IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] Civil Appeal SCA 25/2020
SCCA 46 (19 August 2022)
(Arising in CS 13/2019 [2020] SCSC 182)

In the matter between

JEFFREY PAYET **APPELLANT**
(rep. by Mr. Basil Hoareau)

And

GEORGE PAYET **1ST RESPONDENT**

EDDY PAYET **2ND RESPONDENT**

(represented by his guardian George Payet)

(rep. by Mr. Kieran Shah)

Neutral Citation:	*Payet v Payet & Anor* (Civil Appeal SCA 25/2020 [2022] SCCA 46 (19 August 2022) (Arising in CS 13/2019 [2020] SCSC 182)
Before:	Robinson, Tibatemwa- Ekirikubinza, Andre JJA
Summary:	Appeal against a decision of the Supreme Court – registered lease – Article 595 of the Civil Code – Damages for ejectment without an eviction order.
Heard:	8 August 2022
Delivered:	19 August 2022

ORDERS

The Court makes the following Orders:

The appeal is upheld with no order of costs.

JUDGMENT

ANDRE, JA

INTRODUCTION

[1] This is an appeal arising out of the notice of appeal filed on 10 June 2020 by Jeffrey Payet (appellant) against George Payet (first respondent) and Eddy Payet (second respondent). The appellant being dissatisfied with the decision of Chief Justice M. Twomey (as she then was) delivered at the Supreme Court on the 9 March 2020, in Case No. 13 of 2019 ordering the appellant/defendant in the court a quo, to pay the second respondent/second plaintiff in the court below, the sum of S.R. 1,290,000 for alternative accommodation. Alternatively, a lump sum of S.R. 405,000 for damages actually incurred to date (27 months x S.R. 15,000) and to provide either S.R. 15,000 monthly or suitable accommodation for the remaining months of the lease until 9 February 2025. It was also in the said judgment that the defendant shall pay the first plaintiff S.R. 100,000 for the cost of replacement furniture. Moreover, the defendant was ordered to pay the second plaintiff the sum of S.R. 10,000 for his personal belongings and S.R. 30,000 for moral damages, and that an injunction was issued prohibiting the defendant from interfering with the house on parcel H 2519.

[2] The appellant appeals against the whole of the decision upon the grounds of appeal set out in paragraph two of the notice of appeal and to be considered in detail below. The appellant further seeks the relief set out in paragraph 3 of its notice of appeal, namely, for an order to quash the decision of the Supreme Court and consequently to dismiss the suit against the appellant.

[3] Both respondents vehemently object to the appeal and move for its dismissal and that the finding of the learned Chief Justice be maintained.

[4] All parties were duly represented in the court a quo.

BACKGROUND

[5] Sadly, I also learnt of the passing of the second respondent in this matter. Despite the passing of the second respondent, it does not affect the current matter. As summarised by the trial court, the first respondent in this appeal is the executor of the estate of the late Leonne Payet (the mother to all parties) who passed away on 17 June 2017 and is the brother of the second respondent and the appellant. As agreed by the parties at the hearing (supra), the first respondent is representing the second respondent in his capacity as his guardian (prior to the second respondent's demise).

[5] In summary, this case concerns a family dispute over property. The first respondent is the executor of the estate of the late Leone Payet (deceased) who passed away on 17 June 2017 and is the brother of the late second respondent and the appellant. The deceased had a usufructuary interest in the Title No. H2519 and H 2520 and the appellant has the bare ownership.

[6] In relation to Title No. H2519, it is the respondents' case that their late brother, Jose Payet, another son of the deceased, in good faith and with the permission of the appellant constructed a two-bedroom house on Title H 2519 while the deceased was alive, thereby acquiring a *Droit de superficie*. Upon his death, the house devolved by Will to the deceased, and following her death devolved onto all her six children, including the respondents and the appellant.

[7] In relation to Title No. H2520, the respondents submit that, by an agreement dated 12 February 1998, the deceased granted a nine-year lease to the second respondent renewable for to terms of nine years which lease was registered. The current lease is valid to complete the term of tenancy of nine years on 12 February 2025.

[8] On 12 December 2017, the appellant forcibly removed the second respondent, together with his carer, from the said dwelling house with only his clothes on him. The second respondent is a physically handicapped, deaf, and blind man who was born and had lived in the dwelling house on Parcel H2520 for a period exceeding sixty-eight years. The house was then demolished without an order of the court despite the fact that an application for an injunction to prevent the same had been sought from the court and

awaited a hearing. The furniture in the house, together with the belongings of the second respondent and his carer were thrown outside.

[9] The respondents also averred in the court below that the appellant was seeking the eviction of one Danielle Mancienne, the tenant of the house on Title H 2519, which belonged to the estate of the deceased. It is the respondents' belief that the appellant intended to also demolish the house on parcel H 2519 and deprive the plaintiffs/respondents of the rent money, which has been used for the upkeep and maintenance of the second respondent with the agreement of the heirs of the estate, but the appellant.

[10] In the latter regard, the respondents sought a declaration that the house on title Number H 2519 has devolved onto the succession of the deceased and further that the court grant a perpetual injunction prohibiting the appellant from interfering with the leasehold right over parcel H 2519, Further to pay the cost of alternative accommodation for the second respondent for the remainder of the term of the lease, to pay the cost of replacement furniture, to pay moral damages in the sum of S.R. 700,00 and the costs of the suit.

[11] In his statement of defence and counterclaim in the court a quo, the appellant has claimed that the matter involving the ownership of the properties at issue was res judicata. He also averred that Jose Payet never acquired a *Droit de superficie* over the house on parcel H 2519 and that there was neither planning permission for its construction nor his permission to build the same. Hence, he averred, Jose Payet could not have bequeathed the house by will to his mother, the deceased and then onto her successors.

[12] The appellant also averred that the purported lease by Leonne Payet and the second respondent was null and void as it was contrary to law, namely Article 595 of the Civil Code, and that any lease signed in 1998 was deemed to have been terminated ipso facto on her death

[13] The appellant further averred in the court a quo that he gave the second respondent and his carer, through his guardian the first respondent, sufficient time to vacate the property, which was in dilapidated state. He had been advised by a structural engineer to demolish

the house and had offered an alternative place of abode, namely the Home of the elderly at North east point, to the second respondent which offer was turned down.

[14] Furthermore, the appellant averred that since no order at the time had been issued by the court prohibiting the demolition of the house, he was therefore not barred from proceeding with the same.

[15] With regard to the house of parcel H2519 which was being leased by Daniel Mancienne, the appellant averred that he had no intention of demolishing the same.

[16] The Supreme court ordered that the appellant/defendant in the court a quo, to pay the second respondent/second plaintiff in the court below, the sum of S.R. 1,290,000 for alternative accommodation. Alternatively, a lump sum of S.R. 405,000 for damages actually incurred to date (27 months x S.R. 15,000) and to provide either S.R. 15,000 monthly or suitable accommodation for the remaining months of the lease until 9 February 2025. Further, that the defendant was ordered to pay the first plaintiff S.R. 100,000 for the cost of replacement furniture. Moreover, it was ordered that the defendant must pay the second plaintiff the sum of S.R. 10,000 for his personal belongings and S.R. 30,000 for moral damages. Finally, an injunction was issued prohibiting the defendant from interfering with the house on parcel H 2519.

[17] It is against this background that the appellant is now appealing the said decision on the grounds below.

GROUNDS OF APPEAL

[18] In their heads of argument, the Appellants have abandoned grounds 1, 2, 3, 4, 5, and 7 that appeared in the notice of appeal. Therefore, there are only two grounds for determination, namely:

a. The Learned Trial Judge erred in law and on the evidence in holding that the 2nd Respondent had the right to remain in occupation of parcel

H2520 until 12th February 2025, in that the Learned Trial Judge failed to hold that the third period of 9 years of the lease was a new and fresh lease which only commenced on 12th February 2016 and therefore the said lease became void on 17th June 2017 upon the death of Leonne Payet in accordance with Article 595-2 of the Civil Code;

b. The learned trial judge erred in law and on the evidence in awarding damages against the Appellant in that:

i. The learned trial judge in awarding the damages acted upon the wrong principles and the award of damages was erroneous, as the 1st Respondent did not have locus standi to demand damages on behalf of the 2nd Respondent and there was no evidence to prove the damages awarded by the Court; and/ or

ii. All the damages were manifestly excessive.

[19] The Appellants have approached the Court of Appeal seeking the quashing of the decision of the Supreme Court.

SUBMISSIONS OF PARTIES

APPELLANT'S SUBMISSION

[20] In addressing the sixth ground of appeal, Learned Counsel Mr Basil Hoareau, appearing for the appellant submitted that both the plaintiffs/respondents and the learned trial judge erred in applying the provisions of Article 595(2) in that they took the view that the lease was for a period exceeding nine years and that as the tenancy was in its third period of nine years, the tenant should have been allowed to complete that period of nine years. In

this regard, the submissions are that the learned judge ought to have interpreted and appreciated the meaning of renewal *"par tacit reconduction"* in relation to the lease.

[21] Furthermore, it is submitted that since Article 595(2) provides that "…Tenancies of nine years or less granted less than three years before the expiry of the usufruct in the case of agricultural land, and less than two years in the case of a house, shall be void." Applying the time frame of the lease renewal, he submits that the third lease commenced on the 12 February 2016 and the usufruct of Leonne Payet expired or terminated on the 17th June 2017 on the date Leonne Payet passed away.

[22] He submits further, that the lease became void on the 13 June 2017 and that there was no valid lease agreement running until 12 February 2025.

[23] Submissions made in relation to Ground 8 essentially challenge first the locus standi of the first respondent and the damages awarded in that there was no evidence of such damages or alternatively that the damages were excessive.

RESPONDENTS' SUBMISSION

[24] On the other hand, the respondents by way of submissions of the 2 August 2022, through Senior Counsel Mr. Kieran Shah, submits that Leonne Payet signed a lease with the second respondent on 12 February 1998. The lease was for 9 years and contained a renewal clause. The first term of the lease was from the 12th of February 2007. The subsequent lease was from the 12th of February 2007 to the 12th of February 2016. The third term, which is the subject of ground 6 of appeal was for another 9 years. In terms of their submissions, the third term was not a new lease, but a continuation of the lease granted in 1998.

[25] They further submit that the second respondent was entitled to renew and complete the second term of the lease.

[26] In terms of ground 8, on the locus standi of the first respondent to represent the second respondent, excerpts from the transcripts during trial were submitted to show that indeed the first respondent was the guardian of the second respondent.

[27] On the issue of excessive damages, the respondents restated the order of the court a quo and the order was as follows – SCR 1 290,000 was awarded to the second respondent for alternative accommodation. Alternatively, a lump sum of SCR 405,000 for damages incurred to date (27 months by SCR 15,000 and to provide either SCR 15,000 or suitable accommodation for the remaining months of the lease until 9th February 2025.

ANALYSIS OF THE GROUNDS OF APPEAL

[28] As the appellants have abandoned most of the grounds, this Court will only look at the submissions made in relation to grounds 6 and 8.

[29] I now deal with ground 6 that the Learned Trial Judge erred in holding that the second Respondent had the right to remain in occupation on parcel H2550 until the 12th of February 2025. From the outset, one must distinguish between the usufruct the late Leonne Payet had over the property and the lease agreement in question. I explore this point further below.

[30] The starting point in the enquiry is the lease agreement. For that reason, I repeat the important parts of the lease:

> *"I Mrs Loenne Payet of Marie Anglaise, Mahe, usufructuary of the above title, hereby lease to my son Eddy Rene Martial Payet, also of Mare Anglaise, Mahe the house in the abovementioned title for a term of 9 years from 12th February 1998, at an annual rent of R 1/- per annum payable in advance and subject to the following conditions:*
>
> 1. *The rent shall be increased when the Lessee recovers from his handicap so as to be able to lead a normal working life.*

2. *The Lessee has an automatic right of renewal of this lease (par tacit reconduction) for another 2 terms*

3. *The Lessor, as owner of the house, dispenses the Lessee from the requirement from the requirement of providing security, and waives the right to an inventory."*

[31] The lease was duly registered in terms of the Land Registration Act (CAP 107). Few other things can be discerned from the lease:

31.1 The lease was for a term of 9 years, renewable for another two terms. Therefore, this lease would terminate after 27 years or upon the death of the beneficiaries listed on the lease.

31.2 From the beginning, the main beneficiary of the lease was Eddy Rene Martial Payet - the lessee (the 2nd Respondent); and

31.3 The rental was only to be increased if Eddy Payet was able to lead a normal life.

[32] With this background in mind, I explore the principles governing usufructs. Article 578 defines a usufruct as 'the right to enjoy property which belongs to another in the same manner as the owner himself, but subject to the obligation to preserve its substance'. The late Loenne Payet enjoyed the usufruct over the property of the appellant. This is not in dispute. The Civil Code spells out key rights the usufructuary – namely to enjoy all fruits derived from the usufruct (see Articles 582 – 599). Similarly, the duties of the usufructuary in relation to the property include keeping the property in good repair and handing over the property to the owner at the end of the usufruct. The usufructuary's ownership extends to such use and enjoyment and while still alive, she had an unfettered hand in dealing with not only the property, but the fruits derived from the property once they accrued to her. It is the same reason why she was at liberty to lease the property to the 2nd Respondent with all the conditions under the lease as she deemed fit.

[33] At the same time, the Civil Code sets out parameters upon which the usufructuary exercises his or her rights and how such rights terminate. Article 617 states that the usufruct shall be terminated—

By death of the usufructuary*;*

By the expiration of the period of time for which it was granted;

By the merger or union in the same person of the two capacities of usufructuary and owner;

By non-user during a period of twenty-years;

By the total loss of the thing subject to the usufruct.

[34] It is not disputed that the death of the usufructuary ended the usufruct. As such, upon her death, the rights, duties and obligations that she enjoyed in terms of the usufruct ended. In addition, the rights enjoyed by third parties like the 2nd Respondent had to be assessed in relation to the usufruct. This is why the submissions by Counsel for the Appellants in relation to Article 595(2) are of significance. The Article states that:

> *"Tenancies exceeding nine years shall be binding upon the owner and his heirs for the time which remains to run out of the first period of nine years, if that period has not elapsed, or out of the second period, and so on, so that the tenant shall only be entitled to complete the time of a current tenancy of nine years. Tenancies of nine years or less granted less than three years before the* ***expiry of the usufruct*** *in the case of agricultural land, and less than two years in the case of a house, shall be void."*

[35] In my view, the Article must be read holistically in conjunction with the rights created by the registered lease. The limitations and time frames under subsection 2 in my view were designed to ensure that the bare owner of the property is not prejudiced by the usufructuary entering into long lease agreements past the termination of the usufruct. As already pointed out, a usufruct is by nature a personal servitude. It is inalienable and cannot even be bequeathed to heirs by the usufructuary. Although it confers full ownership (real right) over the use of the property as well as the enjoyment of the fruits deriving therefrom once the same are separated or accrue to the holder, it is limited, as a real right, in that it does not confer ownership of the property on the usufructuary (see

Article 578 of the Civil Code and *Malvina v Louise* (SCA 14 of 1997) [1997] SCCA 31 (05 December 1997)).

[36] First, the analysis given by the Respondent's Counsel to the effect that a lease renewal is simply a continuation of the same lease is untenable. When parties renew a lease agreement, a new lease commences on the expiration of the previous lease but usually on more or less similar terms. I therefore understand the wording of the lease as entailing the creation of a similar relationship between the same parties after the expiration of the first 9 years for two more subsequent terms (see also similar interpretation given in other jurisdictions (*Licences and General Insurance Co v Bassano* 1936 CPD 179 at 186; *Webb v Hipkin* 1944 AD 95; *R v Mahomed* 1924 NPD 407 at 409).

[37] I therefore do not agree with the findings of the learned Justice at para 88 when she stated that the 2nd Plaintiff (now the 2nd Respondent) had the right to remain in occupation until 12 February 2025 as the lease had been granted more than two years before the expiry of the usufruct pursuant to the provisions of Article 595(2) above.

[38] Article 595(2) was created specifically to ensure that the rights of bare owners are not disadvantaged by long leases after the termination of the usufruct – either by death or otherwise. The Article essentially balances the rights of the tenant viz the rights of the bare owner by creating timeframes whereby existing rights of both the owner and tenant are protected.

[39] As the lease of the 2nd Respondent falls squarely under the ambit of Article 595(2), being a tenancy of *less than two years in the case of a house*, such tenancy is void. The second Respondent therefore had no valid lease agreement as that lease agreement terminated upon the death of the usufructuary.

[40] Since ground 8 is based on the success of ground 6 above, this also falls away.

[41] The Appellant rely on the fact the rental amount established during trial that the second respondent was staying at costed merely SCR1500 per month as opposed to the SCR15 000.

[42] I must point out that the conduct of the Appellant was appalling to say the least. This is especially because the 2nd respondent is his brother who had many physical challenges. The second Respondent clearly had recourse under delict and the Control of Rent and Tenancy Agreements Act applies equally to the conduct of the Appellant. However, these were not pleaded or raised on appeal.

DECISION

[43] Based on the above analysis and findings, the appeal is upheld with no order of costs.

ORDER

[44] As a result, this Court orders that the appeal is upheld with no order of costs.

_____

S. Andre, JA

I concur :

…….

Dr. L Tibatemwa-Ekirikubinza JA

ROBINSON JA

I concur with the holding of the appeal and the orders made subject to the following :

I do not accept the reference by my learned sister Andre JA, in her judgment, to the cases found at paragraph 36 or reference to the law of any jurisdiction that does not find application in this case.

…….

F. Robinson JA

Signed, dated, and delivered at Ile du Port on 19 August 2022.