

# IN THE SEYCHELLES COURT OF APPEAL

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## **Reportable**

[2021] SCCA 34 (13 August 2021)  
SCA 68/2018  
(Appeal from CS 2/2017) [2018]  
SCSC 976

In the matter between

**MOHAMED ISA KHUDABIN**  
(rep. by Joel Camille)

**Appellant**

and

**1. WILLETTE PORICE**

**2. YVONNE LILINE PORICE**  
(rep. by Kelly Louise)

**Respondents**

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**Neutral Citation:** *Mohamed Khudabin v Porice & Anor* [2021] SCCA (13 August 2021)  
SCA 68/2018 (Arising in CS 2/2017) SCSC 976

**Before:** Fernando, PCA, Twomey, JA and Robinson JA

**Summary:** Appeal against the decision of Supreme Court granting a *droit de superficie* to respondents – in course of appeal it emerged that one of the respondents had passed away before the case in court a quo had been completed – case has to be sent back for appreciation of that fact by the court.

**Heard:** 5 August 2021

**Delivered:** 13 August 2021

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## **ORDER**

The decision and orders of the Supreme Court are quashed and remitted to the Supreme Court for fresh consideration and decision.

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**TWOMEY JA**

### **Introduction**

[1] *A droit de superficie* is a creation of French jurisprudential law which Seychellois law has inherited but qualified. In this jurisdiction (before the enactment of the Civil Code 2021), the Court of Appeal in *Cable and Wireless (Seychelles) Ltd v Innocente*

*Gangadoo* (Civil Appeal SCA 14/2015) [2018] SCCA 29 (31 August 2018), held with regard to its application that:

*“The presumption arising from Article 553 [of the Civil Code] is that buildings on land are presumed to be that of the landowner unless he permits another to build on the land. In consequence of this provision, it is clear that rights in constructions or superfiary erections or plantations can be distinct from those rights attaching to the soil or the land. A droit de superficie is distinct from the rights of the owner of the land...”*

[2] Further, in *Adonis v Celeste*, CS 124/2012, the Supreme Court relying on *Malbrook v Barra* (1978) SLR 196 and *Youpa v Marie* (1992) SLR 249 found that:

*“[A]lthough such a right is personal to the grantee, a purchaser of land that is subject to a droit de superficie takes the land subject to the droit de superficie. Hence a droit de superficie persists with the transfer of property from the owner of the land to his successor in title.”*

[3] In addition, in *Ministry of Land Use and Housing v Stravens* (Civil Appeal SCA 24/2014) [2017] SCCA 13 (21 April 2017), the Court of Appeal went further to state that:

*“[U]nless expressly stated or inferred otherwise from the intention of the parties, a droit de superficie may well be perpetual.”*

[4] It must also be noted that a *droit de superficie* is capable of being registered as an overriding property right at the Land Registry under section 25(g) of the Land Registration Act (Cap107).

### **The present case**

[5] The Appellant, Mohamed Khudabin, by plaint entered on 11 January 2017 prayed for an order from the court for the vacation of his property by the Respondents, Willette and Yvonne Liline Porice. He testified that he had inherited land parcel V5117 from his father, John Lalande aka Ibrahim Adolwais, ( the deceased). On the land, was a house partly made of brick and partly of corrugated iron sheets in which his father had granted

his sisters, Pierreline Pointe and Christa Lalande permission to reside. Pierreline Pointe's daughter, Willette Porice (the First Respondent) grew up in the house as did her daughter, Yvonne Liline Porice. It was averred in the Complaint that they continue to reside on the property without Mr. Khudabin's permission and have over the years improved the dwelling home. When they set out to carry out further works on the house, Mr. Khudabin sought their eviction, the present subject matter of this appeal.

[6] The two Respondents in their joint statement of defence averred that they had been in occupation of the property with the permission of Mr. Khudabin's father and had been authorised to build and maintain the dwelling house which they occupied on the property. They counterclaimed for an order that they had a *droit de superficie* over the buildings they occupy over Parcel V5117

[7] The learned trial judge found in favour of the Respondents, granting them a *droit de superficie* "over the dwelling house existing on the property subject to repairs and not improvements/repairs amounting to rebuilding."

### **The grounds of appeal**

[8] Dissatisfied with this decision the Mr. Khudabin has appealed to this court on the following grounds:

*"1. The learned trial judge erred in law and on the facts, in having concluded that the Respondents have a droit de superficie over the property of the appellant.*

*2. The learned trial judge erred in law and on the facts in contradiction of herself in holding that the Respondent's improvements to the property would amount to rebuilding at which point the droit de superficie would have been terminated in law and yet proceeded to conclude that the improvement would not have terminated the droit de superficie on the property or at all.*

*3. The learned trial judge erred in law and on the facts in failing to have appreciated that the Respondent never proved the extent of any improvement on the property or at all.*

### **The death of the Second Respondent**

[9] Counsel abandoned grounds 2 and 3 and made submissions in respect of ground 1 as to the nature of the Respondents' rights over the property in issue. In the course of these

submissions, this Court inquired as to whether it was appropriate for the Court *a quo* to grant a *droit de superficie* in favour of both Respondents when no evidence was adduced on behalf of the Second Respondent, nor the evidence of the First Respondent and her witnesses endorsed by the Second Respondent.

[10] It was at this point that both parties informed this Court that the Second Respondent had passed away after the filing of the suit in the court *a quo*. No bad faith is imputed to either party as they informed the court that this fact was only brought to their attention after the decision of the court *a quo*.

[11] Nevertheless, this Court finds itself in the unenviable position of being unable to proceed with the appeal given the fact that one of the parties has passed away and her interests or that of her estate are undefended and unrepresented. The issue is complicated by the fact that the Second Respondent passed away unbeknown to the court *a quo* which nevertheless made an order in her favour. That order cannot stand.

[12] Although pursuant to section 176 of the Seychelles Code of Civil Procedure (SCCP), where the death of a party occurs between the hearing and the judgment, the cause, in relation to that party does not abate, the claim of the deceased must be established by the surviving heirs.

[13] Sections 177 - 179 of the SCCP further provides:

*“177. In case of the death, bankruptcy or insolvency, or change of status or of capacity, of a party to a cause or matter, the court may order that any necessary party be added or that any person entitled to represent the party who has died or become bankrupt or insolvent, or being the successor in interest of any such party, be substituted for such party.*

*178. Any person claiming to be the representative of a deceased plaintiff or for a deceased defendant may apply to the court to substitute his name on the record for that of the deceased plaintiff or the deceased defendant, as the case may be. The application shall be by petition served on the defendant or the plaintiff, as the case may be.*

*179. Any plaintiff or defendant may apply to the court to substitute any person alleged to be the representative of a deceased defendant or of a deceased plaintiff*

*for the deceased defendant or the deceased plaintiff, as the case may be. Such application shall be by petition served on the person whom it is desired to substitute.”*

[14] In *Multichoice Africa Ltd v Intelvision Network Limited and Intelvision Limited* (MA 194/2019) [2020] SCSC 308 (12 June 2020), Govinden J, as he then was, stated:

*“(22)The purpose behind sections 178 and 179 is to allow for the non-abatement of the suit in the event of the unfortunate demise of a party and the survival of the cause of action...*

*(23) This said, the next question is who makes the application: is it the Plaintiff on record or the intended Plaintiff who seeks to be substituted in lieu of the former? A deceased person cannot be a party to legal proceedings and the effect of the death is to suspend the action as to the decedent or succession until his or her legal representative is substituted as a party...”*

[15] Such an event, in any case, necessitates the appointment of an executor to the deceased's estate. Her heirs may even choose not to pursue her claim. However, none of these matters can be entertained by this Court. Rule 31(5) of the Seychelles Court of Appeal Rules in relation to the powers of the Court of Appeal provides, inter alia, that this Court “may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just..”

[16] In view of the circumstances, the decision and orders of the Supreme Court must be quashed and the case must be remitted to the court *a quo* for consideration of the matters that have come to light post its decision. For the avoidance of doubt, we emphasise that the matter should be taken up by the Supreme Court as if its decision had not been delivered.

**Order**

[17] We quash the decision and orders of the Supreme Court and remit the case for fresh consideration and decision.

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Dr. Mathilda Twomey JA

I concur

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A. Fernando, President

**ROBINSON, JA**

In the interest of justice, I agree that the decision and orders of the Supreme Court be quashed, and that the case be remitted to the Supreme Court for fresh consideration and decision, as it emerged at the appeal that one of the Respondents had passed away before the case in the Supreme Court had been completed.

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F. Robinson, JA

Signed, dated and delivered at Ile du Port on 13 August 2021.