C v IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2021] SCCA 80
17 December 2021
SCA 19/2019
(Appeal from CS 54/2016)

In the Matter Between

Mersia Chetty — **1st Appellant**
Emilie Chetty — **2nd Appellant**
(rep. by Ms. Kelly Louise)

and

Gina Laporte — **Respondent**
(rep. by Mr. Rene Durup)

Neutral Citation: *Chetty & Anor v Laporte* (SCA 19/2019) [2021] SCCA 80 (Arising in CS 54/2016) 17 December 2021
Before: Twomey JA, Robinson JA, Tibatemwa-Ekirikubinza JA
Summary: Encroachment and illegal constructions - Acquisitive prescription - Counterclaim - Section 80 Seychelles Code of Civil Procedure. Appeal dismissed. Second Appellant to bear the costs of the appeal
Heard: 2 December 2021
Delivered: 17 December 2021

ORDER

1. The appeal is dismissed in its entirety
2. The Second Appellant to bear the costs of the appeal
3. The orders of the learned Trial Judge are upheld, save for the following amendments-
   (a) Concerning order *"a)"*,
   (b) We delete thereof the figure and words *"three months as from the date of this judgment"* after the word *"within"* and substitute therefor the figure and words *"within six months of the date of the Court of Appeal judgment"*;

(c) Concerning order *"d)"*, we delete thereof the figure *"three"* after the word *"within "* and substitute therefor the figure *"six"*. We also delete thereof the figure *"one"* after the word *"within"* and substitute therefor the figure *"three"*.

4. The orders of the learned trial Judge apply to the Second Appellant, the bare owner of parcel H802, who must fulfil the orders herein stated.

JUDGMENT

ROBINSON, JA (TWOMEY TIBATEMWA-EKIRIKUBINZA concurring)

[1] This appeal is against a decision of a learned Judge of the Supreme Court who, in an action where the Respondent (the Plaintiff then) brought proceedings against the Appellants (the Defendants then) for encroachment and illegal constructions on her parcel H801, gave judgment in favour of the Respondent.

[2] The learned trial Judge made the following orders in favour of the Respondent —

> *"a) The Defendant to remove all the encroachment that is the boundary wall and the swimming pool within three months as from the date of this judgment.*
>
> *b) To restore the Plaintiff's land in good state by removing all debris after removing the encroachments.*
>
> *c) To build a retaining wall along the boundary between her plot and the Plaintiff's plot.*
>
> *d) In case the Defendant fails to take the above steps within three months the Plaintiff is hereby authorised to carry out all the above works, that is removal of the encroachments and all incidental works mentioned above and the Plaintiff shall claim the costs duly certified by a quantity surveyor and the Defendant shall within one month settle the claim.*
>
> *e)* […] *Defendant to pay SR50,000.00 as damages.*
>
> *f) With costs."*. Verbatim

[3] The Appellants have appealed against the judgment on the following grounds —

> *"1. The Learned Judge erred in finding that the appellants had not acquired the 140 sqm currently being occupied by the Appellants by virtue of having been in occupation of the same for over 20 years in a clear and unambiguous manner by constructing thereon, without permission and had treated the property as if it were her own because the appellants in fact thought this portion fell within their boundary lines.*
>
> *2. The learned Judge erred in finding that there was no evidence that suggested the occupation of the Appellants over the encroachment was without permission of the then owner, the Respondent's late father".*

[4] The Appellants' skeleton heads of argument dealt only with ground one of the grounds of appeal. The Appellants' defence claimed, *inter alia,* that they were the owners of the encroached portion of land for acquiring it by acquisitive prescription for more than twenty years. The statements of defence had not sought any relief that the Appellants be declared the owner of the encroached portion. The Appellants' Notice of Appeal asked this Court to make an order declaring that they had acquired the encroached portion of land through acquisitive prescription. In exhibit D3, which is a transfer of land done under the Land Registration Act, dated 30 August 2016 and registered on the 3 October 2016, the Second Appellant is the bare owner of parcel H802, and the First Appellant is the holder of a lifetime usufruct.

[5] After considering the pleadings prudently, this Court at the appeal hearing informed Counsel for the Appellants that as the Appellants have an alleged claim against the Respondent, they should have set up their claim in the Respondent's action. In other words, the defence should have pleaded a counterclaim asking for a declaration of their alleged right. Counsel for the Appellants outrightly accepted the view of this Court.

[6] We give the reasons for our view.

[7] The right to set up a counterclaim is given by section 80 of the Seychelles Code of Civil Procedure, which provides —

> *"(1) Subject to subsection (2), where a defendant in any action wishes to make any claim or seek any remedy or relief against a plaintiff in respect of anything arising out of the subject matter of the action, he may, instead of raising a separate action make the claim*

or seek the remedy or relief by way of a counterclaim in the action; and where he does so the counterclaim shall be added to his defence to the action.

(2) If, on the application of any party against whom a counterclaim is made, it appears to the Court that it is in the interests of justice that the subject matter of the counterclaim be dealt with as a separate action, the Court may

(a) order that the counterclaim be struck out;

(b) order that it be tried separately; or

(c) make such order as it considers appropriate."

[8] [In parenthesis, we state that the question as to whether or not the Appellants must raise a separate action under section 80 of the Seychelles Code of Civil Procedure does not arise in this case]. Section 80 of the Seychelles Code of Civil Procedure emphasises that a counterclaim, although it is spoken of as though it was part of the procedure in the claimant's action, is more than a defence; it is in the nature of a proceeding in a cross-action. In terms of section 80 of the Seychelles Code of Civil Procedure, if a counterclaim were to be treated as having no energy except as a bar to the action, it becomes a defence and not a counterclaim.

[9] We have referred to English cases of persuasive authority on the subject to strengthen our view.

[10] In *Stooke v Taylor* (1880) 5 Q.B.D. 569 p 577 Cockburn, C.J. stated: *"I think the true mode of considering the claim and counterclaim is, that they are wholly independent suits, which for convenience of procedure are combined in one action".*

[11] In the same vein, *Odgers' Principles of Pleadings and Practice in Civil Actions in the High Court of Justice* 19th Edition, p. 220, states —

"For many purposes a counterclaim is substantially a cross-action. "A counterclaim is to be treated for all purposes for which justice requires it to be so treated, as an independent action" (per Bowen, L.J. in Amon v. Bobett, 22 Q. B. D. p. 548). If, after the defendant has pleaded a counterclaim, the plaintiff's

> *action is for any reason stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with* […]. *The Court may order a counterclaiming defendant to give security for costs; but not where the counterclaim is in substance a defence to the action".*

[12] See also *Bow Maclachan & Co. v. The The Camosun,* [1909] A.C. 597; *Williams v. Agius,* [1914] A. C. 522, in which it was stated that the counterclaim must be of such a nature that the court will have jurisdiction to entertain it as a separate action.

[13] Fundamentally, the case is that the rules of pleadings apply to counterclaim and defence to counterclaim as though they are respectively a statement of claim and a defence. We read from *Odgers'*[1] —

> *" A counterclaim must always claim relief against the plaintiff. "A pleading which asks no cross-relief against a plaintiff either alone or with some other person is not a counterclaim." (Per Jessel M.R. in Furness v. Booth (1876) 4 CH. D. at P. 587.".*

See also *Harris v Gamble* (No. 1), (1877) 6 Ch. D. 748 (1877).

[14] Based on section 80 of the Seychelles Code of Civil Procedure and the legal principles enunciated in the English cases of persuasive authority, we hold that, had the Appellants claimed a relief concerning parcel H801, they would, in effect, be claiming in respect of parcel H801, which would substantially be a cross-action : see, for example, *Maria Adonis v William Celeste* SCA 28/2016 [2019] SCCA 32 (23 August 2019) and *PTD v Zialor* (SCA32/2017) [2019] SCCA 47 (17 December 2019). Also, in *Seebun (Appellant) v Domun and others (Respondents) (Mauritius) [2019] UKPC 39 Privy Council Appeal No 0078 of 2014*, the Board, in an appeal which raised questions regarding the acquisition of ownership of immovable property through acquisitive prescription and the loss of a right of action through extinctive prescription, stated: *"[a] person asserting his ownership of property by acquisitive possession can raise an action seeking a declaration of his right of ownership …".* In this connection, the Appellants should have claimed or sought remedy or relief by counterclaim in the Respondent's action and not by way of defence to the Respondent's claim.

[1] Odgers p. 218 – op.cit

[15] For the reasons stated above, we dismiss ground one.

[16] We add in passing that Mr Danny Lucas, Counsel for the First and Second Appellants, in the court below, in his closing written submissions, had submitted that the trial court should refuse the Respondent's request for demolition because it would cause great injustice, and that the Appellants have acted in good faith.

[17] In the case of *Nanon v Thyroomooldy* SCA 41/2009, it is stated that the court may decline a request for demolition only if —

(a) grave injustice may result in certain exceptional cases; and

(b) the encroacher has acted in good faith, within the rules of construction, did not otherwise break any law, and the demolition would cause great hardship.

[18] We state that the following conditions must be fulfilled for the court to refuse a request for demolition in consonant with *Nanon*. The Appellants must plead the material particulars regarding the matters set out in *Nanon*, and evidence, based on the pleadings, must be adduced to establish the matters set out in *Nanon* on a balance of probabilities.

[19] Having considered the statements of defence, we state that the learned Judge cannot be faulted for not having considered the Appellants' submissions concerning the issue as the statements of defence did not plead the material particulars which would have allowed the Appellants to lead evidence of the matters set out in *Nanon*. The statements of defence contained no material averments that the demolition of the encroachment would lead to grave injustice, and that the encroachment was effected in good faith within the rules of construction, did not otherwise break any law, and the demolition would cause great hardship.

[20] Having dismissed ground one, the appeal is dismissed in its entirety. Accordingly, we uphold the orders of the learned Judge repeated in paragraph [2] hereof, save for the following amendments —

a) Concerning order *"a)"*, we delete thereof the figure and words *"three months as from the date of this judgment"* after the word *"within"* and substitute therefor the figure and words *"within six months of the date of the Court of Appeal judgment "*;

b) Concerning order *"d)"*, we delete thereof the figure *"three"* after the word *"within "* and substitute therefor the figure *"six"*. We also delete thereof the figure *"one"* after the word *"within"* and substitute therefor the figure *"three"*.

[21] For the avoidance of doubt, we make an order that the orders of the learned trial Judge, rehearsed in paragraph [2] hereof, apply to the Second Appellant, the bare owner of parcel H802, who must fulfil the orders herein stated.

[22] We make the Second Appellant bear the costs of this appeal.

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F. Robinson, JA

I concur

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M. Twomey, JA

I concur

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L. Tibatemwa-Ekirikubinza, JA

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