IN THE SEYCHELLES COURT OF APPEAL

Reportable
[2022] SCCA 21 (29 April 2022)
SCA 47/2019
(Arising from CS 5/2018)

In the matter between

JIMMY FINESSE **Appellant**
(rep. by Evelyne Almeida)

and

BERTHA CESAR **Respondent**
(rep. by Serge Rouillon)

Neutral citation: *Finesse v Cesar* (SCCA 21) [2022] (29 April 2022) SCA 47/2019 (Arising in CS 5/2018 SCSC 549
Before: Twomey-Woods, André and Dodin, JJA
Heard: 15 April 2022
Summary: Transfer of land by analphabet nonagenarian-allegation of fraud-validity of authentic document-insufficient pleadings – non-suit
Delivered: 29 April 2022

ORDER

(1) The Appellant, Jimmy Finesse is non-suited without prejudice to the Respondent, Bertha Cesar, to refiling a suit against him.

(2) An inhibition pursuant to section 76 (1) of the Land Registration Act, inhibiting the registration of any dealing with Parcel V5600 until further order of the Court.

(3) In terms of section 76(2) of the Land Registration Act, a copy of this order is to be served on the Land Registrar, who shall register the inhibition in the appropriate register.

(4) Each party is to bear its own costs.

JUDGMENT

TWOMEY JA

Background

1 Bertha Cesar, an infirm and analphabet woman in her nineties is alleged to have been defrauded of her property rights in co-owned land at Mont Buxton by Jimmy Finesse, a man who it is also alleged posed as her grandson.

2 In a suit in which she was represented by power of attorney by Michel Elisa, (the husband of Mrs. Cesar's adopted daughter) she pleaded that in April 2015, an alleged sale of her rights in Parcel V5600 was executed in Mr. Leslie Boniface's chambers at Kingsgate House, Victoria without her being present. She pleaded that her thumbprint had been placed on a blank sheet of paper by employees of Mr. Boniface at her home, that she had never agreed to the sale, and that in any event no consideration for the alleged sale had been paid.

3 Mr. Finesse, in a statement of defence that is not entirely clear, admitted that no consideration had been paid for the transfer and that the consideration entered on the transfer document was only a formality that was required to be followed.

The trial and decision of the court *a quo*

4 At the trial, Mr. Finesse was called on personal answers but also gave sworn evidence. He admitted that he did not pay for the transfer of Mrs. Cesar's interest into his name but according to him he had been authorised to act in Mrs. Cesar's name and it was with her approval that he transferred her interest into his name. He contradicted himself by saying that the consideration price was SR100,000 entered for tax purposes but then stated that he applied for tax exemption. Although his birth certificate did not prove that he was Mrs. Cesar's grandson he was indeed the son of Frank Cesar, Mrs. Cesar's son and was treated as such. The latter point does not seem to have been seriously contested by Mrs. Cesar's witnesses. However, apart from an admission that no consideration had been paid for the transfer, none of the facts above were pleaded in the statement of defence.

5 Mrs. Cesar had several witnesses – the thrust of their testimony was to the effect that Mrs. Cesar was never paid and that the transfer document is defective in law in many aspects.

6 Of serious contention is a meeting that took place at the Land Registrar's office to confirm whether Mrs. Cesar had acquiesced to the transfer. Mr. Hoareau claims the Land Registrar and her secretary were also present. There are however no minutes kept of this meeting. Mrs. Cesar's witnesses who accompanied her to the meeting state that Mrs. Cesar clearly stated at the meeting that she never sold her land and whereas Mr. Finesse and Mr. Fred Hoareau, the Deputy Land Registrar claim that Mrs. Cesar confirmed that she had made the transfer. Mr. Hoareau also spoke of a video he had seen of Mrs. Cesar stating that she had no objection to transferring her interest to Mr. Finesse. This video was never produced in evidence.

7 In her decision delivered on 3rd July 2019, the learned trial judge found that the sale was "illegal and void for lack of conformity to the Land Registration Act as well as the fact that the Plaintiff did not understand the significance of the transaction she was undertaking."

The present appeal

8 Mr. Finesse has appealed this decision on the following grounds:

> *(5) The learned trial judge erred in law and on the facts to have concluded that the transfer of land title V5600 by the Respondent to the Appellant was suspect and thus fails to meet the requirements of fraud which was pleaded by the Respondent.*
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> *(6) The learned trial judge erred in law and on the facts in having failed to sufficiently or at all, address her mind to the evidence of the Respondent and Mr. Fred Hoareau, the Assistant Land Registrar, of the meeting held at the offices of the land registrar, whereby the Respondent admitted to having transferred her share in land title V5600 to the Appellant.*
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> *(7) The learned trial judge erred in law for having determined the matter on the issue of the transfer being in non-conformity with the Land Registration Act, specifically rule 5 and on the fact of the unsupported testimonies of the witnesses for the Respondent, that the Respondent did not understand the significance of the transaction relating to the transfer.*

(8) The learned trial judge erred in law and on the facts for hearing and determining this matter on a defective power of attorney through the unsupported evidence of the holder of the power of attorney, Michel Elisa, his wife Jessie Elisa and Sandra Charlot.

Pleadings, Non-Joinder, and Cause of Action

9 The last ground of appeal does not arise from the statement of defence nor the evidence led in the court below and was not an issue addressed by the trial judge. In the circumstances, it is *ultra petita* and is dismissed.

10 While the first three grounds of appeal may have merit, I have difficulties addressing them because of a threshold issue that must be overcome and was missed entirely at the trial stage.

11 I find first, that the Statement of Defence is unintelligible, does not indicate Mr. Finesse's defence and does not defeat the plaint and case brought.

12 I give examples: In Paragraph 3 the following averment is made:

> *"... the Defendant states that the Plaintiff was dully (sic) authorised to act as attorney signed by Mr. Frank Ally(sic) dated 28th July 2014. The Defendant states that in June 2015, the Plaintiff confirmed that she indeed transferred the Sid (sic) interest in the property V5600 at Mont Buxton by her own free will (sic)",*

13 The Defendant in the case was Mr. Finesse and the Plaintiff, Mrs. Cesar – in this context apart from the incomprehensible language I cannot follow what is being averred in this paragraph.

14 Other aspects of the Defence are even more consternating:

> *"6. Paragraph 5[with regard to returning the property] is denied. The Defendant did not transfer any interest in the said property as the plaintiff herself never asked the Defendant to do so. In fact the Defendant has sayings(sic) from the Plaintiff that he never sured (sic) the Defendant. It is the Attorney doing such(sic) for personal gains.*

> *7. Paragraph 6 is denied. The Defendant states that the transfer was done according to law and the land registrar had taken all reasonable steps to ensure that no such thing happens (sic).*

15 What is being alleged here? And what does Mr. Finesse hope to prove in his defence? Even the prayer at the end of the Statement of Defence indicates that the Defendant wants the court to 'dismiss itself":

> *"Wherefore the defendant prays this Honorable (sic) Court be dismissed (sic) with costs.*

16 Secondly, my difficulties do not end with Mr. Finesse's pleadings. They also arise from Mrs. Cesar's Plaint, paragraph 3 of which concerns the attorney who executed the transfer documents – serious allegations are made about him including fraud, and yet he is not joined as a party. A reading of the plaint indicates that the whole suit rests on allegations of wrongdoing directed at the attorney and not at Mr. Finesse. I have tried to discern who the cause of action is aimed at – if is it alleged that fraud was committed by Mr. Boniface, why is Mr. Finesse and not Mr. Boniface being sued?

17 To compound difficulties, there is a prayer to the effect of asking the court to direct the Land Registrar to rectify the Register – but there is neither averment raised nor a cause of action against either herself or her deputy Mr. Hoareau, and yet evidence of wrongdoing on their part was allowed to be adduced.

18 Thirdly, in alleging that there was fraud committed and a dereliction of duty by the attorney but then a breach of contract as no consideration was paid by the purchaser, it is unclear what the cause of action is. It appears to be an action in both delict and contract which is not permitted by our laws against *cumul d'idemnités*[1] (Article 1370 alinéa 2 of the

[1] Concurrency of actions

Civil Code)[2] and it is also alleged that the transfer is null and void for not conforming to the provisions of the Land Registration Act?

19 Sections 71 - 75 of the Seychelles Code of Civil Procedure provide in relevant part that:

> *"71 The plaint must contain the following particulars:*
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> …
>
> *(d) a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action;*
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> *75. The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claims. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted".*

20 At the trial stage where the plaint does not disclose viable causes of action, the court may order it to be struck out, give judgement or allow the parties to rectify the pleadings. Equally, section 112 of the Civil Procedure Code permits the court to join "plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." In the absence of such an order, the court can only deal with the matter as concerns only the parties to the suit (section 112). In *Wilmot v W&C French* (1971) SLR 326 Sauzier J stated that it is necessary to make a person party to action if he or she is to be bound by the result of the action which cannot be effectually and completely settled unless he or she is a party (citing *Amon v Raphael Tulk & Sons Ltd.* (1956) 1 QB 357).

21 The case of *Weller and Anor v Katz*[3] summarises the law on insufficient or erroneous pleadings and the following passages are instructive:

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[2] *Multi Choice Africa Limited v Intelvision Network Limited and Anor* SCA 45/2017 (9 April 2019) [1], *Hermitte v Attorney General and Anor* (SCA 48/2017) [2020] SCCA 19 (21 August 2020).

[3] *Weller and Anor v Katz* (SCA 39/2017) [2020] SCCA 6 (21 August 2020

(50) "…We state that we are bound by the pleadings of the parties as they are themselves. If we were to entertain this appeal based on the existing pleadings, it would lead to a miscarriage of justice.

(51) In Gallante v Hoareau [1988] SLR 122, the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

"[t]he function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this reason that section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action".

(52) In Tirant & Anor v Banane [1977] 219, Wood J, made the following observations —

"[i]n civil litigation each party must state his whole case and must plead all facts on which he intends to rely, otherwise strictly speaking he cannot give any evidence of them at the trial. The whole purpose of pleading is so that both parties and the court are made fully aware of all the issues between the parties. In this case, at no time did Mr. Walsh ask leave to amend his pleadings and his defence only raised the question of plaintiff's negligence.

In Re Wrightson [1908] 1 Ch. at p. 799 Warrington J. said:

"The plaintiff is not entitled to relief except in regards to that which is alleged in the plaint and proved at trial.

…

(53) In Elfrida Vel v Selwyn Knowles Civil Appeal No 41 and 44 of 1988, the Appellate Court held —

"[i]t is obvious that the orders made by the trial judge were ultra petita and have to be rejected. It has recently been held in the yet as unreported case of Charlie v Francoise (1995) SCAR that civil justice does not entitle a court to formulate a case for a party after listening to the evidence and to grant a relief not sought in the pleadings. He was of course at pains to find an equitable solution so as to do justice to the Respondent but it was not open to him to adjudicate on the issue … which had not been raised in the pleadings".

(54) In Lesperance v Larue SCA 15/2015 (delivered on the 7 December 2017), the Appellate Court reiterated the point that a court cannot formulate the case for a party. At paragraphs 11, 12 and 13 of the judgment, the Appellate Court quoted with approval the decisions of the English Court and the principle enunciated by Sir Jack Jacob in respect of pleadings —

> *"11. In his book "The Present Importance of Pleadings" by Sir Jack Jacob, (1960) Current Legal Problems, 176; the outstanding British exponent of civil court procedure and the general editor of the White Book; Sir Jacob had stated:*
>
> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice ..."*
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> *In Blay v Pollard and Morris (1930), 1 KB 628, Scrutton, LJ that: "Cases must be decided on the issues on record, and if it is desired to raise other issues they must be placed on record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course."*

22 In the case of *Pirame v Peri*[4], the Court of Appeal held that no regard should be had to evidence on the record that is outside the pleadings and that even if evidence is led outside

[4] (unreported) SCA 16 of 2005

the pleadings and not objected to it does not have the effect of translating it into the pleadings or the evidence.

23 The present appeal contained many matters which were *ultra petita*. The defence was also unintelligible. Evidence was adduced outside the four corners of the suit. The case gave rise to serious issues of concern and it is perhaps why the learned trial judge granted remedies. The decision is now being appealed.

24 Additionally, the present appeal presents a case of classic non-suit. The action was bought against the wrong persons or not against all the persons implicated. What are the solutions available to this court when pleadings or grounds of appeal are incompatible with the evidence adduced and/or the determination by the trial court? In *Weller*,[5] the Court of Appeal dismissed an appeal purely on the fact that were it to entertain the appeal based on the existing pleadings, it would lead to a miscarriage of justice.

25 In *Dorothy Hall v Maria Amina Morel & Ors*[6] (Civil Appeal SCA22/2017) [2019] SCCA 24 (23 August 2019), there had been a failure to join heirs in a suit that involved their property interests. The minority view was that the appeal should be dismissed.

26 In *Chez Deenu Pty Ltd v Seychelles Breweries Limited*[7], it was held that when a finding is made that the action is untenable in law it may be appropriate to further find that the matter should not be dismissed but to declare it non-suited. In the words of Domah J:

> *"The appropriate order to make in a case where the court gives the option to a litigant to bring a proper case because the decision is based only in law and the evidence has not been heard on the merits of the case is to non-suit the action. This enables the litigant unsuccessful in law but with a possible success in another cause of action to bring a proper fresh action."*

[5] Supra, fn 3
[6] CCivil Appeal SCA22/2017) [2019] SCCA 24 (23 August 2019);
[7] (unreported) SCA 22/2011

27 Similarly, in *Platte Island Villa Resort Ltd v EME Management Services Ltd*[8] where Chief Justice Egonda-Ntende decided in a case of admitted facts that the appellant had failed to discharge the evidential burden of proof on only one critical aspect and dismissed the action as a matter of law, the Court of Appeal found that the only order which could be made in the circumstances was an order for non-suit rather than dismissal.

28 The concept of non-suit - where a plaintiff has failed to make a legal case -. does indeed arise in the present circumstances and the cases of *Chez Deenu* and *Platte Island* are apposite.

29 In this regard, it must be noted that in *Mein v Chetty (No 1),*[9] it was queried whether our procedural laws provided for the remedy of non-suit. The remedy was abolished in England in the late 19th century and was replaced by the rules of court relating to the discontinuance of suits. Our Code of Civil Procedure is silent on non-suit but also provides for discontinuance of suits. Hence, section 182 provides for a plaintiff to give notice to discontinue a suit he has filed before a defence is filed or with leave of the court at any time until judgment is given in the matter. There are limits to this procedure however and it does not cater for other non-suit circumstances such as the present case.

30 In the present appeal, the peculiar circumstances do not lend themselves to either an order for dismissal or one for the confirmation of the court a quo's decision.

31 I note however that Rule 31 (5) of the Seychelles Court of Appeal Rules provides as follows:

> *"In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or <u>may make such other order in the matter as to it may seem just…" (emphasis added)</u>*

[8] (SCA 17/2013) [2015] SCCA 20 (28 August 2015)
[9] (1975) SLR 184.

Decision

32 As this court is empowered to make any order that seems just and given the most peculiar circumstances of this case, it is my belief that the most just order is an order for non-suit. Subsequent to this order, the Respondent would be therefore free to file a suit appropriately. In football parlance, this is neither a win nor a lose situation for either party in the present case - it is a draw.

33 Out of an abundance of caution, I find that it is necessary in terms of section 76 of the Land Registration Act to prevent any further dealings with Parcel V5600 and maintain the status quo until the resolution of the dispute between the parties relating to the transfer of Parcel V5600 or further order of a court.

Order

34 Accordingly, I hereby make the following orders:

(1) The Appellant, Jimmy Finesse is non-suited without prejudice to the Respondent, Bertha Cesar to refiling a suit against him.

(2) An inhibition pursuant to section 76 (1) of the Land Registration Act, inhibiting the registration of any dealing with Parcel V5600 until further order of the Court.

(3) In terms of section 76(2) of the Land Registration Act, a copy of this order is to be served on the Land Registrar, who shall register the inhibition in the appropriate register.

(4) Each party is to bear its own costs.

Signed, dated, and delivered at Ile du Port on 29 April 2022.

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Dr. Mathilda Twomey-Woods, JA

I concur

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Samia André, JA

I concur

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Gustave Dodin, JA