

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 76 (17 December 2021)
SCA 34/2019
(Appeal from CS 76/2017) SCSC 399

Lucine Vidot

Appellant

(rep. by Mr. Basil Hoareau)

and

Jeanne Lesperance

Respondent

(rep. by Mr. Oliver Chang-Leng)

Neutral Citation: *Vidot v Lesperance* (SCA 34/2019) [2021] SCCA76

(17 December 2021) (Arising in CS 76/2017) SCSC 399

Before: Fernando President, Robinson JA, Tibatemwa-Ekirikubinza JA

Summary: Land ownership - acquisitive prescription - conditions to be satisfied to prove acquisitive prescription - meaning of peaceful, unequivocal, uninterrupted.

Heard: 2 December 2021

Delivered: 17 December 2021

ORDER

The appeal is dismissed with no order as to costs.

JUDGMENT

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA

1. Lucine Vidot (appellant) and Jeanne Lesperance (respondent) are both children of the late Desire Vidot. The latter lived in concubinage with the Meze Joseph Vankeirsbilek for many years before he passed away on 20th August 1995.

2. During his lifetime, Meze Joseph Vankeirsbilek jointly owned the land comprised in parcel C1665 situated at Anse Louis, Mahe together with his sister, Nelly Marie Harsant. Nelly Marie Harsant had a house built on parcel C1665 for her and Meze Joseph Vankeirsbilek.
3. Over the years, Lucine and Jeanne left the house to start their own families but would occasionally return whenever they would break up with their partners. When Lucine's partner died in 1986, she returned permanently to the dwelling house on parcel C1665 together with her child.
4. On 17th October 1994, by a deed of transfer, Meze Joseph Vankeirsbilek transferred his undivided half share in parcel C1665 and the house thereon to the respondent for a consideration of SR 1/=. On 5th August 1997, the respondent formally registered the transfer deed and became the owner of Meze Joseph Vankeirsbilek's half share in the property.
5. On 20th August 1995, 11 months after Meze Joseph had transferred his share to Jeanne, he passed away. A few years thereafter, Meze Joseph's sister who owned the other half share in the property passed away. On 28th August 1999, Meze Joseph's concubine (Desire Vidot) also passed away
6. Prior to the death of Meze Joseph's sister, she bequeathed her half share in the property to her nephew, Serge Vankeirsbilek. On 11th February 2004, Jeanne purchased Serge's share for a valuable consideration of SR 5000/=. On 23rd January 2004, Jeanne formally registered this transfer into her names. She thus became the sole registered owner of the entire property.
7. The appellant, together with her other siblings, lodged a plaint dated 7th February 2005 in the Supreme Court wherein they sought an order from court to compel the respondent to sub-divide the land among the siblings to wit Cause No. 74 of 2005.

8. Before Cause 74 of 2005 had been heard, the respondent lodged in the Supreme Court (before Perera J) an application for a writ *Habre facias possessionem*. The writ is an application made before a Judge in Chambers seeking an order in favour of an applicant who has a clear title to real property to be restored in possession of that property where another person is occupying the property without having any bona-fide defense.
9. The respondent, among other reliefs, sought for an order to evict the appellant from the property. Perera J held that since the appellant had an arguable case and was neither a squatter nor a trespasser who could be evicted summarily, the dispute had to be resolved through an ordinary suit. The respondent's application was therefore dismissed with costs.
10. Dissatisfied with the Ruling, the respondent appealed to the Court of Appeal. She sought orders that the judgment of Perera J be set aside and the present appellant be ordered to vacate the property. In dismissing the appeal, the Court of Appeal, *inter alia*, held that the decision of the trial Judge could not be impugned because the issues between the parties had to be decided in an ordinary suit as opposed to a summary suit or application. The Justices of the Court of Appeal therefore ordered that the main suit vide Case No. 74 of 2005 filed by the respondent be set down for hearing.
11. Subsequently, the main suit was set down for hearing before Pillay J. The following three issues were framed for determination by the court:
 1. Whether Jeanne was the owner of parcel C1665 including the house thereon.
 2. Whether Lucine should be ordered to vacate the land and house without payment of compensation.
 3. Whether Jeanne was entitled to damages from Lucine on the basis that she threatened and refused her to access the property.
12. With regard to issue (i), Pillay J held that the issue of ownership of the land was decided in the two decisions of the Court of Appeal (i.e SCA No.25 of 2007 and SCA No. 38 of

2013) and that it was not for the court to re-visit the issue again which had already been confirmed by the highest court. Pillay J concluded that the respondent, Jeanne, in fact owned the property in question.

13. In respect of issue (ii), Pillay J held that since the respondent was found to be the rightful owner of the property, then the appellant had no claim in the property.
14. On the issue of damages, the Judge held that the respondent had not satisfactorily discharged her burden to prove that the appellant had threatened her or refused her access to develop the rest of the property.
15. In conclusion, Pillay J ordered the appellant to vacate the property. Each party was ordered to bear their own costs.
16. Dissatisfied with that decision, Lucine has appealed to this Court on the following grounds:

- 1. The learned trial Judge erred in law and on the evidence in that her decision is unreasonable and cannot be supported by evidence.**
- 2. In accordance with Article 2224 of the Civil Code, the appellant hereby pleads that the appellant has acquired parcel C1665 and part of parcel C1665 on which the house of the appellant is located along with surrounding areas of the house, by acquisitive prescription, in accordance with Article 2262 of the Civil Code, since the appellant has been in continuous, uninterrupted, peaceful, public and unequivocal occupation. (sic)**

Prayers

17. The appellant prays that:
 - (i) This Court quashes the decision of the Supreme Court Judge and dismisses the respondent's plaint.**
 - (ii) A declaration that the appellant is the owner of parcel C1165 or a part thereof by having acquired the same by acquisitive prescription.**

Consideration of the Court

18. Although the Notice of Appeal was based on two grounds of appeal, in the written submissions filed by the appellant and at the hearing the first ground of appeal was not pursued.
19. But before dealing with Ground 2, the Court must deal with an issue raised in the written submissions of the respondent: that the matter before court was res judicata. It was the argument of the respondent that since the issue of ownership of the property was dealt with by the Court of Appeal in **Lucine Vidot and Others vs Jeanne Lesperance**¹ and the court decided that the respondent was the rightful owner of the property, the appellant was barred from bringing any cation in regard to ownership of the same property.
20. In order to analyse the issue, it is necessary to record the chronology of events relevant to the issue.
21. In **Lucine Vidot and 5 Others vs Jeanne Lesperance**² the present appellant together with 5 others filed a plaint before the Supreme Court. The plaintiffs were seeking a judgment ordering the present respondent to sub-divide her half share of parcel C 1665 which was registered in the respondent's name. It was the contention of the plaintiffs that the division would be pursuant to a previous **agreement** between the parties involved.
22. Two main issues were framed by the Trial Judge in the suit:
 - Had the defendant before or at the time of acquiring ownership of the suit property, entered in to any agreement with the plaintiffs to subdivide an half share in it and transfer that portion to those of the plaintiffs, who did not already own another plot of land? And*
 - If so, should the Court order the defendant to perform his obligations as per the terms of the said agreement?*

¹ SCA 38/2013

² Lucine Vidot, Carol Vidot, Doreen Hoareau, Marie Vidot, Andre Vidot, Joanna Vidot **SC 74/2005**

23. The learned Trial judge decided in favor of the defendant (present respondent), concluding that the transfer deed regarding the land was duly executed and registered in favor of the defendant and that there was no evidence to support the contention that defendant had entered into an agreement with the plaintiffs to sub divide her half share of the property and share the property with them. The judgment was delivered on 2/10/2013. The plaintiffs in the matter filed an appeal in the Court of Appeal but the appeal was dismissed.³

24. When the decision of the main case was appealed, several issues were considered by the Court of Appeal pursuant to the grounds of appeal filed. The pronouncement of the Court of appeal were as follows:

Whether the judge err in not weighing the legality of the transfer deed dated 17th October 1994.

25. The court opined that the appellants never prayed for declaring the need null and void. Thus this ground failed.

Whether the judge erred by holding that the appellants failed to establish a prima facie case.

26. Going by the pleadings court opined that, the appellants' claim was based on an alleged agreement to sub divide among the siblings. Written evidence regarding this claim was never produced. Thus it was contrary to Article 1321 of the Civil Code.

Whether the matters adduced during the hearing was extraneous.

27. The court opined that the trial Judge's decision was based on the alleged agreement to sub-divide. The trial judge refrained from deciding outside pleadings thus has not erred.

Whether the Trial Judge err by not adducing oral evidence?

28. Court of Appeal answered in the negative. As per A. of 1321 of the Civil Code.

³ Lucine Vidot v Carol Vidot, Doreen Hoareau, Marie Vidot, Andre Vidot, Joanna Vidot SCA No.38 of 2013

29. Accordingly the Appeal was dismissed by the court of Appeal on 22/5/2016.
30. A fresh action **Jeanne Lesparance vs Lucine Vidot**⁴ was instituted in the Supreme Court by the respondent where she prayed that a vacation order be granted against Lucine Vidot, the present appellant. Issues before the court were: 1. Whether the plaintiff the owner of parcel C 1665 including the house there on? 2. Whether the Defendant should be ordered to vacate the land and house without payment of compensation? 3. Is the plaintiff entitled to damages?
31. The Supreme Court held in favor of the Plaintiff on 22/5/2019 and the defendant was ordered to vacate the land and the house. It is this decision which Lucine appealed against and the matter is now before this Court.
32. Although Ground 1 in the Notice of Appeal filed was that “The Learned Judge erred in law and on the evidence in that her decision is unreasonable and cannot be supported by the evidence”, this ground was not pursued. The only ground pursued by appellant was that: The appellant have acquired the land or part thereof by **acquisitive prescription**.

Does the present case amount to Res Judicata?

33. The law relating to Res Judicata is contained in Article 1351 of the Civil Code as stated below:
1. *The authority of a final judgment shall only be binding in respect of the subject-matter of the judgment. It is necessary that the demand relate to the same subject-matter; that it relate to the same class, that it be between the same parties and that it be brought by them or against them in the same capacities. (My emphasis)*

34. According to this Court in the case of **Cable and Wireless (Seychelles) Ltd vs Innocente Gangadoo**⁵ Article 1351 enumerated above was the translation made by

⁴ SC 399 CS 76/2017

⁵Civil Appeal SCA 14/2015

Chloros in 1975 of the French provision then in effect. Twomey JA goes on to explain that it is generally accepted in Seychelles that the word class used by Chloros was a misprint for cause, an error which was never corrected.⁶ What is correct is the original English translation of the provision used in Seychelles until 1975 and that is the Blackwood's Wright's version which states as below:

A judgment has only the effect of res judicata as regards the subject-matter of the judgment. In order that the thing should be res judicata, the claim must be (1) for the same thing, (2) based on the same legal grounds, (3) be between the same parties, and brought by and against them respectively in the same right (emphasis added).

35. In the case of **Wilfred Freminot & Anor v Christopher Gill & Anor**⁷ Robinson JA lays down the law relating to Res Judicata in the Seychelles as follows:

"The plea of res judicata is governed by art. 1351 of the Civil Code which reads:

For the plea of res judicata to be applicable, there must be between the first case and the second case the threefold identity of "objet", "cause" and "personnes".

The "objet" is what is claimed. "La cause" is the fact, or the act whence the right springs. It might be shortly described as the right which has been violated. (See de Bertier de Sauvigny & ors. V. Courbevoie ltée. & ors, 1955 M.R. 215)."

⁶ It must be noted that in Act No1 of 2021 this provision was amended and the word "class" was replaced with "cause of action"

⁷

Civil Appeal SCA 30/2016 & CROSS APPEAL SCA 32/2016) [2019] SCCA 10 [2019] SCCA 10

36. Furthermore the case of **Gabriel v Government of Seychelles**⁸ indicates that:

A plea of res judicata will be upheld if –The claim in the second action is regarding the same subject–matter as the first action; The plaintiff seeks an additional or alternative remedy to the earlier one; The claim could have been made in the first action; and The subject–matter of both suits is identical.

37. Accordingly it is evident that for a matter of Res Judicata to succeed the Parties to the suit, the subject matter and the cause of action have to be the same.

38. It can be stated that the property which is the subject matter of the dispute is identical in the earlier Court of Appeal case (SCA No.38 of 2013) and the matter before us – Parcel C 1665.

39. However, whereas the in SCA 38 of 2013 what was sought was implementation of an alleged agreement between the parties that the Parcel would be divided between them, in the matter before court, the cause of action is based on the principle of acquisitive prescription – different legal grounds. Furthermore, whereas both cases have Jeanne Lesperance as the person being complained about, in the earlier matter the case was brought by 6 plaintiffs, the present appellant being only one of the six. The case before us is brought by only one of the appellants in SCA 38 of 2013 – Lucine Vidot. What the appellant is claiming could not have been claimed by the other five appellants in the earlier matter. I therefore find that not only is the cause of action different but so are the parties.

40. Accordingly a plea in Res Judicata cannot succeed.

Ground 2

41. Under Ground 2, the appellant argues that she should be declared the owner of the suit property or a part thereof by reason of acquisitive prescription (*uscapion*).

⁸ (2006) SLR 169

42. I note that this issue was raised for the first time before this Court. In **Chetty v Esther**⁹, this Court barred raising of new issues on appeal without leave of Court and proper procedures being followed. Therefore, in the present case, ground 2 of the appeal ought to be struck out. However, **Article 2224** of the **Civil Code** is an exception to the foregoing principle. The Article provides that:

A right of prescription may be pleaded at all stages of legal proceedings, even on appeal, unless the party who has not pleaded it can be presumed to have waived it. (Emphasis of Court)

43. The right of ownership of property through acquisitive prescription is rooted in **Section 26** of the **Seychelles Constitution**. It is also reiterated in **Article 712** of the **Civil Code**.

44. In the case of **Chetty vs. The Estate of Regis Albert & Ors**¹⁰, acquisitive prescription was defined as the acquisition of property rights through the effects of possession over time as outlined by **Article 2229** of the **Civil Code**. The Article provides that:

In order to acquire by prescription, possession must be continuous and uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of an owner.

(i) The possession must be continuous, uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of an owner. (Article 2229 of the Civil Code).

(ii) The right of ownership by prescription is acquired on the last day that the period of possession ends. (Article 2261 of the Code).

(iii) Acquisitive prescription shall accrue after a period of 20 years. (Article 2262).

45. Can it be said in the case before us that the appellant's possession fulfill the elements of acquisitive prescription?

⁹ SCCA 44/2020.

¹⁰ (CS 131/2018) [2020] SCSC 268.

46. I will consider independently, each element of acquisitive prescription relevant in the matter and this is because all the elements have to coincide. The state of being in possession of land for more than twenty years raises a presumption in favour of the possessor of the property. And therefore I must first determine how long the appellant was in possession of the land, *acting in the capacity of an owner*.

The 20 year period

47. It was the case for the appellant that time started running in 1995, after the death of her step father - Meze Vankeirsbilek. Counsel argued that the contents of the plaint filed by the respondent in CS 74/2005 (paragraphs 7 and 8) to the effect that Meze Vankeirsbilek passed away on the 20th August 1995 and “soon thereafter” the appellant without seeking permission from the co-owners of the property, started making alterations to the house is evidence that it is then that the appellant started acting in the capacity of an owner. According to Counsel the contents are Judicial Admission. In essence counsel contends that since the statement is found in the respondent’s pleadings this has the effect of withdrawing this fact from issue and dispensing wholly with the need for proof of the fact. On this point, I agree with counsel for the appellant. Time started running in 1995 – it is then that the appellant who was living on the property started acting as owner.
48. I find that by the year 2015 the appellant had been in possession of the disputed property for 20 years.
49. On the other hand, it was the respondent’s contention that all along, the appellant has been occupying the property as a licensee, living on the property with the permission of its owners. I believe this assertion is aimed at bringing into play Article 2232 of the Civil Code which *inter alia* states that acts which are merely permitted do not give rise to possession or prescription. See also **Seychelles Development Corporation v Morel**.¹¹ Indeed inherent in the legal principle of acquisition by prescription is that a person who does not have legal title to a piece of property—usually land — may acquire legal ownership based on continuous possession or occupation of the property without the permission (licence) of its legal owner.

¹¹ 2002-2003 SCAR 79.

50. I opine that at one point in time, the appellant was on the premises with permission of the co-owners, Meze and his sister Nelly Marie Harsant. Once Meze had passed on his share to the respondent (17th October 1994), the permission from Meze lapsed. In a letter dated 21st November 2002 and another dated 3rd March 2004, the respondent caused her attorney to write to the appellant informing her that the respondent was the owner of the undivided half-share of Meze Vankeirsbilek and the appellant should not carry out any works to the house. The appellant had in reply caused her lawyer to write a letter dated 4th December 2003 to the respondent in reply to the November letter.
51. Prior to her death, Harsant bequeathed her half share in the property to Serge Vankeirsbilek. The respondent purchased that share on 11th February 2004 and registered the transfer of the share into her names. The respondent thus became the sole registered owner of the entire property. Permission from the former owners of the undivided half lapsed when they ceased to be owners. Subsequently the appellant lived on the property without permission. Her circumstances do therefore not fall under Article 2232 above mentioned.

Was the relevant period peaceful?

52. It was the submission of Counsel for the respondent that the possession was not peaceful and was interrupted. To support his case counsel cited three letters written to the appellant dated 21 November 2002; 3rd March 2004 and 21 September 2016. One of the letters was replied to by the appellant's lawyer and the response was dated 4th December 2003.
53. In **Anglesy v Mussard and Anor**¹² Gardner Smith CJ defines each of these terms: to be continuous and uninterrupted no act must have happened to disturb possession. As for peaceful possession Smith, CJ states that there are two schools of thought on this definition: "According to one it means peaceful on the part of dominant owner and on the part of others, according to the other it means on the part of the dominant owner alone (Daloz, C.C. Annoté, art. 229 nn. 44-49)... Possession is not peaceable if contradicted by resistance, by force consisting either numerous acts or in reclamation before competent

¹² (1938) SLR 31

authority (27 & 57, ib.n.57). Isolated acts of interference, immediately repressed, do not remove from the possession the character of the peaceable (ib. n. 53).”

54. I opine that three letters cannot be “isolated” acts of interference. Such conduct is consistent. The three letters do not constitute interruption to prescription but are evidence of interference in the peaceful possession.

Was the period uninterrupted?

55. It was the argument of the respondent that the process of acquisition by prescription was interrupted by two “occurrences” - the letters written to the appellant by the respondent and two, the causes of action brought by the respondent against the appellant to wit an application for a writ of *habere facias possession*¹³ filed and heard by the Supreme Court and on appeal by the respondent, by the Court of Appeal.¹⁴ In response to the argument of the respondent, Counsel for the appellant argued that Articles 2242 and 2246 of the Civil Code disqualified both the letters and the court cases referred to from the definition of interruption. He also cited the case of **Antoine Sinon v Lormena Pierre**.¹⁵

Under Article 2242 it is provided that: Prescription may be interrupted either naturally or by a legal act.

2243. A natural interruption occurs when the possessor is deprived for longer than a year of the enjoyment of the thing through the actions of the former owner or through the action of a third party.

2244. A writ or summons or a seizure served on a person in the process of acquiring by prescription has the effect of a legal interruption of such prescription.

2246.(1) A writ or summons to appear before a court, even if that court has no jurisdiction, interrupts the prescription.

¹³ CS 443 Of 2006

¹⁴ SCA 25/07.

¹⁵ Civil Appeal 19 of 2001.

(2) *The interruption shall be deemed not to have occurred if—*

(d) *the plaintiff's claim is rejected.*

56. It is on record that the application for a writ of *habere facias possession* was dismissed by the Supreme Court¹⁶ and on appeal by the respondent, the appeal was dismissed by the Court of Appeal.¹⁷ In essence the respondent's claim was rejected.

57. I therefore find that based on the wording of **Article 2246 (2) (d)** the application for *habere facias possession* did not interrupt the prescription.

58. In **Antoine Sinon v Lormena Pierre (Supra)** this Court held that:

An interpretation of prescription by a legal act arises only upon an act done to commence proceedings in court or an act done pursuant to proceedings instituted in court. The word "writ, summons, and seizure" connote the institution of legal proceedings. ... A mere letter sent by an Attorney to (the person claiming ownership under prescription) informing her that the defendant "will be taking legal recourse ... contemplating the commencement of legal proceedings at a future point of time falls far short of the requirement of Article 2244 (now 2246).

59. Based on this Court's authority of **Antoine Sinon v Lormena Pierre (Supra)**, I find that the letters written to the appellant by the counsel for the respondent in this matter did not in law constitute an interruption of the process of acquiring the property by prescription.

60. The question which must still be answered is: what is the legal effect of the decision of the Supreme Court in CS 74/2005 in which a finding was made that the respondent was the owner of the property in dispute? The judgment was delivered on 2/10/2013.

¹⁶ CS 443 Of 2006

¹⁷ SCA 25/07

61. A decision by a court of law, informing a person in the process of acquiring by prescription, that she has no right to the property in issue constitutes an interruption to the process of acquisition by prescription.
62. I therefore find that the judgment of the Supreme Court - delivered on 2/10/2013 -and therefore before 2015 interrupted the prescription.

Was it unequivocal possession?

63. By 2005, the appellant was still claiming ownership of the land in issue, through inheritance. The appellant and 5 of her siblings filed a plaint on 9th February 2005 and the respondent filed a defence on 13th October 2005. The plaintiffs sought judgment from the Supreme Court ordering the respondent to sub-divide the land which is the subject matter of the dispute before us between the respondents and the plaintiffs. It was the contention of the plaintiffs in that case that the land had been left as their inheritance by their step father who had died in 1995. The Supreme Court held in favour of the respondent. The plaintiffs appealed against the judgement of the Trial Judge but the appeal was dismissed.
64. It is my finding that the fact that the appellant brought court action over ownership which she now claims to have acquired through prescription is evidence of equivocality in possession. The case was filed close to ten years after the period contended by the appellant's counsel as the date when the appellant started acting as owner - 1995.
65. I therefore find that the 20 year period within which the appellant acted as owner of the property was not peaceful, was not uninterrupted and the possession was equivocal.

Conclusion.

66. In view of the above findings, the appeal is dismissed.

Order

67. Each party is to bear their own costs.

Dr. Lillian Tibatemwa-Ekirikubinza, JA

I concur

Fernando, President

F. ROBINSON, JA

I will deliver a considered judgment in this appeal on the 29 December 2021 at 10.00 am.

F. ROBINSON, JA

Signed, dated and delivered at Ile du Port on 17 December 2021.