

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 17 30 April 2021
SCA 52/2018
(Appeal from CS 49/2015)

In the matter between

ANNE NOURRICE
(rep. by Mr. Frank Elizabeth)

Appellant

and

ALEX SALOME
In his capacity as the executor of the estate
of Louis Victor Nourrice
(all rep. by Mr France Bonte)

Respondent

Neutral Citation: *Nourrice v Salome* (SCA 52/2018) [2021] SCCA 17 30 April 2021

Before: Fernando President, Robinson, Dingake JJA

Summary:

Heard: 22 April 2021

Delivered: 30 April 2021

ORDER

1. Appeal is allowed.
 2. The orders of the learned Judge are quashed.
 3. The orders of 28 October 2015 in C.S. No. 276/2003 stand.
 4. The Land Registrar is directed to give effect to this judgment.
-

JUDGMENT

ROBINSON JA (FERNANDO PRESIDENT concurring)

1. This is an appeal by the Appellant, the first defendant then, against a decision of a learned Judge of the Supreme Court who made orders —

"1. [directing] *the Land Registrar to rectify the land Register to remove the Appellant (the First Defendant then) as a co-owner of 3/6 share in parcel S2025.*

2. [directing] *the Land Registrar to register the heirs of Louis Nourrice as the sole co-owners of parcel S2025.*

3. [ordering] *the First Defendant to pay the costs of the suit."*

The Proceedings before the Supreme Court:

The case for the parties

2. The plaint advanced the following reasons, which have caused the Respondent (the plaintiff then), the executor of the estate and succession of the late Louis Victor Nourrice (hereinafter referred to as the Deceased), to initiate the proceedings —

(i) The Deceased was the brother of one Francine Sifflore (born Nourrice), hereinafter referred to as "*the late Francine*", who passed away on the 12 November 1950. During their lifetime, the Deceased and the late Francine co-owned a parcel of land situate in the District of Anse Aux Pins, as per title deed transcribed in vol. 40 No. 226 (the "*Property*").

(ii) The late Francine had one child, Marie-Therese Nourrice, born on the 12 September 1917. Marie-Therese Nourrice, who died on the 27 March 1956, hereinafter referred to as "*the late Marie-Therese*", was the mother of the Appellant.

(iii) The late Marie-Therese sold Wilfred Lajoie a portion of her share in the Property by a deed dated 22 March 1951, transcribed in vol. 41 No. 145. The late Marie-Therese also sold one Charly Fostel a portion of her share in the Property by a deed transcribed in vol. 16 No. 574.

(iv) Paragraph 8 of the plaint averred that the Deceased was the sole owner of the rest of the Property, which subsequently was registered as parcel S2025.

- (v) On the 20 February 1987, the Land Registrar, who was named the second defendant on the plaint, issued a notice for the first registration of the Property stating that: the heirs of the Deceased owned 2/6th share; Mr Auguste Jeremie owned 1/6th share; the late Francine owned 3/6th share.
- (vi) On the 8 January 2003, the Appellant swore an affidavit on transmission by death in which she claimed *inter alia* that she was the owner of 3/6th share in parcel S2025 devolved on her after the death of the late Marie-Therese, her mother. The 3/6th share in parcel S2025 had devolved on the late Marie-Therese after the late Francine's death.
- (vii) The Appellant had in fraud of their rights swore the affidavit on transmission by death.
- (viii) The plaint contended that parcel S2025 belongs to the estate of the Deceased.
- (ix) The plaint also claimed that the affidavit on transmission by death, filed by the Appellant on the 9 January 2003, purportedly registered the Appellant as the owner of parcel S2025.
- (x) Paragraph 14 of the plaint stated that the second defendant's registration of the affidavit on transmission by death was unlawful and wrong as the second defendant had failed to find out from her records that the late Marie-Therese had sold her entire share in the Property.
- (xi) In his plea, the Respondent averred that the filing of the affidavit on transmission by death by the Appellant had deprived the estate and succession of the Deceased of the ownership of parcel S2025.

3. The plaint asked the Supreme Court to make the following orders —

"(a) An order annulling the registration of ownership of parcel S2025 as per the purported Affidavit of Transmission dated 8th January 2003 and registered on the 9th January 2003;

(b) An order declaring the estate of the Deceased owner of parcel S2025;

(c) A declaration that the Affidavit of Transmission dated 8th January 2003 and registered on the 9th January 2003 as transcribed was as a result of the 1st defendant acting fraudulently in order to deprive the Plaintiff, the estate of the deceased, of the parcel S2025

(d) An order that the 1st and 2nd Defendants pay the costs of this case;

(e) Any other orders that the Court deemed fit."

4. The second defendant in her plea accepted the late Marie-Therese had sold a portion of her share in the Property to Wilfred Lajoie. Concerning the sale of the other portion of the late Marie-Therese's share in the Property to Charly Fostel, the second defendant claimed that it was transcribed in vol. 41 No. 132 and not in vol. 16 No. 574.
5. Concerning paragraph 8 of the plaint, the second defendant averred that the Deceased did not remain the sole owner of the rest of the Property, which was subsequently registered as parcel S2025. The second defendant stated that, as per the Register, there are three co-owners, namely the heirs of the Deceased (2/6th share), Auguste Jeremie (1/6th share) and the Appellant (3/6th share). Further, the second defendant stated that the affidavit on transmission by death transmitted only 3/6th share in the ownership of parcel S2025 to the Appellant. The ownership of parcel S2025 was not transmitted solely in the Appellant's name as alleged by the Respondent.
6. The defence of the second defendant claimed that the orders should not be granted because parcel S2025 belongs as per the Register, to three persons, namely: the heirs of the Deceased (owner 2/6th share), Auguste Jeremie (owner 1/6th share), and the Appellant (owner of 3/6th share).
7. For her part, the Appellant, in her defence, raised pleas in *limine litis* moving that the plaint be dismissed with costs for the following reasons —

"i. The said action is prescribed. The transfer for Land Title S2025 to the 1st Defendant from the estate of her grandmother, the late Francine Sifflore (nee Nourrice) was registered with the Registrar of Lands on the 9th of January 2003, and this action filed twelve years later on the 3rd June 2015. (Seychelles Civil Code Article 2265 (10 years prescription period).

ii. This said action is Res Judicata. It was finally disposed of by the Supreme Court of Seychelles, in Civil Side No. 276 of 2003, by order of the Honourable Judge D Karunakaran dated 28th of October 2015".

8. With respect to the merits, the Appellant's defence denied the Respondent's claims. The defence claimed that the matters related in the affidavit on transmission by death were correct and lawful and not a fraud. The defence also curiously contended that parcel S2025 legally belongs to the Appellant. In support of the Appellant's allegation that she is the legal owner of parcel S2025, paragraph 5 of the defence claimed that: "*[t]he co-ownership was held by the Defendant's grandmother, namely the late Francine Sifflore (nee Nourrice), who had only one child, namely the Defendant's mother, the late Marie-Therese Nourrice, who died leaving behind one heir, the Defendant. Defendant is in the direct line of inheritance and presently, the registered owner".*
9. The Appellant denied the orders being sought by the Respondent and moved that the plaint be dismissed with costs.

The proceedings before the Supreme Court:

Defence in law: *res judicata*

10. At this point, we refer to the plea of *res judicata*. It is helpful to set out the background to this plea.
11. On the 13 October 2003, the Appellant entered a petition for division in kind CS No. 276/2003 for parcel S2025 to be divided in kind among (1) the Appellant, (2) the heirs of the Deceased represented by Gilbert Nourrice and Victor Nourrice and (3) Auguste Jeremie. The petition claimed that the Appellant was the owner of 1/2 share in parcel S2025. The Deceased's heirs represented by Gilbert Nourrice and Victor Nourrice and

Auguste Jeremie were named the respondents on the petition for division in kind CS No. 276/2003. The process server filed a return of service with the Supreme Court, which showed that both respondents named on the petition were served.

12. On the 27 March 2014, Alex Salome, in his capacity as the executor of the estate of the Deceased, filed an application MA99/276, opposing the petition for division in kind CS No. 276/2003. The application claimed that the averments in the said petition were incorrect as the late Marie-Therese had disposed of her entire share in parcel S2025. The Supreme Court dismissed the application in its ruling of 26 October 2015, on the ground that it "*cannot act on speculation*".

13. On the 28 October 2015, the learned Judge made the following order in CS No. 276/2003 —

"[1] [...] for the subdivision as per the report submitted by Surveyor Michel Leong dated 22nd September 2015. I direct the Surveyor to proceed with the subdivision and allocate plot 1, which was Surveyed as parcel S9242, to Anne Nourrice and Plot 2 and 4 which was surveyed as parcels S9243 and S9244 and S9245 to Auguste Jeremie and others. Order is made accordingly, file closed".

14. I turn to the plea of *res judicata*. At the hearing of the plaint, Counsel for the Appellant raised a plea in *limine litis* to the effect that the Supreme Court could not entertain the plaint as it is *res judicata*. Mr Anthony Derjacques, who appeared for the Appellant before the Supreme Court, contended, in essence, in his written submissions that the cause of action in the plaint was the same as in the petition for division in kind CS No. 276/2003. The Respondent by Counsel was of the view that the plaint was not *res judicata*. However, the reasons advanced by the Respondent for the holding of such a view is unclear.

15. The learned Judge dismissed the plea on the ground that the cause of action in the plaint and the petition for division in kind CS No. 276/2003 were not the same. The learned Judge was of the view that —

"[16] [i]n the present suit, Alex Salome in his capacity as the executor of Heirs Louis Victor is suing Anne Nourrice for the fraudulent or mistaken swearing of an affidavit of transmission by death and for the annulment or rectification of an entry on the Land Register purporting to make her a co-owner of Title S2025."

16. The Appellant has appealed this finding by the learned Judge.

Defence in law: prescription

17. The plea of prescription claimed that the Respondent's action is prescribed by the statutory ten-year limitation as the Appellant has registered title. Concerning this plea of prescription, the question at issue framed by the learned Judge in her ruling of 29 March 2018, was whether or not a registered title could be annulled or rectified. The learned Judge held the view that she may direct that any registration be cancelled or amended where she is satisfied that any registration has been obtained, made or omitted by fraud or mistake under section 89¹ of the Land Registration Act. The learned Judge did not determine the question in her ruling of 29 March 2018, as she felt "*duty-bound to hear evidence to determine if the First Defendant's title was obtained in good faith or by other means*".

The hearing

18. The learned Judge, by her ruling of 29 March 2018, directed the Land Registrar to provide a report to the Court "*on the root of title and chain of ownership by the First defendant and other co-owners of Parcel S2025 on or before the 29 March 2018*". Indeed, the Land Registrar filed a report "*on the root of title and chain of ownership by the First defendant and other co-owners of Parcel S2025*" with the Supreme Court.

19. On the 21 May 2018 at 9:30 a.m., on hearing of the plaint, Mr Bonte, Counsel for the Respondent, was absent, but the Respondent was present. Hence, the learned Judge ordered the hearing to proceed *ex parte*. Mr Bonte showed up while the Appellant was testifying. The learned Judge lifted that order with the Appellant's consent.

¹ "89 (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

20. The 21 May 2018 transcript of proceedings revealed that the Respondent and the Appellant called no evidence but opted to file closing submissions. In this respect, both Counsel expressly told the Supreme Court that they would be relying on the Land Registrar's report. The Land Registrar was not called to give evidence about her report. At this juncture, I can do no better than to record the interactions between the learned Judge and both Counsel with respect to what had emerged —

"Court: Mr Bonte it is also my duty to inform you that I have received the Report from the Registrar, which is entirely on the favour of your client. The Report finds that the antecedence of Anne Nourrice, alienated her share of the property and that the property was own solely by Louis Nourrice. And that Alex Salome is the only one entitle to the property.

Mr Bonte: If I could have sight of it first.

Court: That is the determination amass the rest of it.

Mr Bonte: I am asking him if he does not want we talk in the face of the documents, maybe we could shortcut to a solution.

Court: What solution could there be your client owns the land, his client doesn't.

Mr Derjacques: I would accept my learned friend proposal in the light of the report that arose this morning. I would like to examine it.

Court: You came and you had a chance you were sitting with my Secretary reading the Report Mr Derjacques let us not be disingenuous.

Mr Derjacques: Not with my client.

Court: How long will you need?

Mr Derjacques: I need file submissions will give me time , so I know now it is not base really on facts. It is based on title so I need to do legal research a final submission.

Court: What do you want me to do Mr Derjacques, what is your application?

Mr Derjacques: I would like an opportunity to draft to have copies of one, and then to draft a legal submission.

Court: Based on the findings of the Land Registrar.

Mr Derjacques: Yes.

Court: So you do not want to lead evidence at this stage?

Mr Derjaques: No, with an Annex and we have affidavits.

Court: The only issue left in this case in view of my ruling is if there was an error, in the registration of title. Now you want to lead evidence to that or you want to just submit in law on that?

Mr Derjacques: We need to submit on law?

Court: Both of you?

Mr Derjacques: Because these are authenticated documents.

Mr Bonte: He would submit and then I would reply.

[...].

COURT TO COURT INTERPRETER:

*Dina please explain to everybody in Court today, that there is a report from the Land Registrar in which she explains that the land which is the subject of this case was solely owned by Louis Nourrice. Because his sister who is the mother of Anne Nourrice has already sold her share, the two lawyers want to submit on law before I give my judgment. And I have given them time and I will mention this matter on the 27th of June for those submissions, and then we will give a date for my judgment. So that it will facilitate the discussion with the lawyers, **explain to Mrs Anne Nourrice that Marie-Therese Nourrice sold her share in 1951 to Wilfred La Joie. And the other part to Charlie Fostel, this is what the land Registrar has said that it mean therefore, she has no share left in the land. Was sold before**". Emphasis supplied*

The submissions

21. The written submissions offered on behalf of the Appellant did not address the substantive matters in the case. Mr Anthony Derjacques principally submitted that there was no hearing before the Supreme Court because no evidence was called in accordance with sections 129 and 134 of the Seychelles Code of Civil Procedure.

22. He also submitted that the learned Judge was required to hear evidence under section 89 (1)² and 89 (2)³ of the Land Registration Act to determine whether or not the Appellant's title was obtained in good faith or by other means. In this respect, he submitted that the report of the Land Registrar is not admissible as evidence as it falls afoul section 17 (4)⁴ of the Evidence Act.

² Ibid.

³ Ibid.

⁴ Section 17 (4) stipulates: "In this section expert report" means a written report by a person dealing wholly or mainly with the matters on which the person is or would, if living, be qualified to give expert evidence".

The judgment

23. Concerning the submission of Mr Anthony Derjacques that the suit must be dismissed as there was no hearing before the Supreme Court since no evidence was called under section 129 of the Seychelles Code of Civil Procedure, the learned Judge found —

"[16] [i]n the present case, the report of the Second Defendant was made available to the parties and they proceeded to deliberate about it and then decided to make submissions on it. The pleadings, pleas in limine litis and the ruling of the court on the pleas were also very much live matters at the hearing. These were deliberated on and the course adopted by the parties was to proceed to make submissions only. That indeed constitutes a hearing, and the submission that the process did not amount to a hearing is therefore rejected".

24. Concerning the submission of Mr Anthony Derjacques that the report of the Land Registrar was not admissible as it did not meet the requirements of section 17 (4) of the Evidence Act, the learned Judge found: *"[19] [t]he Land Registrar's evidence is compelling and [she] [was] persuaded by it as it pieced together using the transcription of deeds from 1917. This evidence has not been objected to, opposed or rebutted in any way".*

25. Next, the learned Judge framed two issues for consideration as follows —

- (i) whether or not there was fraud or mistake in the registration of parcel S2025; and
- (ii) whether or not the Appellant had *"paid valuable consideration for its acquisition and had knowledge of the omission, fraud or mistake or caused the omission, fraud or mistake or contributed to it by her act, neglect or default"*.

26. Having considered the two issues, the learned Judge concluded that the Land Register should be rectified to exclude the Appellant as co-owner in 3/6 share of parcel S2025. She took into account the following matters —

- (i) the family free in the report of the Land Registrar, which established that the late Marie-Therese had sold her share in the Property to Charly Fostel (Transcription Volume 16/574) and Wilfred Lajoie (Transcription Volume 41/145);
- (ii) the second defendant's notice of first registration to heirs Victor Nourrice, Auguste Jeremie and the late Marie Therese. She found that that notice of first registration was erroneous as concerns the Appellant because the late Marie-Therese had alienated the late Francine's share in the Property;
- (iii) an affidavit of transmission by death, sworn to by the Appellant, which she found to be incorrect;
- (iv) the fact that, although there has been no evidence produced by the Respondent to show the fraud he alleges on the part of the Appellant, the averments in the Appellant's affidavit and the registration of a 3/6 share of the land in her name were erroneous;
- (v) that had care been taken to check the deeds; the mistake would not have happened;
- (vi) that although it was unclear whether or not inheriting land would amount to obtaining it by valuable consideration, she was, however, *"satisfied that the First Defendant substantially contributed to the mistake in the erroneous registration of a 3/6 share of the Property in her name by her neglect in properly checking title deeds"*.

The grounds of appeal and contentions of the Appellant and Respondent

27. The soundness of the learned Judge's reasons and findings is being challenged on the following seven grounds of appeal —

"i. The Honourable Chief Justice erred in law in failing to hold that the action of the Respondent was prescribed in law.

ii. The Honourable Chief Justice erred in law in failing to hold that res judicata applied in that the Supreme Court had already made a final order in civil side No 276 of 2003 dated the 28th of October 2015.

iii. The Honourable Chief Justice erred in law in failing to find that the transfer made with respect to land title S2025 on the 9th of January 2003 was done in good faith and that the property was identified and consideration was per the laws of succession and therefore constituted a valid transfer in law.

iv. The Honourable Chief Justice erred in law in failing to hold that there was no evidence at all given by the Plaintiff or any witnesses, including the Defendant and for the defence as a result there was no hearing in accordance with law.

v. The Honourable Chief Justice erred in law in failing to hold that the court cannot make a valid and considered judgment without a hearing and evidence.

vi. The Honourable Chief Justice erred in law in failing to properly interpret section 89 (2) of the Land Registration Act in that there must be a finding following evidence on omission, fraud or mistake in order to void a transfer or immovable property.

vii. The Honourable Chief Justice erred in law in failing to hold that the written report of the registrar of lands was not admitted, nor admissible and not evidence and was therefore in conflict with the Civil Procedure Code and Cap 74 and section 17 (4) of the Evidence Act."

28. This case is not without its challenges that result in the need for us to express certain reservations.

29. First, the Respondent in his capacity as the executor of the estate of the Deceased could not have filed a third-party opposition to the order of 28 October 2015 in CS No. 276/2003. Section 172 of the Seychelles Code of Civil Procedure Code requires that any person whose interests are affected by a judgment rendered in **a suit in which neither he nor persons represented by him were made parties**, may file an opposition to such judgment. Emphasis supplied

30. Second, section 209 of the Immovable Property (Judicial Sales) Act provides for statutory appeals from any decision or order of a Judge under or in the execution of the provisions of the Act. In his capacity as the executor of the estate of the Deceased, the Respondent did not appeal from any order made by the learned Judge in C.S. 276/2003. This issue

was not raised in the Supreme Court . We have decided not to address the issue *proprio motu*.

31. We consider the grounds of appeal.

Ground 1

32. Under ground 1, Counsel for the Appellant adopted the argument made in the Supreme Court with respect to the plea of prescription.

33. With respect to this ground, suffice it to state that the plea framed by the Appellant is misconceived. It appears that the Appellant has pleaded the wrong prescription. As for prescription under Article 2265 of the Civil Code of Seychelles, a defendant raising it should plead all the material facts and file a counterclaim.

34. Hence, ground 1 stands dismissed.

Ground 2

35. Ground 2 of the grounds is misconceived and must be dismissed. A party can successfully invoke "*l'autorité de la chose jugée*" under Article 1351 of the Civil Code of Seychelles [CAP 33] if the party demonstrates that the previous and the subsequent litigation involve: the same parties acting in the same capacity, the same subject matters and are founded on identical grounds which constitute the cause of action. If one of the three elements is not present, one of the parties would not be able to invoke "*l'autorité de la chose jugée*" inasmuch as the subsequent case would be new in relation to the first case.

36. In the present case, we are of the view that the learned Judge's finding to the effect that the previous judgment does not have "*l'autorité de la chose jugée*", is correct. The learned Judge correctly found that the causes of action and claims are different. In CS276/2003, the Appellant petitioned for a division in kind of parcel S2025. In the action CS49/2015, the Respondent, in his capacity as the executor of the estate of the Deceased, is suing the Appellant for the fraudulent swearing of an affidavit of transmission by death and for the

annulment of an entry on the Land Register purporting to make her a co-owner of parcel S2025.

Grounds 4, 5 and 7

37. The only issue which arises for consideration under grounds 4, 5 and 7 of the grounds, is whether or not the learned Judge was correct to conclude as she did in this case since the Respondent did not prove his allegation of fraud.
38. As mentioned above, the Respondent is suing the Appellant for fraudulent swearing of an affidavit on transmission by death. The Respondent by Counsel called no evidence in this case but opted to file written submissions. Fraud must be specifically alleged and proved: see, for example, *Jacqueline Labonte and or v Robert Bason Civil Appeal No. 13 of 1996*. The learned Judge, in her judgment, remarked that there had been no evidence produced by the Respondent to show the fraud he alleges on the part of the Appellant. We hold that the learned Judge should have dismissed this case after having come to this finding. Having not done so, the learned Judge erred.
39. We add in passing that the learned Judge relied on the report of the Land Registrar "*on the root of title and chain of ownership by the First defendant and other co-owners of parcel S2025 on or before the 29 March 2018*", to satisfy herself that the Land Register should be rectified to exclude the Appellant as co-owner in 3/6 share of parcel S2025. The learned Judge found the Land Registrar's evidence compelling and was persuaded by it. We note that the Land Registrar did not give evidence and that her report was never exhibited in this case. Thus, the learned Judge was wrong to rely on the report of the Land Registrar to rectify the Land Register to exclude the Appellant as co-owner.
40. For the reasons stated above, we allow grounds 4, 5 and 7 of the grounds of appeal pertaining to the issue raised. This is enough to dispose of the appeal.
41. We allow the appeal on grounds 4, 5 and 7 of the grounds of appeal. Consequently, we quash the orders of the learned Judge. The orders of 28 October 2015, made by Judge

Karunakaran in C.S. No. 276/2003 subsist as they have never been quashed. We direct the Land Registrar to give effect to this judgment.

42. We make no order as to costs.

Signed, dated and delivered at Ile du Port on 30 April 2021

Robinson JA

I concur

Fernando President