

IN THE SEYCHELLES COURT OF APPEAL

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**Reportable**

[2022] SCCA 2 (31 January 2022)  
SCA 30/2019 and SCA 36/2019  
(Consolidated)  
Appeal from CS 114/2017) [2019]  
SCSC 421

In the matter between

**SUZANNE MUSSARD JEAN-BAPTISTE**  
(rep. by Basil Hoareau)

**Appellant**

And

**DERMOT HUGHS PADAYACHY**  
(rep. by Kieran Shah SC)

**Respondent**

And

**DERMOT HUGHS PADAYACHY**  
(rep. by Kieran Shah SC)

**Appellant**

And

**SUZANNE MUSSARD JEAN-BAPTISTE**  
(rep. by Basil Hoareau)

**Respondent**

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**Neutral Citation:** *Mussard-Jean-Baptiste v Padayachy* [2022] SCCA 2 (31 January 2022) SCA 30/2017 and SCA 36/2017 (Consolidated) Arising in CS 114/2017) SCSC

**Before:** Twomey, JA, Robinson JA and Tibatemwa- Ekirikubinza JA

**Summary:** Power of attorney- when null and void –sections 20, 70, 88, 89 of the Land Registration Act.

**Heard:** 2 December 2021

**Delivered:** 31 January 2022

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**ORDER**

The cross appeal is partly allowed and the appeal is dismissed with costs.

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**JUDGMENT**

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**TWOMEY JA**

## **Introduction**

- [1] Antonia Mussard had two daughters: Marie-France Padayachy and Suzanne Mussard-Jean-Baptiste (the latter being the Appellant and Cross-Respondent, hereinafter, Mrs. Jean-Baptiste). Antonia passed away on 19 September 2001. During her lifetime, she owned land, namely Parcel V2062 at Hangard Street, Victoria, Mahé, Seychelles. On 6 April 1993, prior to her death, Antonia transferred the said parcel of land to Marie-France. This transfer was executed by Marie-France under a general power of attorney granted to her by Antonia registered on 16 November 1978 at the Registry of Deeds.
- [2] It bears mentioning that Parcel V2062, as other parcels of land in Seychelles, was originally registered in the Register of Deeds under the (Old) Mortgage and Registration Act 1927 (MRA). It was transferred to the (New) Land Register pursuant to the Land Registration Act 1967 (LRA) on 21 June 1983. It further bears noting that agents can only transfer property under the LRA by “an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve” (see sections 60 and 70(2) of the LRA). The prescribed form referred to is Form LR13 as contained in the LRA. It is emphasised at this juncture that it is not in contention that at the time the Power of Attorney was granted, Parcel V 2062 was registered under the MRA.
- [3] Marie France died intestate on 28 November 2013. She had two surviving heirs: her two children, Rachel Duncan née Padayachy and Dermot Padayachy (the latter being the Respondent and Cross-Appellant, hereinafter Mr. Padayachy). Parcel V2062 was transmitted after Marie-France’s death to Mr. Padayachy and registered in his sole name on 8 June 2016, his sister Rachel having renounced all her legal rights and interests therein.

## **The court proceedings**

- [4] Shortly after Marie-France’s death and after the transmission of the land to Mr. Padayachy, Mrs. Jean-Baptiste filed a Complaint praying for a declaration that she was entitled to half of Parcel V2062, as an heir to her mother’s estate. She averred that the transfer of the property from her mother to Marie-France was null and void as a result of the fact that the power of attorney utilised for the transfer of the property was neither in the form prescribed by the LRA nor executed before a legal practitioner and in any event

not in accordance with section 60 of the LRA. She further averred that no original certified copy of the power of attorney was filed in the File of Powers of Attorney in contravention of the LRA.

- [5] In his Statement of Defence, Mr. Padayachy pleaded inter alia, that the cause of action was barred by prescription - first under Article 2262 of the Civil Code of Seychelles as his mother had purchased the property by a deed of transfer, which had been duly registered, secondly, under Article 2265 of the Code, as his mother, his predecessor in title had purchased the property in good faith which deed of transfer had been duly registered, and thirdly if indeed Mrs. Jean-Baptiste could impugn the transfer, her action should have been brought within 5 years of the date of transfer.
- [6] He further pleaded that the Land Registrar was empowered to accept a document different from the prescribed forms under the provisions of the LRA, and denied that the transfer was illegal.
- [7] He further pleaded that he and his predecessor in title had been in continuous and uninterrupted, peaceful, public, unequivocal and *animus domini* possession of Title V2062 for more than twenty years and had prescribed the same. Alternatively, that the title had been acquired for value and in good faith and having been in their continuous and uninterrupted, peaceful, public, unequivocal and *animus domini* possession for more than ten years had prescribed the same under a *juste titre*.
- [8] He prayed for the dismissal of the suit with costs.
- [9] The court *a quo* after hearing evidence and submissions from the parties dismissed the Plaintiff, finding that although the power of attorney by which Marie-France had purported to transfer Parcel V2062 was null and void for not having been in the prescribed form and not being registered pursuant to the provisions of the LRA, that the action brought by Mrs. Jean Baptiste was barred as it could not be said that she was exercising a property right but rather a personal claim against a titleholder which is prescribed after 5 years.

## **The appeal and cross-appeal**

[10] Both parties being dissatisfied with the decision of the court *a quo* have appealed. Mrs Jean-Baptiste has appealed on the following grounds:

- 1 *The learned trial judge erred in law in holding that the cause of action instituted by the Appellant was not an action en revendication.*
- 2 *The learned trial judge erred in law in holding that the cause of action instituted by the Appellant was prescribed under Article 2271 of the Civil Code.*

[11] Mr. Padayachy has appealed on the following grounds:

- (1) *The learned trial judge was in error to hold that the notarial power of attorney dated 30 October 1978 registered on 16 November 1978 in Register A37 No 1989 at the Registry of Deeds in terms of section 12(1) of the Mortgage and Registration Act was void as
  - a. *It was not filed in the Register and File of Powers of Attorney*
  - b. *That in consequence, the transfer made pursuant to this power of Attorney was null and void.*in that
  - i. *both the Power of Attorney and the land in question in the year 1979 was registered under the Mortgage and Registration Act and in any event form cannot take precedence over the substance of the Power of Attorney*
  - ii. *the Grantee of a Power of attorney cannot be held liable for the non-performance of an administrative function of the Registry of Deeds.**
- (2) *The learned trial judge was in error not to consider and hold that alternatively, the Respondent had acquired the property by acquisitive prescription of 20 years and/or 10 years, or its claim defeated by the prescription of 20 years and/or 10 years.*

## **The validity of the power of attorney to effect the transfer of Parcel V2062**

[12] Notwithstanding the grounds appeal relating to causes of action and prescription, it seems to me that the burning issue to be resolved in the present appeals is whether a Power of Attorney filed in the Register with the Registrar of Deeds under the MRA in respect of property registered under the MRA can be used to effect the transfer of property after the same property has been transferred to the (New) Land Register under the LRA. The other

issues raised in the grounds of appeal are peripheral to the validity of the transfer of V2062 from Antonia to Marie-France and indeed the validity of the Power of Attorney and need not be addressed if I find that the Power of Attorney was legal and valid to effect a transfer of land under the LRA in the circumstances of this case.

[13] It is the submission of Mr. Hoareau, Counsel for Mrs. Jean Baptiste that the provisions of the LRA in respect of Powers of Attorney are mandatory and failure to comply with them or to execute transfers of property using legally deficient Powers of Attorney would nullify such transactions.

[14] It is at this stage important to bring these provisions to light. Sections 60 and 70 of the LRA provide in relevant part:

*“Section 60 (1) Every instrument evidencing a disposition and executed in Seychelles shall be executed in the presence of a notary, barrister, attorney, magistrate, Justice of the Peace, a duly appointed Government Representative, or the Registrar, who shall attest the execution in the prescribed form...*

*70 (1) Upon the application of the donor or the donee of a power of attorney which contains any power to dispose of any interest in land, such power of attorney shall be entered in the register of powers of attorney and the original, or with the consent of the Registrar a copy thereof certified by the Registrar, shall be filed in the file of powers of attorney.*

*(2) Every such power of attorney shall be in the prescribed form or such other form as the Registrar may in any particular case approve, and shall be executed and attested in accordance with section 60.” (Emphasis added)*

[15] In Mr. Hoareau’s submissions, what can be gleaned from the above provisions with respect to the particular circumstances of the present appeal, is that if a transfer was to be effected in respect of Parcel V2062, both the instrument of transfer and the Power of Attorney permitting Marie-France to execute the transfer on behalf of Antonia would have to be signed before one of the legal practitioners listed in section 60 and that the Power of Attorney would have to be entered in the Register of Powers of Attorney with an original or duly certified copy of the original filed in the register under the LRA. The Power of Attorney filed would have to be in the prescribed form, (namely Form LR13) or in a form approved by the Registrar.

[16] After having scrutinised the transcript of proceedings of the court *a quo* and the exhibits therein, I note that Exhibit P5, a general Power of Attorney was signed before Notary Ramnikal Valabji on 30<sup>th</sup> October 1978 and registered on 16 November 1978 in Register A37 No 1989 at the Registry of Deeds. I also note that the said registered Power of Attorney is cited in the instrument of Transfer of Title V2062 signed before Attorney Anthony Juliette on 6 April 1993 namely:

*THE LAND REGISTRATION ACT  
TRANSFER OF LAND*

*TITLE No V2067*

*Mrs. Antonia Mussard of Hangard Street, Mahe, Seychelles, herein duly represented by Mrs. Marie-France Mussard, of the same address, in virtue of a power of attorney conferred upon her by the said Mrs. Antonia Mussard dated the thirtieth day of October one thousand nine hundred and seventy-eight registered in Reg. A 37 No 1989, hereinafter referred to as the Transferor in\ consideration of the price of Rupees thirty thousand which sum has been paid) hereby transfer to Marie-France Mussard of Hangard Street, Mahe, Seychelles hereinafter referred to as the Transferee the land comprised in the above-mentioned title.*

*Dated this 6<sup>th</sup> day of April 1993.*

[17] Further, the Power of Attorney relied on for the transfer above, a copy of which was produced in court by Mrs. Jean-Baptiste, contains the following grant of power from the donor to the donee:

*“to buy and sell movable or immovable property or properties; also to appear at the office of the Land Registration ...”*

[18] The Senior Registration Officer, Ms. Rosemay Carolla, produced an Index of the MRA in which she testified that the names of persons giving powers to others are entered. She further testified that Register 837 (the *Répertoire*) in which the Power of Attorney referred to above had been registered was not available as according to her:

*“[I]t is falling apart and is being treated...” (Transcript of proceedings, p. 44).*

- [19] There was in fact no contention that this power of attorney indeed existed, was filed in the register of Powers of Attorney under the MRA and correctly referred to in the deed of transfer but Mr. Hoareau submits that this Power of Attorney filed under section 12 of the MRA in the *Répertoire* could not be used to transfer property in terms of the LRA. He contends that while the Land Registrar has discretion as to the *form* of the instrument, she holds no discretion in respect of the mandatory provision of filing an original of the Power of Attorney in the Register of the LRA. In brief, if I understand him correctly, he contends that a Power of Attorney registered in the *Répertoire* is not good for the transfer of property under the LRA unless the same Power of Attorney or a different one was again registered in the Register of the LRA.
- [20] Mr. Hoareau has further contended that the Land Registrar's evidence that he had accepted the Power of Attorney as was his discretion, could not be relied on as after him leaving the post of Land Registrar and practising as an Attorney, some twenty-three years after the impugned transfer was conflicted in the evidence he gave as he was now acting as attorney for the heir of the proprietor. I cannot overemphasise how far-fetched that contention is. There is, in any case, no evidence that the court *a quo* disbelieved the former Land Registrar- the learned trial judge only states that he should have registered and filed the Power of Attorney in the correct register. There is no basis to support this allegation and it is rejected outright.
- [21] Mr. Shah, Counsel for Mr. Padayachy has submitted that the execution and attestation of the Power of Attorney were correctly done before a Notary Public. He further contends that unlike other forms under the LRA, which if not followed, does not transfer title, there is no absolute requirement that it has to be in the prescribed form. It can be in any form if approved by the Registrar. The Power of Attorney conferred authority on Marie France to sell the property which she did. Mr. Shah also submits that both the form and substance argument raised by Mr. Hoareau have no application as under section 70(2) of the LRA the Registrar had the discretion to accept a Power of Attorney that was not in the format prescribed.
- [22] Having considered the submissions of both counsel and the evidence on record it is clear that Marie France had the power to transfer the property. This fact is indeed not

contested. The power of attorney giving her such agency subsisted and was correctly referred to in the instrument of transfer but remained filed and listed in the Register of the MRA. What is in contention is that it was not filed anew in the correct Register under the LRA. Should this mistake or inadvertence on the part of the Land Registrar result in the transfer being declared illegal, null and void?

[23] I am acutely aware as I consider this issue that there may be several properties in the New Land Register transferred from the Old Register through instruments similar to the one in the present appeal. There is no provision of the law nor evidence before this Court that when land was transferred from the Old Register to the New Register, Powers of Attorney relating to these transfers not in the prescribed form with respect to the LRA but registered in the file of Powers of Attorney under the MRA were made redundant in respect of any potential transfers of land under the LRA.

[24] I am also concerned that mistakes made by the Land Registrar in the process of registering title would result in land ownership being precarious. It is my view that section 20 of the LRA in providing for the security of title of the land proprietor guarded against just such occurrences. It provides in relevant part:

*“Subject to the provisions of this Act-*

*(a) the registration of a person as the proprietor of land with an absolute title shall vest in him the absolute ownership of that land, together with all rights, privileges and appurtenances belonging or appurtenant thereto...”*

[25] The LRA makes provision for the rectification of the Register only in specific circumstances. In this respect, sections 88 and 89 provide in relevant form:

*88(1) The Registrar may rectify the register or any instrument presented for registration in the following cases:*

*(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor...*

*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.*

[26] It is clear from these provisions that unless an allegation of omission, fraud or mistake is made and such omission, fraud or mistake was in the knowledge of the proprietor or contributed substantially to it by the proprietor that the Register will not be rectified.

[27] In the present case, the pleadings made no allegation of omission, fraud or mistake nor were evidence of such adduced. There is no basis therefore for this Court to cancel or amend the Register to change the title in respect to Parcel V2062. The appeal has no merit whatsoever and is dismissed. Ground 1 of the cross-appeal succeeds.

[28] That being the case I see no reason to consider the other grounds of appeal relating to the prescription of the action.

### **Order**

[29] In the circumstances, I make the following orders:

- 1 *The cross-appeal is partly allowed.*
- 2 *The appeal is dismissed with costs.*

Signed, dated and delivered at Ile du Port on 31 January 2022.

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Dr. Mathilda Twomey JA



I concur

Dr. L Tibatemwa-Ekirikubinza