

COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 16 (26 April 2023)

SCA 15/2020

(Arising in CS 79/2020)

The Estate of the late Andre Delhomme
(rep. by Mr Elizabeth)

Appellants

and

The Attorney General
(rep. by Mrs Thompson)

Respondent

Neutral Citation: *The Estate of the late Andre Delhomme and Others v The Attorney- General* (SCA15/2021) [2023] SCCA 16 (Arising in CS 79/2020) (26 April 2023)

Before: Robinson, Tibatemwa-Ekirikubinza, Andre, JJA

Heard: 12 April 2023

Summary: Contracts and obligations — action for breach of contract — extinctive prescription Articles 2271 and 2262 of the Civil Code of Seychelles — *the Civil Code of Seychelles distinguishes between real actions and personal actions* — Respondent pleaded that the five-year extinctive prescription applies — the learned Judge concluded that the Appellant’s action was barred by the twenty-year extinctive prescription under Article 2262 of the Civil Code of Seychelles — Articles 2223 and 2224 of the Civil Code of Seychelles — question at issue: *whether or not the learned Judge was correct to raise ex proprio motu the twenty-year extinctive prescription — la prescription n’opère pas de plein droit* / prescription does not operate as of right — Article 2223 of the Civil Code *“interdit aux juges d’une manière absolue, de suppléer le moyen résultant de la prescription”* / the court is absolutely prohibited by Article 2223 from taking judicial notice of prescription — Appeal is allowed on ground sixteen with costs

Heard: 12 April 2023

Delivered: 26 April 2023

ORDER

- (a) For the reasons stated above, the appeal is allowed on the amended ground 16. We find the contentions contained in grounds one to fifteen of the grounds of appeal to be misconceived in view of the conclusion we have arrived at in this case, Hence, grounds one to fifteen stand dismissed.
- (b) Hence, we quash the decision of the learned Judge dismissing the Appellant’s action in *limine litis* on the ground that the action is prescribed having been filed more than twenty

years after the accrual of the cause of action. For the order of the learned Judge, we substitute therefor an order dismissing the plea in *limine litis*.

- (c) We remit the case to the Supreme Court for the learned Judge to deal with the action on the merits only.
- (d) With no order as to costs.

JUDGMENT

ROBINSON JA

The background

1. This appeal raises questions about the loss of a right of action through extinctive prescription. It comes before the Court of Appeal from a judgment of a learned Judge of the Supreme Court delivered on the 18 May 2021 in case reference CS79/2020. The learned Judge dismissed the plaint on the ground that the action is prescribed having been filed more than twenty years after the accrual of the cause of action. The learned Judge did not consider the merits of the case.
2. Before discussing the question at issue set out at paragraph [38] hereof, we set out the parties' pleadings and the evidence adduced at the trial relevant to this appeal.

The case for the Appellant and the Government of Seychelles

3. It is undisputed that the late André Delhomme, hereinafter referred to as "*the Deceased*", before his death, had absolute ownership of $\frac{3}{4}$ and bare ownership of $\frac{1}{4}$ of Coetivy Island.
4. Madeleine Hery had the usufructuary interest of $\frac{1}{4}$ of Coetivy Island. Veronique Marie Hilda Huguette Maryan Green-Delhomme, the executrix of the estate of the Deceased and Helene Marie Amelie Gabrielle Delhomme are the daughters of the Deceased and his wife, Doctor Hilda Stevenson Delhomme.
5. By an agreement dated 13 December 1979, transcribed in Vol 64 No.157 and registered in Register B30 No.3641, the Deceased and Madeleine Hery agreed to sell Coetivy Island

to the Government of Seychelles, and the Government of Seychelles agreed to buy Coetivy Island for and in consideration of the sum of Seychelles rupees Four Million (SCR4,000,000/-), hereinafter referred to as "*the Agreement*".

6. We reproduce the Agreement verbatim hereunder, so far as relevant for present purposes

"1. *In consideration of the sum of Rupees four million (R.4,000,000) of which sum the vendors acknowledge receipt of Rupees two million five hundred thousand, (R.2,500,000), the vendors hereby convey unto the Government the property*

To hold unto the Government in absolute ownership.

2. *The Government undertakes to pay to the vendors the outstanding sum of Rupees one million five hundred thousand (R.1,500,000) in the following manner:-*

(i) *Rupees Three Hundred Thousand (R300,000.00) by 15th January, 1980*

(ii) *Rupees Three Hundred Thousand (R300,000.00) by 15th February, 1980*

(iii) *Rupees Three Hundred Thousand (R300,000.00) by 15th March, 1980*

(iv) *Rupees Three Hundred Thousand (R300,000.00) by 15th April, 1980*

(v) *Rupees Three Hundred Thousand (R300,000.00) by 31st May, 1980.*

3. *It is further agreed that in the event of the Government failing to make any two consecutive payments as stipulated in clause 2 hereof the outstanding sum or any part thereof remaining unpaid shall become immediately due and payable.*

4. *The Government also grants the vendors a Seller's Privilege under Article 2103 of the Civil Code to secure the payment of the outstanding sum of R.1,500,000.*

5. *The Government is to pay all fees and duties of this sale [...]."*

7. The paragraph [11] of the plaint claimed that the Respondent had acted in breach of the Agreement by failing, refusing, and neglecting to pay the Appellant the sum of Seychelles Rupees One Million Five Hundred Thousand (SCR1,500,000/-) as agreed by the parties.

8. Based on the matters averred in the plaint, the Appellant claimed that the Agreement "*has become frustrated, null and void*", at paragraph [12] of the plaint.
9. The Appellant prayed the trial court to make the following orders in his favour (at paragraph 9 of the plaint) —

"1. Declare that the contract of sale has become frustrated null and void by reason of the Defendant's failure to pay the Plaintiff the balance of the purchase price in the sum of SCR1,500,000.00.

2. Make an order of rescission of the contract of sale, cancelling the registration of the island of Coetivy in the name of the Government of Seychelles and dording the Registrar of Lands, to rectify the Land Register by cancelling, deleting and replacing, the name of the Government of Seychelles as the registered owner of the said island and replacing it with the name of the Plaintiff.

FURTHER AND IN THE ALTERNATIVE

3. Order the Defendant to pay the sum of SCR1,500,000.00 together with interest at the commercial rate of 12% from the date of the said contract of sale, 13th December 1979, until the date of judgment.

4. Make any further and other order the Court deems fit."

10. The Respondent raised a preliminary plea of prescription, claiming that the Appellant is time-barred from bringing the cause of action.
11. On the merits, the Respondent denied paragraphs [11] and [12] of the plaint. In reply to paragraph [11] of the plaint, which contended that the Respondent has failed to pay the Appellant the sum of SCR1,500,000/- as agreed by the parties, the Respondent puts the Appellant to strict proof that the payments stipulated in the Agreement were not paid.
12. The Government of Seychelles also averred that it has never acknowledged any debt owing to the Appellant, nor is there any evidence of the Appellant making a demand or claim against it at any time within five years from the date that an instalment became due and payable for any debt owed by the Government of Seychelles to the Appellant in respect of the Agreement.

13. The Government of Seychelles also denied that the Agreement has become frustrated, null, and void and claimed that it has never pleaded frustration of contract in any dealings with the Appellant and that in any event, the frustration of contract is a defence to a breach of contract which is up to the Appellant to raise and prove.
14. The Government of Seychelles also denied being liable to the Appellant in any sum and averred that the Appellant is not entitled to the relief prayed for.
15. The Respondent prayed for the dismissal of the plaint with costs.

The proceedings on the plea in limine litis

The evidence of the parties

16. At the trial, Mr Allen André Joseph Hoareau gave evidence on behalf of the Appellant and Mr Patrick Lablache gave evidence on behalf of the Respondent.
17. *The evidence of Mr Hoareau.* Mr Hoareau confirmed that the Deceased transferred Coetivy Island to the Government of Seychelles for the sum of SCR4,000,000/-, a covering letter dated 8 January 1980, together with a transcription of the deed of sale dated 13 December 1979, transcribed in Vol 64 No.157, and registered in Register B30 No.3641 on the 18 of December 1979 were exhibited as P3.
18. According to the document, an outstanding amount of SCR1,500,000/- remained unpaid. He also confirmed that there was a charge registered against Coetivy Island for the debt owed by the Government of Seychelles to the Deceased. Mr Hoareau stated that he could not truthfully say whether or not the outstanding balance of SCR1,500,000/- had been paid. He testified that according to what is stated in the transcript, the said amount has never been paid.
19. Mr Hoareau only knew that the Deceased estate had a claim against the Respondent when he returned to Seychelles five years ago. Having seen the transcription of the Agreement, he became conscious that the Respondent had not fully paid the Deceased. He also stated that the charge over the property in the sum of SCR1,500,000/- still subsists.

20. When asked whether or not the Government of Seychelles had paid any money to the Deceased for Coetivy Island, he stated that according to the Agreement, only SCR2,500,000/- had been paid; and that this sum was apparently paid into a bank account. Mr Hoareau did not know where the bank statements of the Deceased's bank accounts were kept.
21. Mr Hoareau admitted that he had no letter from Mr Delhomme demanding payment from the Government of Seychelles the sum of SCR2,500,000/- owing to him. He explained that payment of the last instalment under the Agreement was due in May 1980. He admitted that he had no letter from the Government of Seychelles acknowledging any debt due to the Deceased. Still, he maintained that according to the "*official Government papers,*" the Government of Seychelles had not paid the outstanding debt of SCR1,500,000/-.
22. Mr Hoareau was unable to show any charge or mortgage on the Agreement. As for the seller's privilege granted to the vendors, he stated that the Deceased and Mrs Delhomme never acted on it because they were scared to go to the Government for anything.
23. In re-examination, Mr Hoareau explained that both the Deceased and Mrs Delhomme died in France and never returned to Seychelles.
24. *The evidence of Mr Lablache.* Mr Patrick Lablache is a 63-year-old consultant with the Ministry of Habitat, Infrastructure, Land and Transport. In 1979, the Government of Seychelles bought Coetivy Island from the Deceased after negotiations between the two parties. As far as he could remember, the Deceased negotiated the sale of Coetivy Island personally and not through a representative. The Deceased and the Government of Seychelles agreed to the sum of SCR4,000,000/- after various communications between them.
25. He stated that SCR2,500,000/- was paid, and the Government of Seychelles effected payment directly to bank accounts and never in cash. He is unaware of which bank the payment was made as payments are made by the Treasury Department. He was unaware

of any default in payment with respect to Coetivy Island and had never seen any demand for payment.

26. In cross-examination, Mr Lablache stated that in 1979 he was working as Lands Officer for the Government of Seychelles. In that capacity, he negotiated the purchase of Coetivy Island with the Deceased on behalf of the Government of Seychelles. The price for Coetivy Island was determined following negotiations based on correspondence between the parties. He recalled that he finally made an offer of SCR4,500,000/- on behalf of the Government of Seychelles accepted by the Deceased, who sent an acceptance to him.
27. He admitted that he did not see the payment being made. As to whether or not he had any evidence to show that the outstanding sum of SCR1,500,000/- agreed to be paid in instalments by the end of May 1980, was paid, he stated that he did some research on the matter and managed to find a letter giving instructions to the Chief Accountant and Treasury to effect these payments. He then went back to the Treasury Department to find out if they had any record of the payments but was informed that they did not keep records extending that far back. He reiterated that the amount was paid as he cannot remember any cases of that nature where the payment was not effected.
28. In re-examination, Mr Lablache stated that regarding the document giving instructions for payment, he could not obtain complete records for such payments because the Ministry of Finance informed him that they only kept such records for up to ten years.
29. The principal issue before the learned Judge was whether or not the Appellant's action was time-barred by extinctive prescription.

Determination of the learned Judge

30. Counsel for the Respondent essentially contended before the trial court that the five-year extinctive prescription under Article 2271 of the Civil Code of Seychelles, which applies to personal actions, applies to the Appellant's action as it is based on a breach of contract.
31. For his part, Counsel for the Appellant contended that the five-year extinctive prescription did not apply to the Appellant's action. In support of his contention, he

submitted that (i) the five-year extinctive prescription started to run when the Appellant had knowledge of all the essential facts giving rise to the cause of action, (ii) the breach being a continuing breach only extinguishes once all instalment payments have been made, and (iii) but related to the second contention, the five-year extinctive prescription did not apply to the Appellant's action as the breach is a continuing one dependant on payment of the last instalment of the purchase price.

32. The learned Judge considered the pleadings, Articles 2271, 2262, and 2265 and other provisions of the Civil Code of Seychelles relevant to the proceedings, the evidence, and the written and oral submissions of the parties to determine the question. The learned Judge referring to the pleadings stated that the Appellant's action arises from an alleged breach of the Agreement, which is the non-payment by the Government of Seychelles of part of the purchase price for Coetivy Island amounting to SCR1,500,000/-. Based on the pleadings, she stated that the remedies sought by the Appellant are the rescission of the Agreement and the registration of the Appellant as the owner thereof, alternatively, the recovery of the unpaid part of the purchase price for Coetivy Island.
33. The learned Judge, after an extensive analysis of the evidence and the provisions of the law, determined that — "*i>n light of the remedies sought by the plaintiff it is clear that the present action is a "real action[s] in respect of the rights of ownership of land or other interest therein and falls within the purview of either Article 2262 which provides for a 20 years prescription period for such actions, or Article 2265 which reduces the period to 10 years where the person raising a plea of prescription has "a title which has been acquired for value and in good faith"*. Hence, she held that the Appellant's action was barred by the twenty-year extinctive prescription.
34. The learned Judge summed up her conclusion as follows (*at paragraph 92 of the judgment*) —

"[92] The cause of action in the present case accrued on 15th February 1980 and proceedings commenced with the filing of the plaint on the 24th August 2020. Forty years have elapsed between the accrual of the cause of action and filing of the plaint. No evidence has been brought by the plaintiff of the occurrence of any event which may have interrupted prescription, which in any event was not raised

by the plaintiff. In fact in his testimony Mr. Hoareau the sole witness for the plaintiff admitted that he has no evidence either that Mr. Delhomme made any demand to the Government for payment of the outstanding sum, or that the Government has acknowledged any debt due by it to Mr. Delhomme (see paragraph 12 above). I, therefore, find that the present action, having been filed more than 20 years after the accrual of the cause of action, is prescribed.

[93] Having found that the action is prescribed, I decline to consider the matter on the merits as to do so would be purely an academic exercise in the circumstances.

[...]

[95] Accordingly, I dismiss the plaint. Each party shall their own costs."

The appeal

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35. The judgment of the learned trial Judge is being challenged on 16 grounds, which are reproduced verbatim hereunder —

"Ground 1

The learned Judge erred in law when she rejected the Appellant's argument that the condition precedent was payment of the monthly instalment of SCR300,000 which would effectively give ownership and title to the Island to the Respondent when performed and fulfilled. The learned Judge failed to appreciate the Appellant's legal argument that non-fulfilment of the condition, i.e. payment of SCR300,000 per month, amounts to a continuous breach of the Agreement giving rise to a continuous cause of action rendering prescription irrelevant.

Ground 2

The learned Judge erred when she failed to appreciate the legal significance of article 1650 of the Civil Code which places the obligation on the buyer to pay the purchase price on the day and place agreed upon by the sale. And article 1584 which distinguishes a sale which is completed either purely and simply or subject to a condition precedent or subsequent.

Ground 3

The learned Judge erred when she failed to distinguish and appreciate the law which applies to a sale where the purchase price is paid in full upfront and a sale subject to payment by instalment. The learned Judge thus erred when she concluded that neither the buyer's obligation to pay the price nor the execution of such obligation can be considered as a condition precedent because, together with the consent of the parties and the thing, subject matter of the sale, the price is one of the "éléments constitutifs de la vente."

Ground 4

The learned Judge erred when she failed to appreciate the legal significance of article 2257 which provides that prescription shall not run with regard to a claim which is subject to a condition, until that condition is fulfilled; with regard to a claim maturing on a fixed date, until such date arrives. The learned Judge erred when she failed to apply article 2257 to the facts of this case when considering her ruling.

Ground 5

The learned Judge erred in law when she failed to rule that as long as the buyer does not fulfil its principal obligation to pay the purchase price under article 1650 of the Civil Code, prescription is not relevant and the breach continues giving rise to a right to the seller to seek rescission of the contract of sale or a declaration from the Court that there has been no sale of the property.

Ground 6

The learned Judge erred in law when she failed to consider and apply paragraph 878 of Dalloz, Encyclopedie Juridique, 2e edition, Repertoire de Droit Civil, Tome V, Vo. Vente: which provides that unless and until the buyer pays the purchase price, the sale is non-existent.

Ground 7

The learned Judge erred in law when she failed to imply a clause in the contract of sale that the contract of sale was conditional to the execution of the buyer's obligation i.e. payment of the purchase price and the effect of the contract of sale was delayed until payment of the price by the buyer.

Ground 8

The learned Judge erred in law when she interpreted paragraphs 34, 40 and 41 of the Dalloz, Encyclopedie Juridique, 2e edition, Repertoire de Droit Civil, Tome V, Vo. Vente to mean that "it would appear from the above that a condition that suspends the transfer of ownership of property until payment of the price must be expressly provided for in the contract of sale." The Appellant is of the view that such a condition can also be implied in the contract of sale.

Ground 9

The learned Judge erred when she concluded that "[t]he obligation of the defendant to pay the price cannot be a condition precedent to a sale. Only the transfer of ownership of the property can be made conditional to the payment of the price but this was neither expressly stipulated in the deed of sale nor in my view can it be inferred from the circumstances that this was the intention of the parties in the present case."

Ground 10

The learned Judge erred in law when she failed to rule that article 1183 of the Civil Code is applicable to the contract of sale and that the non-performance by the defendant of its obligation to pay the purchase price amounts to a condition subsequent. The non-payment of the price by the defendant is the event which gives rise to the cancellation of the defendant's obligation in terms of article 1168 of the Civil Code.

Ground 11

The learned Judge erred when she failed to apply article 1183 of the Civil Code to the facts of this case and rejected the Appellant's arguments that Article 1183 provides that the effect of the condition subsequent (i.e. the non-payment of the price by the defendant) is the rescission of the obligation and restoration of things in the same state as they would have been if the obligation had never existed.

Ground 12

The Judge erred in law when she ruled that the obligation of the defendant to pay the price cannot be a condition precedent to a sale. The Appellant submits that this position of law is only applicable when payment is made up front and in full at or before the time of signature of the title deed transferring ownership of the property to the buyer. But it is not applicable when the purchase price is paid by instalments which has the effect of transferring ownership of the property at some point in the future when the full purchase price is paid.

Ground 13

The learned Judge erred when she rejected the Appellant's arguments that article 2257 provides that prescription shall not run with regard to a claim which is subject to a condition, until that condition is fulfilled. Further the learned Judge erred when she rejected the Appellant's arguments that until the outstanding part of the purchase price is paid and the condition subsequent fulfilled, prescription cannot start running.

Ground 14

The learned Judge erred when she held that the condition subsequent envisaged by article 1184 is the non-payment of the price by the buyer. As soon as payment becomes due and the buyer fails to make payment, the condition is fulfilled and prescription starts running. The Appellant submits that this confusion arose from the learned Judge's failure to appreciate the distinction between a sale where payment is made or is due in full upfront and a sale which is subject to payment of the purchase price by instalments.

Ground 15

The learned Judge erred when she held that article 2257 is not applicable to the present case.

Ground 16

The learned Judge erred when she held that the Appellant's action is prescribed and time-barred in law."

36. By way of relief, the Appellant asked the Court of Appeal to allow the appeal and set aside the judgment of the Supreme Court and order rescission of the Agreement for failure by the Respondent to pay the balance of the purchase price as agreed or at all, alternatively, order the Respondent to pay the Appellant the balance of the purchase price with interest thereon from the 15 of March 1980.

Analysis of the contentions of the parties

37. Though the grounds of appeal are lengthy, the essential point made in them is that the learned Judge was wrong to find that the Appellant's action is prescribed under Article 2262 of the Civil Code of Seychelles. The Appellant also filed comprehensive skeleton heads of argument concerning the grounds of appeal. Counsel for the Respondent, in her skeleton heads of argument, offered submissions with respect to the grounds of appeal.
38. Having considered the record at the appeal with care, we determine that there is only one point for consideration, and that is whether or not the learned Judge was correct in law to raise *ex proprio motu* the twenty-year extinctive prescription.
39. This Court drew this point to the attention of Counsel at a sitting of the Court of Appeal. Subsequently, the Appellant, through Counsel, sought leave of this Court to amend ground sixteen of his notice of appeal, which application was acceded to by this Court at the hearing of the appeal.
40. The amended ground sixteen reads — *"The learned trial Judge erred in law when she dismissed the appellant's case and held that the Appellant's action is prescribed and time barred by 20 years' prescription when same was never pleaded at all by the respondent and the issue was ultra petita in law"*.
41. We now turn to the question at issue.

Whether or not the learned Judge was correct to raise *ex proprio motu* the twenty-year extinctive prescription

42. The Civil Code of Seychelles distinguishes between real actions and personal actions. The general rule for personal actions is that they are barred by extinctive prescription of five years after the cause of action arose. Article 2271 of the Civil Code of Seychelles stipulates that personal actions are barred by extinctive prescription of five years as follows —

"Article 2271

All rights of action shall be subject to prescription after a period of five years except as provided in articles 2262 and 2265 of this Code.

Provided that in the case of a judgment debt, the period of prescription shall be ten years."

43. By comparison, the general rule for real actions is contained in Articles 2262 and 2265 of the Civil Code of Seychelles. Article 2262 of the Civil Code of Seychelles stipulates —

"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.

44. Article 2265 of the Civil Code of Seychelles stipulates —

"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."

45. Both Counsel have offered submissions on the question of whether or not the learned Judge was correct to raise *ex proprio motu* the twenty-year extinctive prescription, which we have considered with care.

46. We have already mentioned that the Respondent pleaded that the five-year extinctive prescription under Article 2271 of the Civil Code of Seychelles applies to the Appellant's

action; and that the learned Judge concluded that the twenty-year extinctive prescription applies to the Appellant's action.

47. Counsel for the Appellant relied on Articles 2223 and 2224 of the Civil Code of Seychelles and the cases of *PTD Limited v Keven Zialor Civil Appeal SCA 32/2017* (17 December 2019) and *Prosper & Another v Fred (SCA 35/2016) [2018] SCCA 41* (14 December 2018), in support of his submission that the learned Judge erred in law in relying on the extinctive prescription of twenty years which concerned real actions to dismiss the Appellant's action, when the Respondent has pleaded that the Appellant's action (a personal action) was barred by extinctive prescription of five years.
48. Counsel for the Respondent, in her skeleton heads of argument and at the hearing of the appeal, reiterated the Respondent's plea that the five-year extinctive prescription under Article 2271 of the Civil Code of Seychelles applies to the Appellant's action. Hence, in the view of Counsel for the Respondent, the Appellant's action was prescribed in law. At the hearing of the appeal, we informed Counsel for the Respondent that it would be inappropriate for this Court to entertain the Respondent's contention that the learned Judge erred in law in concluding that the five-year extinctive prescription did not apply to the Appellant's action as the Respondent had not cross-appealed the judgment. Rule 19 of the Seychelles Court of Appeal Rules, 2005, as amended stipulates —

"(1) Every respondent who wishes to cross-appeal shall deliver a notice of his/her cross-appeal within fourteen days after receiving the appellant's notice of appeal.

(2) The notice of cross-appeal shall comply with the provisions of sub-rules (2), (3), (6), (7), (8), (9) and (10) herein and shall be substantially in the form D in the First Schedule hereto."

49. Articles 2223 and 2224 under "**TITLE XX PRESCRIPTION CHAPTER 1 GENERAL PROVISIONS**" of the Civil Code of Seychelles stipulate —

" Article 2223

The Court cannot, on its own, take judicial notice of prescription in respect of a claim.

Article 2224

A right of prescription may be pleaded at all stages of legal proceedings, even on appeal, unless the party who has not pleaded it can be presumed to have waived it. (Empasis supplied)

50. Article 2223 of the French "*Code Civil*" stipulates — "**Art. 2223.** [l]es juges ne peuvent pas suppléer d'office le moyen résultant de la prescription.", **CODES DALLOZ CODE CIVIL quatre-vingt-douzième édition**, page 1646. Article 2223 of the Civil Code of Seychelles is similar to Article 2223 of the French "*Code Civil*".

51. In **PTD Limited** [supra], Counsel for the appellant argued *inter alia* that the learned Judge erred in law in granting the respondent a "*droit de superficie*" by way of acquisitive prescription of ten years. In this respect, he contended that there were no pleadings to the effect that the appellant had acquired a "*droit de superficie*" by way of acquisitive prescription of ten years, for value and in good faith. Counsel for the appellant contended that, under the Civil Code of Seychelles, prescription must be pleaded for a court to rely on it because "*la prescription n'opère pas de plein droit.*" In support of his submissions, Counsel for the appellant relied on Articles 2223 and 2224 of the Civil Code of Seychelles, the case of **Prosper & Another** [supra], and the following extracts from **Dalloz Encyclopédie de Droit Civil 2e Ed. Verbo Prescription Civile**, at notes 332, 333, and 334 —

"Art. 2. — *CONDITIONS POUR QUE LA PRESCRIPTIONS PRODUISE SES EFFETS.*

§ 1er. — *Nécessité d'invoquer la prescription*

332. *La prescription n'opère pas de plein droit et l'article 2223 du code civil interdit aux juges, d'une manière absolue, de suppléer le moyen résultant de la prescription. La règle est générale et s'applique, quelle que soit le délai (Civ. 31 Mai 1847, D. P. 47. 4. 379; 2janv. 1855, D. P. 55. 1. 13 ; 26 FEVR. 1861, d. p. 55. 1. 13; [...];*

333. *Le juge ne peut même pas suppléer d'office une prescription plus courte qui serait acquise, alors que la partie ne se prévaut que d'une prescription plus longue qui n'est pas encore accomplie [...];*

334. *La règle selon laquelle le juge ne peut pas suppléer d'office le moyen résultant de la prescription s'applique d'ailleurs en toute matière et même lorsqu'il s'agit de courtes prescriptions*".

52. The case of **Prosper & Another** [supra] held that — "[...] *generally prescription must be pleaded and cannot be raised by the court itself (see Article 2223 of the Civil Code [...]).*"
53. In **PTD Limited** [supra], Counsel for the respondent, while admitting that the respondent did not make such a plea, contended that the respondent had to establish that he acquired the "*droit de superficie*" by prescription; and that if the learned Judge were to find that the facts supported the "*droit de superficie*", he could have declared that the respondent had established that right over the property.
54. In **PTD Limited** [supra], the Court of Appeal accepted the submissions offered on behalf of the appellant, based on which it concluded that prescription must be pleaded; and that a court cannot take judicial notice of prescription in respect of a claim.
55. We endorsed the findings of the Court of Appeal in **PTD Limited** [supra] with respect to the question at issue. Note 332 from **Dalloz Encyclopédie de Droit Civil 2e Ed. Verbo Prescription Civile** states that, "[l]a prescription n'opère pas de plein droit et l'article 2223 du code civil interdit aux juges, d'une manière absolue, de suppléer le moyen résultant de la prescription. La règle est générale et s'applique, quelle que soit le délai¹ [...]." [Emphasis supplied]
56. In light of the above, we accept the submissions of Counsel for the Appellant made on the point at issue and hold that the learned Judge was wrong to take judicial notice of the twenty-year extinctive prescription, which had not been pleaded to dismiss the Appellant's action in *limine litis*. We also accept the submission of Counsel for the Appellant, that having found that the five-year extinctive prescription did not apply to the Appellant's action, the learned Judge should have dismissed the plea in *limine litis*.

¹ «The court is absolutely prohibited by Article 2223 from taking judicial notice of prescription. This general rule applies whatever the period may be»

57. It follows, therefore, that the question of whether or not the learned Judge was correct to conclude in her judgment that the Appellant's action is "*une action réelle*"/ a real action and not "*un action personnelle*"/ a personal action and whether or not the action is time-barred, does not arise for consideration. This judgment does not express any views on the correctness of the learned Judge's conclusions.

The Decision

58. For the reasons stated above, the appeal is allowed on the amended ground 16. We find the contentions contained in grounds one to fifteen of the grounds of appeal to be misconceived in view of the conclusion we have arrived at in this case, Hence, grounds one to fifiteen stand dismissed.

59. Hence, we quash the decision of the learned Judge dismissing the Appellant's action in *limine litis* on the ground that the action is prescribed having been filed more than twenty years after the accrual of the cause of action. For the order of the learned Judge, we substitute therefor an order dismissing the plea in *limine litis*.

60. We remit the case to the Supreme Court for the learned Judge to deal with the action on the merits only.

61. With no order as to costs.

F. Robinson JA

I concur:-

Dr. L. Tibatemwa-Ekirikubinza JA

I concur:-

S. Andre JA

Signed, dated, and delivered at Ile du Port on 26 April 2023.