

**Finesse v Atala & Or
(2003) SLR 214**

Philippe BOULLE for the Plaintiff
Gustave DODIN for the First Defendant
France BONTE for the Second Defendant

Ruling delivered on 14 March 2003 by:

PERERA J: The Plaintiff claims damages from the Defendants for allegedly demolishing a part of a wall on her land, which she claims was not authorized in the Court Order upon which the First Defendant, a Process Officer of this Court executed a warrant of execution.

The Plaintiff testified inter alia that she commissioned a photographer, on the same day the wall was demolished, to take photographs, which have been marked as items 2 to 6, subject to the photographer being called.

The photographer, Allen Fred, testified that he was a professional photographer, and that on the instructions of the Plaintiff, he took the five photographs and developed them. He stated that he has several negatives in his possession that it would take time to sort them. Objections were raised by Learned Counsel for the Defendants against the production of the photographs as exhibits in the case, mainly on the ground that the negatives have not been produced and also on the ground that the photographer was unable to give the measurements of the objects photographed.

The requirement that negatives should be produced before a photograph is admitted in evidence is based on procedure and not law. Hence the non-production of negatives is not fatal to such admission. In criminal cases however, this practice is relied on strictly, as a case against an accused has to be proved beyond reasonable doubt. Hence the Court, in these cases cannot permit any evidence based on mechanical processes which have the capacity to be tampered with, to be admitted. In civil cases however, the burden on the Plaintiff being based on proof on a balance of probabilities, photographic evidence, although cannot be relied on as proof in itself, yet would be admitted to aid the Court, but only upon the object or objects so photographed being explained and measurements given by testimony of the photographer or the party seeking to produce them. Hence it would be the function of the Court to consider the photographs in the same way as documents, on a consideration of such evidence and on a balance of probabilities. (See the case of *Hindson v Ashby* [1896] 2 Ch 1.)

In the case of *Andre Esparon v Bernard Vidot* (1993) SCA 11 the trial Judge placed reliance on photographs taken by a tourist who was not called as a witness. They were admitted in evidence without objections by Counsel. The photographs were relied on by the Judge to resolve a conflict in two versions of oral evidence as regards the position of a bus on the road in a road accident which caused personal injuries to the Plaintiff.

The Seychelles Court of Appeal held that in the absence of the photographer's evidence and as photographs were not in themselves capable of telling a determinate story, a proper evaluation of photographic evidence was not possible. It was also held that the fact that they were admitted in evidence without objections did not per se render them impeccable in so far as the probative value was concerned, and that the photographs needed to be explained in order to aid the Court to evaluate them.

In that case, apart from tendering the photographs, neither the Plaintiffs nor the Defendants said anything about the photographs. Hence a rehearing was ordered solely on the ground that the photographs themselves afforded no evidentiary value and that hence any conclusion arrived at by the judge was not valid. The Court did however not state that a photograph, which for purposes of Section 2 of the Evidence Act (Cap 74) is a "document", is inadmissible merely because the maker was not called as a witness or the negatives not produced.

In the present case, the Plaintiff testified regarding the alleged damage to her wall and also gave evidence as regards the approximate measurements. The photographs are intended to support such evidence. Moreover, a Quantity Surveyor, Miss Cecile Bastille has produced a valuation report on the alleged damage. This report has been marked as Item 7, and awaits her evidence before being exhibited. Hence unlike in the case of *Andre Esparon* (supra), the photographs do not stand alone to be considered as evidence. In these circumstances, the objections are overruled, and the photographs marked Items 2 to 6 are admitted in evidence as exhibits P3 to P7.

As regards an ancillary ruling sought by Mr Boule, Learned Counsel for the Plaintiff as to whether documents could be put to an adverse party called on personal answers, it is my view that as the purpose of personal answers is to obtain admissions, any documents can be put to such party for such limited purpose, be they already marked as items or otherwise. However no such document will be marked in evidence as exhibits in the course of examining an adverse party on personal answers.

Ruling made accordingly.

Record: Civil Side No 358 of 1999