

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 48 (19 August 2022)
SCA 01/2020
(Appeal from CS 06/2018)

1. ELKE TALMA

2. ALWYN TALMA

Appellants

(rep. by Mr. Frank Elizabeth)

and

1. ENCHANTÉE (PROPRIETARY) LTD

(rep. by Mr. Basil Hoareau)

2. REGISTRAR OF LANDS

(rep. Ms. Vanesa Nicette)

Respondents

Neutral Citation: *Talma & Anor v Enchantée Proprietary Ltd. & Anor* (SCA 01/2020) [2022] SCCA 48 (Arising in CS 06/2018) (19 August 2022)

Before: Fernando, President, Twomey-Woods, Andre, JJA

Summary: Mortgage and Registration Act - Land Registration Act – Land Survey Act
unimpeachability of land survey - Article 2265 Civil Code - prescription

Heard: 2 August 2022

Delivered: 19 August 2022

ORDER

The appeal is partly allowed.

JUDGMENT

TWOMEY-WOODS JA

(Fernando PCA and Andre JA concurring)

Background

[1] Seychelles has in operation two methods of registering transfers of land: first, the Mortgage and Registration Act 1927 (MRA), under which in a register, the Répertoire (commonly referred to as the Old Land Register), the name of every party affected by any deed or other transactions concerning the immovable property is entered. The entry provides notice of the transaction to third parties but does not guarantee title. Hence, in several cases, property has been successively transferred to different buyers. Secondly, the Land Registration Act of 1967 (LRA) which simplifies the processes by which land transactions are carried out also ensures that land interests are registered to bind future purchasers of the property. In contrast to the MRA, title is guaranteed under the LRA. When the LRA was enacted, it was planned that all land in Seychelles would be surveyed, title adjudicated and registered in the New Land Register under the LRA. Sadly, forty-five years later, some land, namely on Praslin and La Digue islands, has still not found their way onto the New Land Register.

[2] The present case concerns this sad state of affairs and the difficulties caused by the collision between the two registration methods.

[3] The pleadings in the present matter are confusing regarding parties and descriptions of property they owned. We have had to trace the root of title and identify subdivisions alphabetically (but not in the same order as in the Complaint) and redact the salient facts as follows: Mr. Raoul Uzice owned property at Anse Lazio, Praslin (Property A). In 1949, he transferred part of it to his mother, Mireille Hoareau (née Uzice) (Property B). The rest of the parent Parcel (A minus B), now C, was transferred to Bennett Stirling in 1962. Stirling transferred Parcel C to Richard Soames in 1969. Soames extracted from Parcel C a further parcel – Parcel D. In 1986, Soames sold Parcel D to Alwyn Talma. In 1992, Soames sold the remainder of Parcel C (C minus D), now E, to Alwyn Talma. Meanwhile, Mireille Uzice transferred Parcel B to Patrick John Mortimer Canter (Canter) in 1967. In 1999, Canter sold Parcel B to Enchantée. According to the Répertoire, therefore, in 1999, Enchantée owned Parcel B, and Alwyn Talma owned Parcels D and E.

[4] In 1996, Alwyn Talma caused his property (parcels D and E) to be surveyed under the Land Survey Act (LSA) and registered on the New Land Register as Parcel PR2552. The survey

and registration have inadvertently amalgamated Parcels B, D and E from the Old Land Register into Parcel PR2552 onto the New Land Register. In 2005, Alwyn Talma transferred Parcel PR2552 to his daughter Elke Talma.

The case in the court a quo

[5] The case before the court concerned a Plaint by Enchantée to have the New Land Register rectified to indicate that Parcel PR2552 did not include Parcel B.

[6] The Statement of Defence by the Talma

[7] s contained several points in *limine litis*, namely that the suit was prescribed under both the LRA and the LSA but also that Enchantée's action was not maintainable in law as their ownership of the land was untenable given the fact that when Enchantée purchased Parcel B from Canter, one of its company directors and 4% of the company's shares were held by Mr. Graeme Beggs, a non-Seychellois who had not obtained sanction to obtain an interest in property contrary to the provisions of the Immoveable Property Transfer Restrictions Act (IPTRA).

[8] Ultimately, the court found that the suit was neither prescribed under the LRA nor the LSA. Regarding the former, the Plaint filed in 2018 was not outside the ten-year prescription limit for persons claiming acquisition for value, and in good faith and in respect of the latter, its provisions do not create or deny title.

[9] Regarding the contravention of the IPTRA, the court found that having breached the Act's provisions, the transfer of that property was unlawful. It ordered that the transaction be brought to the attention of the Minister of Land Use and Housing to take appropriate action. It further ordered that the registration of Parcel PR2552 be declared null and void and its transfer to Elke Talma null and void insofar as it concerned the property of Canter. He ordered a new survey of Parcel PR2552 to distract Canter's land, after which the New Land Register would reflect the same.

The appeal

[10] Dissatisfied with this decision, the Talmas have appealed on five grounds, namely:

- 1 *The learned trial judge erred in law when he dismissed the plea in limine litis of the Appellants that the 1st Respondent's action was prescribed in law pursuant to Article 2265 of the Civil Code.*
- 2 *The learned trial judge erred in law when he dismissed the plea in limine litis of the Appellants that the 1st Respondent's action was prescribed in law pursuant to sections 21 (4) and (5) of the Land Survey Act.*
- 3 *The learned trial judge erred in law when he went on to consider the case on its merits and made several orders consequent thereof after he had already ruled that the action of the 1st Respondent was without merit as sanction was not sought nor granted to the 1st Respondent by the government before the 1st Respondent purchased the property in question.*
- 4 *The learned trial judge erred in law when he failed to dismiss the 1st Respondent's case against the Appellants despite having ruled that the 3rd plea in limine litis filed by the Appellants succeeded.*
- 5 *The learned trial judge erred when he considered and ruled upon facts and matters not raised in the pleadings of the parties and made orders not sought for by any of the parties.*

[11] The grounds raised can be organised around the following issues- (1) was Enchantée's action prescribed, (2) was the trial judge entitled to consider the case on its merits after holding that a plea in *limine litis* succeeded, (3) were the orders of the trial judge *ultra petita*.

(1) Was Enchantée's action prescribed? (Grounds 1 and 2),

[12] Regarding this issue, Mr. Elizabeth, Counsel for the Talmas, has relied on both the provisions of the LSA and the LRA.

[13] We shall deal with the provisions in turn.

The law with regard to the LSA

[14] In this regard, we must bring the relevant provisions of the LSA to light:

“Original surveys, re-surveys and division surveys

12(1) All owners of land whose rights may be affected by a survey shall have a right to be present at such survey.

(2) A land surveyor before performing a survey shall summon such owners to attend the survey at a place, date and time to be specified in the summons. The summons shall be sent by registered post to the last known address of the owner in Seychelles and shall be posted seven days before the day of the survey. The owner of the land under survey at whose instance the survey is to be performed need not be summoned as provided under this subsection.

(3) The duty imposed upon a land surveyor by the provisions of subsection (2) shall be carried out by him with all due diligence. Failure on his part to summon any such owners or failure on the part of any such owners to be present at the survey shall not preclude the land surveyor from performing the survey and shall not invalidate such survey.

...

13. (1) An agreement as to beacons and boundaries (in this section referred to as “the agreement”) shall be required in the following cases and in such other cases as may be prescribed-

(a) when a survey is carried out of any previously unsurveyed boundary;

...

21. Beacons and boundaries

(1) The position of any beacon or boundary deemed in terms of this section to have been lawfully established shall be unimpeachable, that is to say, it shall not be capable of being brought into question in any Court, and the Director shall not accept for approval or filing any document which shows any beacon or boundary inconsistent with such position.

(2) Subject to the provisions of subsection (3) a beacon or boundary shall be deemed to have been lawfully established-

(a) when its position is in agreement with the position thereof adopted in an original survey and when a diagram based on such original survey has been approved in accordance with the provisions of section 13 or section 14;

...

(d) when its position is in agreement with a judgment or order of the Supreme Court or with the award of an arbitrator or arbitrators...

(3) A contiguous owner who was not called upon to sign the agreement as to beacon or boundaries in accordance with the provisions of subsection (3) of section 13 or section 14 shall be deemed to have accepted the position of such beacons and boundaries and be bound thereby if ten years have elapsed from the time when such beacons and boundaries would but for such failure have been lawfully established under the provisions of section (2):

Provided that is if at any time within the said ten years it comes to light that such contiguous owner exists and should have been called upon to sign the agreement the procedure laid down in subsections (3) to (9) of section 13 or section 14 shall be followed before the beacons and boundaries to which the agreement relates may become lawfully established.

(4) The beacons and boundaries shown on a plan filed under subsection (6) of section 15 of the Land Registration Act shall be deemed to have been lawfully established after 10 years have elapsed from the first registration under the provisions of the said Act of the parcel of land to which such plan relates or on the conversion by an order of the Supreme Court of the title to such parcel from a qualified to an absolute title.

(5) The period of the years mentioned in subsections (3) and (4) shall not be suspended by any event or for any cause whatsoever and shall run against all persons without exception notwithstanding anything in any enactment to the contrary. (Emphasis added)

[15] Mr. Elizabeth contends that sections 21(4) and (5) provide a prescriptive period of ten years for the placement of beacons, after which the survey is unimpeachable. As Parcel PR2552 was surveyed and approved on 26 November 1996 and Enchantée has brought its claim in 2019, the action was prescribed. He further submits that the learned trial judge's finding is erroneous when he states that the survey was irregular as summonses were not served on contiguous owners. Mr. Elizabeth adds that the learned trials judge's additional finding that as there was no agreement with Mr. Canter in respect of the beacons and boundaries, the Appellants could not avail of the benefits of prescription is also erroneous. He submits that section 12 of the LSA makes it clear that failure by the Land Surveyor to summons a contiguous owner does not invalidate a survey. Sections 21(4) and (5) are also self-explanatory; the prescriptive period runs against all persons, without exception, including Enchantée, even though they had not yet purchased the property.

- [16] In reply, Mr. Hoareau has submitted that the Appellants are confusing the concepts of titles with boundaries. The LRA deals with title to land, and the LSA deals with boundaries and beacons on registered land. In the present case, it is not the title of Ms. Talma which is at issue but the extent of Parcel PR 2552. Further, the LSA does not provide prescription but rather for the unimpeachability of surveys.
- [17] Mr. Hoareau contends that the Statement of Defence does not disclose the facts relied on by the Appellants to have the survey of Parcel PR2552 declared unimpeachable, namely that in terms of section 21(4) of the Act, the survey plan had been verified by the Director of Survey and filed in accordance with the LRA and that ten years had elapsed from the first registration of Parcel PR 2552 and that it had been converted from qualified title to absolute title under the LRA. In the circumstances, the Appellants cannot rely on the provisions of the LRA.
- [18] Both Counsel's submissions have validity. We explain. While Mr. Elizabeth is correct to state that the learned trial judge was erroneous in finding that failure to summons and agree a survey with a contiguous owner is fatal to a survey, Mr. Hoareau is correct to state that the survey is impeachable (as opposed to prescribed) as the conditions laid out in section 21 of the LSA were not met or at the very least neither pleaded nor proved at trial.
- [19] For a survey to be unimpeachable after ten years, section 21 of the LSA provides that it has to be shown that the beacons and boundaries thereon have been lawfully established. The procedure for such lawful establishment is set out in section 14 of the LSA, which provides that the position of such beacons when agreed has to be approved, lodged with the Director of Surveys, notices sent out, published in the Gazette, and objections if any lodged with the Registrar of the Supreme Court and then finally approved by the Director of Surveys. The LSA also provides for resurveys- obviously for when surveys run awry.
- [20] The pleadings of the Appellant only state that the property was surveyed in 1996 and that there were no objections from contiguous owners but do not disclose any of the facts relating to the lawfulness of the boundaries. In the circumstances, the Appellants cannot rely on the provisions of section 21 of the LSA that the survey is unimpeachable given that

ten years have elapsed since establishing the boundaries. This ground of appeal is therefore dismissed.

[21] That being the case and given that there were prayers from both the Appellants and Enchantée that the court makes appropriate orders, these prayers are acceded to. Orders will ensue to remedy the apparent error in the survey of Parcel PR2552.

The law with regard to the LRA and the Civil Code

[22] Mr. Elizabeth has submitted that the suit is prescribed in terms of Article 2265 of the Civil Code. The rules relating to prescription of actions contained in the Civil Code provide in relevant part:

“Article 2262 All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.

...

Article 2265 If the party claiming the benefit of such prescription produces a title which has been acquired for value and in good faith, the period of prescription of article 2262 shall be reduced to ten years.”

[23] Relying on Article 2265, Mr. Elizabeth has submitted that prescription of ten years would start to run against Mr. Talma when he purchased the land in 1986. He also relies on section 26 of the LRA, namely that every proprietor acquiring any land shall be deemed to have notice of every entry in the register.

[24] He also contends that since Enchantée has contravened the law, it does not have ownership of Parcel B and has no standing to bring the present suit. The right of action vested in the seller, Mr. Canter, who could have brought a suit against Mr. Talma, but that would also be prescribed as Mr. Talma purchased the land in 1986.

[25] Mr. Hoareau has referred to the Statement of Defence to submit that it does not disclose whether it is acquisitive prescription or extinctive prescription that is claimed by the Appellants. He has referred this Court to several authorities on the necessity to plead material facts, failing which the defence of prescription could not be sustained. He

contends that to obtain acquisitive prescription, a counterclaim ought to have been filed by the Talmas.

[26] He has also submitted that the evidence before the court did not support a plea for prescription under Article 2265, as under those provisions, there must be title acquired for value. The evidence he submits does not establish that fact. There were judicial admissions by both Appellants that the survey incorporated extra land into Parcel P2552 by mistake. Having failed to counterclaim for the acquisitive prescription, they could not gain title to the additional land.

[27] To our minds, it is clear that the prescription claimed by the Appellants is extinctive, that is, that the suit against them is time-barred. That is clear both from the grounds of appeal, the skeletons heads of arguments and the submissions of Mr. Elizabeth. The Appellants have used the shield under Articles 2262 and 2265, and not the sword. Therefore, we do not need to address the necessity of a counterclaim and acquisitive prescription.

[28] With regard to prescription since 1986 and notice under the LRA, that submission by Mr. Elizabeth also cannot be sustained. In 1986, the land was only in the Répertoire under the MRA. The rules of the LRA did not apply to it. The submission of Mr. Elizabeth with regard to Mr. Canter has no validity. As far as Mr. Canter was concerned, he had good title as entered in the Repertoire of the MRA.

[29] The registration of Parcel PR2552 was correct insofar as it referred to Parcels D and E, for which Mr. Talma and subsequently Ms Talma had good title. As mentioned in this decision, the need to correct an erroneously drawn boundary does not invalidate the title to land. This view is supported by section 94 of the LRA, which provides that no claim for compensation for erroneous surveys can arise after title registration. The LRA also makes provision for resurveys.

[30] The suit by Enchantée relying on an erroneous survey can only be said to challenge the extent of Parcel PR2552 and not title to it by Ms. Talma. To that extent, the pleas in limine regarding prescription under the LRA with regard to title is misconceived and is dismissed.

[31] The grounds concerning prescription under the Civil Code are also dismissed.

(2) Was the trial judge entitled to consider the case on its merits after holding that a plea in limine litis succeeded (grounds 3 and 4)

[32] The learned trial judge found that the transfer from Mr. Canter to Enchantée was null and void as it breached the provisions of the IPTRA. Mr. Elizabeth submits that in those circumstances, the court had to find that Enchantée had no standing to bring the suit against the Talmas. Mr. Hoareau has countered that argument by submitting that Enchantée had purchased the property and therefore had the standing to bring the suit, notwithstanding the fact that without having obtained sanction for the transfer, it was in contravention of the IPTRA and would have to apply for retrospective sanction. We disagree with this submission. In terms of Article 1101 of the Civil Code, for the formation of a contract to be concluded, the *cause* should be *licite*. The *cause* in the present case could not be *licite* as a legal restriction under the IPTRA applied to the contract formation. That should have been enough to dispose of the case in the court *a quo*.

[33] These grounds of appeal have raised concerns for this Court as allied to them is an uncontroverted fact which emerged in the pleadings and the proceedings. Enchantée, a company, bought the land from Mr. Canter on the 19th and November 1999 and the 28th of December 1999 (presumably, those dates refer to the parties' separate signing of the agreement). The sale was registered and inscribed in the Répertoire on 18 January 2000. The company is represented by its director Francis Savy to effect the purchase. On that date, the company register indicates that Enchantée has three shareholders: Francis Savy, who holds 96 shares, Graeme Beggs, who holds four shares and Karunanidhi Vignaraja, who owns one share. All three are directors of the company. The particulars of Directors indicate that while the other two directors and shareholders are Seychellois, Graeme Beggs is British.

[34] Subsequently, on 14 April 2010, a mortgage on the land now apparently owned by Enchantée was effected in favour of Seychelles International Mercantile Banking Corporation Limited in the sum of US\$ 300,000 for the benefit of Indian Ocean Resorts Limited. The signatory of the mortgagor was Graeme Beggs, and the borrower Francis Savy.

[35] When asked in a request for further and better particulars who the directors of the company are, the answer is that they are Francis Savy and Priscilla Uranie; no date is disclosed as to her substitution for Mr. Beggs - the only document in evidence before this Court is a company return dated 2017 showing Ms. Uranie as shareholder and director of Enchantée. In place of Mr. Beggs. What is even more disturbing is that the particulars of return registered in 2014 show that the document dated 1 October 2014 has the year 2014 crossed out, replaced by 2000 and initialled by an unknown person. The present Registrar General's stamp and signature appear on the document. As the learned trial judge pointed out, the current Land Registrar was not in that office in 2000.

[36] These transactions concerning land interests are registered without much ado, although they contravene the IPTRA. No explanation is proffered by the Land Registrar, who was a party to the case and represented in court. The Land Registrar's defence – in fairness as filed by her Counsel from the Attorney-General's Office - was that no cause of action was disclosed against her. We find that approach bewildering. It is equally bewildering that no position is taken by the Land Registrar in this appeal. Counsel on her behalf, Ms. Nicette, rested on her submission that the remedy of forfeiture of the land to the state is available.

[37] At the appeal hearing, Mr. Hoareau submitted that these matters have no bearing on the appeal. We disagree – it was incumbent on the Land Registrar to clarify the situation regarding land transactions that contravened the IPTRA and why the date on an official document was altered. Without an explanation, the wrong inference may impact the Land Registrar's Office's integrity. There may well be an innocent explanation for these matters, but we are none the wiser without it.

[38] Returning to the decision by the learned trial judge that the sale between Mr. Canter and Enchantée was null and void, what then should be the order that follows? We believe that the learned trial judge rightly had to hear the merits of the case even when the plea in limine litis succeeded to decide on the appropriate orders that should issue.

(3) Were the orders of the trial judged according to law?

[39] It is Mr. Elizabeth’s submissions that in terms of the IPTRA and the LRA, the learned trial judge’s orders were erroneous. The only orders he could have made in the circumstances of the case were those provided within the confines of the provisions of section 5 of the IPTRA, namely an order of forfeiture in favour of the Government of Seychelles.

[40] Mr. Hoareau has submitted that the prayers of both the Appellants and the 1st Respondent include a prayer that the court make any order it deems fit, which it did.

[41] We note that sections 3 and 5 of the IPTRA provide as follows:

“3 (1) A non-Seychellois may not—

(a)

purchase or acquire by any means whatsoever and whether for valuable consideration or not, except by way of succession or under an order of the court in connection with the settlement of matrimonial property in relation to a divorce proceeding any immovable property situated in Seychelles or any right therein

...

5. Any transaction effected in contravention of the provisions of sections 3, 4, 7(1) or (2) or section 12 shall be unlawful and void, and in the case of a sale, any immovable property or rights therein purporting to have been transferred under such sale shall be forfeited to the Republic.”

[42] We believe the intent and contents of the provisions above are that the consequence of contravening section 3 is forfeiture of the property purported to have been transferred. Whilst a prayer might entreat the court to make any orders it deems fit; these orders have to be lawful and within the confines of the provisions of the law. The court’s order with regard to notifying the Minister to take appropriate action is therefore misconceived.

Decision

[43] This ground of appeal has merit and consequently, the appeal is allowed.

Orders

[44] In the circumstances, we make the following orders:

1. *The transfer of property from Patrick John Mortimer Canter to Enchantée (Proprietary) Ltd as per deed dated 18 January 2000, registered in Registration Volume A 157 No. 151 and transcribed in Volume 45 No 439 dated 18 January 2000, is declared null and void.*
2. *The property described in the above order is forfeited to the State.*
3. *The Director of Land Survey is ordered to immediately resurvey Parcel PR2552 and after the statutory publication and approval to submit the same to the Land Registrar for the update of records.*

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

Dr. M. Twomey-Woods JA

I concur

A. Fernando President

I concur

André JA