never paid the deposit by Linda Katz and/or
- (iv) the agreement reached on the 25 April 2002, was invalid and cannot be enforced as the Deceased had divested himself of parcel T1985 and or
- (v) the Deceased never appointed a land surveyor to survey parcel T1985.

[20] Given their contentions, the Joint Executors averred that they are not liable at all to Linda Katz.

[21] The Joint Executors prayed for an order dismissing Linda Katz's plaint with costs.

### **The agreed facts**

[22] Michelle Ward did not testify in both actions. According to the admission of Nathalie Weller and the undisputed evidence adduced in both actions —

- (i) the Land (T3356, T3357, T3358, T3359, T3360 and T3361) is the only asset of the Deceased
- (ii) the parent parcel of the Land was parcel T1985
- (iii) the Land is registered in the name of the Deceased at the Land Registry
- (iv) Linda Katz, Michelle Ward, Nathalie Weller and Deborah Gaitanou are entitled to the Deceased's succession in the proportions set out opposite each of their names, in paragraph 22 (v) below, as per a written agreement entered into by and between Linda Katz, Michelle Ward, Nathalie Weller and Deborah Gaitanou, dated the 26 January 2015. On the 26 January 2015, the said written agreement was entered into as a judgment of the Supreme Court in the action *Linda Dawn Katz v Michelle Ward, Natalie Weller and Deborah Lorraine Gaitanou*, C.S. No. 33/2014, exhibit P5.
- (v) the Deceased's sole heirs and beneficiaries to his succession are at present —  
Linda Katz — 18.75 per cent

Michelle Ward — 27.0833 per cent

Nathalie Weller — 27.0833 per cent

Deborah Gaitanou — 27.0833 per cent

### **The live issues canvassed before the Supreme Court**

[23] Before the Supreme Court, the parties framed the issues to be decided by the learned Chief Justice as follows —

*"[18] 1. Was there an agreement between the Deceased and the Plaintiff to distract and transfer two acres of land from parcel T1985 to the Plaintiff?*

*2. If so, should the subdivisions to Parcel T 1985 made subsequent to the agreement be cancelled?*

*3. If the agreement between the Deceased and the Plaintiff is valid how should the Defendants now distribute the estate?"*

[24] With respect to the first issue to be decided, the learned Chief Justice considered the question of whether or not Linda Katz had forged the Deceased's signature on the agreement reached on the 25 April 2002, exhibit P17. After an analysis of the evidence adduced before her and the written submissions of both Counsel, the learned Chief Justice concluded that: "*[43] [...] there is in the circumstances no proof of the allegation of fraud by the Defendant but only of the speculative belief of the Second Defendant*", and that: "*[44] [i]n these circumstances the authentic document continues to have validity and full effect [...]*".

[25] Having come to the finding that there was in effect an agreement between the Deceased and Linda Katz to distract and transfer two acres of land from parcel T1985 to Linda Katz; concerning the second issue to be decided, the learned Chief Justice came to the unavoidable conclusion that the subdivisions made to parcel T1985, after the agreement reached on the 25 April 2002, exhibit P17, should be cancelled.

[26] With respect to the third issue to be decided, the learned Chief Justice, basing herself on Articles 1582, 1583 and 1589 of the Civil Code of Seychelles and *Hoareau v Guilleaux*



(1978 – 1982) SCAR 158, opined that when the parties have agreed upon the price and the subject matter of the sale and there was common intention between them to transfer the ownership of the property under the terms agreed, *"a promise to sell property subject to registration, is complete and effective as between the parties"*.

[27] She also went on to consider whether or not the action is prescribed in law and whether or not the promise of sale amounts to a *donation déguisé*. She rejected the argument advanced on behalf of the Joint Executors on *donation déguisé* on the ground that it was not a live issue in their pleadings and before her.

[28] With respect to the plea of prescription, she accepted the contention of Counsel for Linda Katz that, because the promise of sale concerned immovable property, *"such actions are categorised as real actions, and the real rights therein are only prescribed by the twenty-year limitation rule (Article 2262)*.

[29] Having found that the promise of sale was valid, the learned Chief Justice opined that the estate should be divided as follows—

*"[52] ... after distraction and transfer to the Plaintiff of the two-acre beach front or road front property as agreed in the promise of sale of 28 April 2002, the remainder of the estate is to be divided among the four heirs of the Deceased in the proportions as agreed in the judgment by consent dated 26 January 2016 and entered as a decision of the Supreme Court in CS 33/2014, that is 18.75 % to the Plaintiff and 27.0833 % each to the two Defendants and Deborah Gaitanou"*.

[30] Therefore, the learned Chief Justice found the two consolidated complaints proved and ordered—

*"1. The subdivisions of Parcel T1985 into Parcels T3356, T3357, T3358, T3359, T3360 and T3361 are declared cancelled with notice of this cancellation to both the Planning Authority and the Registrar of Lands.*

*2. The Survey Division of the Planning Authority is hereby ordered to survey parcel T1985 in accordance with the application lodged to their department in November 2001, that is, to distract, 7,560 square metres from the same as indicated in the application with a right of way demarcated.*

3. *The Registrar of Lands is thereafter ordered to register the subdivided parcel of land distracted from Parcel T1985 in the name of the Plaintiff, Debra Katz (sic) "Linda Dawn Katz" after proof of payment by the Plaintiff to the Defendants of the sum of Pound Sterling 15,000; and to register a grant of easement to the water supply and the right of way as demarcated in the survey plan and in accordance with the registered Agreement dated 25 April 2002.*

4. *Upon the completed survey distraction and transfer of the subdivided plot of land T1985, the defendants as Executrices of the Estate of the late Gabriel Richmond Brendan Hoarau (the Deceased) are ordered to proceed to distribute the Deceased's estate in accordance with the decision of the Supreme Court in CS 33/2014, that is 18.75% to the Plaintiff and 27.0833% each to the two Defendants and Debra Gaitanou (sic) "Deborah Lorraine Gaitanou".*

## **The appeal**

### ***The preliminary legal objection***

[31] Mr Frank Elizabeth, who appeared for the Joint Executors in the case at first instance, filed forty grounds of appeal against the judgment of the learned Chief Justice on behalf of the appellants.

[32] Thereafter, Nathalie Weller did not prosecute the appeal. The appeal was prosecuted by Michelle Ward acting in her capacity as the executrix to the succession of the Deceased (hereinafter referred to as the "*second Appellant*").

[33] On the 7 July 2020, Miss Christen, instructed by the second Appellant, made an application by way of notice of motion supported by an affidavit to file amended grounds of appeal. At the hearing of the application, on the 21 July 2020, Counsel for Linda Katz, Miss Benoiton, did not oppose the application, which application was granted by this Court.

[34] Learned Counsel for the second Appellant filed the following amended notice of appeal on the 22 July 2020, which we repeat in part —

"[...]

### ***2. Amended Grounds of Appeal:***

- A. *The learned Chief Justice erred in Fact and in Law in finding that this Promise of Sale executed on the 25 April 2002 was equivalent to a sale in that:*
- i. *It was a promise of sale which contained a deposit,*
  - ii. *The parties did not intend to go through with the sale,*
  - iii. *The deposit was not paid, and*
  - iv. *Even if the deposit was paid, the promise of sale was for a portion of land that had not yet been surveyed and extracted.*
- B. *As such the Ld. Chief Justice erred in Law in ordering specific performance of the obligations of the Appellant under the Promise of sale.*

**3. Relief sought from the Seychelles Court of Appeal:**

***WHEREFORE the Appellant prays this Honourable Court to set aside all the orders of the Ld. Chief Justice in the event that a deposit was not paid, or in the alternative to set aside the orders of the Ld Chief Justice and order that the Appellant is to abide by Article 1590 and return to the Respondent double the deposit [...] ". (Emphasis supplied)***

[35] Counsel for Linda Katz in her heads of argument took a preliminary objection to the relief prayed for in the amended Notice of Appeal. Counsel contended that the amended Notice of Appeal, which was filed on the 22 July 2020, did not accurately reflect the amendments granted by this Court on the 21 July 2020. The amendments granted by this Court, on the 21 July 2020, *inter alia* read that: "**3. Draft Relief sought from the Seychelles Court of Appeal: WHEREFORE the Appellant prays for: a) an order setting aside the Judgment of the Ld Chief Justice in its entirety with costs**". Emphasis supplied. She urged this Court to disregard the unauthorised amendment.

[36] We shall consider the preliminary objection raised together with the amended grounds of appeal.

**The grounds of appeal argued together**

[37] Learned Counsel for the second Appellant argued the grounds of appeal together.

[38] Article 1590 of the Civil Code of Seychelles provides —

*"Article 1590*

*If the promise to sell is accompanied by a deposit, each of the contracting parties shall be free to withdraw; the person who has paid the deposit shall lose it, the person who has received it shall return double the amount".*

[39] Counsel for the second Appellant in her heads of argument and oral submissions, based herself on Article 1590 of the Civil Code of Seychelles and on the contents of the agreement reached between the parties on the 25 April 2002, exhibit P17. Specifically, Counsel focused on the part of the agreement, which provided: *"The purchase price is Pounds Sterling Twenty Thousand (20,000/-). A deposit of Pounds Sterling 5,000 will be paid on signing of this Agreement and the balance of pounds Sterling 15,000 will be paid forthwith upon the signature of the instrument of transfer of the parcel"*. Counsel contended that the payment of a deposit of 5000 pounds sterling, upon signing of the said agreement, should be construed in favour of that sum being *arrhes* (a deposit) and not an *acompte* (an advance payment) towards the purchase price of the property, the legal consequence of which was that the parties were free to rescind the said agreement. Therefore, she contended that the written agreement reached between the parties, on the 25 April 2002, exhibit P17, did not satisfy the legal requirements of a promise of sale under Article 1590 of the Civil Code of Seychelles.

[40] In the course of oral submissions at the appeal, Counsel for the second Appellant conceded that the legal nature of the payment of the sum of 5000 pounds sterling (whether or not it was *arrhes* (a deposit) or an *acompte* (an advance) is a factual issue for the sovereign appreciation of the trial Court based on the evidence of the common intention of the parties at the time of the drawing up of the agreement reached between the parties on the 25 April 2002, exhibit P17. See *Hoarau and other v Payet Civil Appeal No. 5 of 1991*. This is made more explicit by the following extracts from *Encyclopédie Dalloz, Répertoire de Droit Civil, Tome I, V<sup>o</sup> Arrhes* —

*"6. [...] Qu'une somme d'argent soit versée à titre de dédit, d'acompte, ou encore à titre de réparation d'un éventuel dommage, cela relève de la volonté souveraine dans son domaine qui est le contrat. Sur ce point, les juges du fond doivent justement déterminer la nature juridique de la somme avancée en analysant*

*l'intention commune des parties et les circonstances de la cause (Cass. req. 16 févr. 1932, S. 1932. 1. 133 ; Civ. 1 re , 30 mai 1969, JCP 1969. II. 16039)...*  
[...]

*10. La somme versée d'avance a le sens que les parties lui reconnaissent : ce sont les contractants qui lui donneront la fonction voulue, à savoir une fonction de dédit, d'acompte, ou encore, une fonction probatoire. Cette commune intention des parties doit être recherchée par les juges du fond [...]*

[...]

*12. ...Si les parties sont d'accord sur le prix et si, au surplus, elles conviennent qu'en cas de désistement de l'acquéreur la somme versée à titre d'acompte restera acquise au vendeur, le juge doit conclure à l'existence d'un acompte et non pas simplement des arrhes, donnant une faculté réciproque de dédit [...]*

*13. ...Ainsi, s'il apparaît des circonstances de l'espèce que le vendeur avait la conviction et l'attitude d'un contractant irrévocablement engagé, le juge peut qualifier la somme versée d'acompte en dépit de l'utilisation par les parties du terme «arrhes» (CA Paris, 13 déc. 1955, D. 1956. 131, RTD civ. 1956. 362, obs. J. Carbonnier). C'est notamment le cas lorsque le juge constate l'accord des parties sur la chose et le prix et le caractère définitif de la vente (Civ. 1 re , 28 juin 1955, D. 1956. somm. 84). Cette approche concrète, qui chasse toute méthode de qualification systématique de la somme versée en arrhes ou acompte, permet d'appréhender d'avantage la volonté réelle des parties et de connaître leur véritable but [...]"*

[41] Counsel for Linda Katz took objection to the contentions raised in the amended grounds of appeal and the heads of argument, which challenged the legal nature of the sum of 5000 pounds sterling. She submitted that this was not made a live issue in the pleadings or canvassed in the course of the hearing at first instance or raised in the submissions of Mr Frank Elizabeth in the court below. In her submissions, she relied on section 75 of the Seychelles Code of Civil Procedure and some authorities of our Courts concerning the importance and functions of pleadings. Section 75 of the Seychelles Code of Civil procedure provides: "75. [t]he 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".*

[42] Counsel for the second Appellant at the appeal respectfully accepted that the legal characteristics of the sum of 5000 pounds sterling with respect to whether or not it was *arrhes* (a deposit) or an *acompte* (*an advance*) was not a live issue before the learned Chief Justice. Nonetheless, she respectfully urged us to deal with the second Appellant's contentions raised in the amended grounds of appeal and her heads of argument. We give reasons as to why we cannot proceed following the request of Counsel for the second Appellant.

[43] In light of the preliminary objection raised by Counsel for Linda Katz, which we hold was well taken, it is incontestable that we cannot refer to the relief contained in the amended Notice of Appeal, filed on the 22 July 2020, because the amendment filed was unauthorised and, in any event, the pleadings did not encompass the relief.

[44] Thus, we shall restrict ourselves to the amendment (relief) granted by this Court, on the 21 July 2020, which reads: "*3. Draft Relief sought from the Seychelles Court of Appeal: WHEREFORE the Appellant prays for: a) an order setting aside the Judgment of the Ld Chief Justice in its entirety with costs*".

[45] It follows, therefore, that it would be a futile exercise for us to pronounce on the matters raised in paragraph "**A.i.**", "**A.ii.**", "**A.iii.**", and "**A.iv.**" of the amended grounds of appeal, concerning the legal characteristics of the sum of 5000 pounds sterling. We dismiss the contentions of the second appellant contained in the said paragraph "**A.i.**", "**A.ii.**", "**A.iii.**", and "**A.iv.**" of the amended grounds of appeal. We also dismiss the contentions of the second Appellant contained in paragraph "**B**" of the amended grounds of appeal, which flows directly from and is inextricably linked with, the matters contained in paragraph "**A.i.**", "**A.ii.**", "**A.iii.**", and "**A.iv.**" of the amended grounds of appeal.

[46] We accept the contention of Counsel for Linda Katz that the second Appellant is bound by her pleadings and cannot be allowed to raise new issues without the due amendment

having been made. We state that we are bound by the pleadings of the parties as they are themselves. If we were to entertain this appeal based on the existing pleadings, it would lead to a miscarriage of justice.

- [47] 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 —

*"[t]he 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".*

- [48] In *Tirant & Anor v Banane* [1977] 219, Wood J, made the following observations —

*"[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".

- [49] 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 Francoise (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".*

- [50] In *Lesperance v Larue* SCA 15/2015 (delivered on the 7 December 2017), the Appellate Court reiterated the point 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
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*"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 ..."*

*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."*

*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."*

*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*

[51] For the reasons given above, all the amended grounds of appeal fail and the remedies granted by the learned Chief Justice stand. The appeal is dismissed in its entirety with costs.

Signed, dated and delivered at Ile du Port on 21 August 2020

Robinson JA

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I concur

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Fernando President

I concur

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Burhan AJA