

IN THE SUPREME COURT OF SEYCHELLES

1. Edouard Mousmie

of Anse Aux Pin, Mahé

2. Sonny Sauzier

of St. Lois, Mahé

Applicants

Vs

Ferrina Amade

of Anse Aux Pins, Mahé

Respondent

Civil Side No: 411 of 2006

Ms. L. Pool for the Applicant

Mr. F. Bonte for the Respondent

D. KARUNAKARAN, J

RULING

This is an application for a writ of *Habere Facias Possessionem*. The 1st applicant in this matter claims to be the owner of a dwelling house - the super structure - built on a parcel of land title C1841 situated at Au Cap, Mahe, whereas the 2nd applicant is admittedly, the owner of the land comprised in the said title. Both applicants jointly allege that the respondent is now occupying the property - comprised of the said land and house - illegally without any colour of right. Hence, they have made the instant application to the Court for a writ ordering the respondent to quit, leave and vacate that property.

On the other hand, the respondent, who is non-else than the daughter of the 1st applicant, though admits that she is now in occupation of the property, resists this application on the ground alleging that she and her family have an interest in the said property. According to the respondent, they have invested their funds in sum of Rs99, 850.00 towards the construction of the said house and presumably, claim to retain possession of the property. According to the respondent, she and her husband one Mr. Simon Amade took a housing loan of Rs 132,891. 80 from the Seychelles Housing Development Corporation for the said construction; they made repayments of that loan to the tune of Rs99, 850.00. Hence, the respondent requests the Court to dismiss the instant application and moreover, seeks an order compelling the applicants to extract the portion of land on which the house stands and transfer that portion of land to the respondent and her husband.

The 1st Applicant has averred in his affidavit that he is aged 83 and an illiterate. He is married to one Jenita Mousmie, aged 70. The couple has seven children. The Respondent herein is their eldest daughter, who being literate, used to assist the 1st Applicant in all his administrative matters. Particularly, she assisted him in the purchase of the said property Title C1841 and also in applying for and obtaining the loan from SHDC in order to build the house on the said land. For many years the 1st Applicant gave moneys to the Respondent regularly to pay for the monthly installments to SHDC towards the repayment of the said housing loan. According to the 1st Applicant, as he is an illiterate person the Respondent at the time of purchasing of the property tricked him and through fraud included her name as well in the transfer deed and stealthily acquired an undivided half share in the land title C 1841. When the 1st Applicant and his family members discovered the fraud, the Respondent agreed - out of shame - to transfer the land back to the 1st Applicant. Thus, the 1st Applicant eventually became the sole owner with an absolute title of the said land C 1841 with the house thereon, having got back the undivided half share from the respondent by a transfer deed dated 19th January 2004 vide Exhibit 1. The said property was encumbered with a charge of SR 132,891.80 in favour of SHDC (now Housing Finance Company Limited) for a loan the 1st Applicant had availed to build his house. The 1st Applicant paid the outstanding loan and obtained discharge of the charge on the 25th July 2005, vide Exhibit 3. Subsequently, the 1st Applicant sold the land Title C 1841 by a deed of transfer dated 25th July 2005 to the 2nd Applicant, vide Exhibit 4. At the same time, the 1st Applicant, by a registered Restrictive Agreement dated 25th July 2005 reserved the dwelling-house thereon for himself, and agreed to sell it on a later date

to the 2nd Applicant, vide Exhibit 5. By a separate Agreement dated 29th September 2005 in Exhibit 6, the 1st Applicant agreed inter alia, to effect transfer of the house to the 2nd Applicant free of all encumbrances on or before the 15th September 2006 and should the 1st Applicant fails to effect transfer of the house free of all encumbrance within that period, then he would pay a conventional penalty of 1500/- per month with a 15% annual increase to the 2nd Applicant, with effect from the 15 September 2006.

The 1st applicant has also averred in his affidavit that the Respondent is at present illegally occupying the said house and is also not on good terms with 1st Applicant, her mother and siblings. Besides, the Respondent has on the 13th October 2005 placed a caution on the title frivolously, though she had no right to claim a defined interest capable of creating a registerable instrument. According to the 1st applicant the occupation of the house by the Respondent is causing great hardship and moral trauma to the aging 1st Applicant and his aging wife. Furthermore, the 1st Applicant is, from the 15 September 2006, liable to pay the conventional penalty of Rs.1, 500 to the 2nd Applicant. This has considerably increased the financial burden of the 1st Applicant.

The 2nd applicant has also filed an affidavit in support of this application corroborating all material facts and circumstances contained in the affidavit of the 1st applicant. According to the 2nd applicant, he is the owner of the land comprised in Title C184I and he has entered into an agreement with the 1st applicant for the purchase of the house thereon. The 1st applicant has promised to sell that house to him free of all encumbrances on or before the 15th September 2006. In pursuance of the said agreement, the 2nd applicant has already deposited 10% of the sales price in the account of Mr. Daniel Belle, a Notary Public to be held in escrow, to be paid to the 1st Applicant and the balance to be paid as soon as the house is vacated and completion of the sale as per the terms of their agreement. However, the sale of that house could not be completed since the Respondent has refused to vacate the house. In these circumstances, the applicants contend that the Respondent has no legal right, cause or capacity to remain in occupation of the house.

For these reasons, both applicants jointly pray this Court to issue a writ Habere Facias Possessionem against the Respondent ordering her and her assigns or agents to quit, leave and vacate the house and pay the costs of this action to the applicants.

On the other side, the respondent has filed a counter-affidavit stating the reasons why the Court should not issue the writ sought by the applicant in this matter. According to the respondent, the 1st Applicant is her father. After the respondent's marriage with one Simon Amade, she and her husband were occupying a house at Pointe Larue, together with the 1st Applicant and his wife. On the 20th February 1987, the 1st Applicant purchased the property in question, i.e. C. 1841 from one Gerard Belle and the respondent's name was included in the transfer document. She and her husband took a loan of Rs132, 891.80 from SHDC for the construction of the house by mortgaging the said property. Thereafter, the 1st Applicant and his wife came to live with the respondent in the house. As the 1st Applicant was in his old age, it was agreed that both the respondent and her husband would be responsible for the loan repayments. Thus, according to the respondent, she and her husband paid up the loan till December 2003 to a total amount of Rs99, 850.00. Subsequently, due to some misunderstanding with other members of the family, the respondent was forced to transfer back her undivided half share in the said property to the 1st Applicant. In the year 2004, the 1st Applicant and his wife vacated the house and went to live elsewhere. Despite several requests, according to the respondent, the 1st Applicant neglected/refused to extract the portion of land on which the house stands and transfer that portion of land in favour of the respondent and her husband. On the 25th July 2005, without the respondent's knowledge and/or consent, the 1st Applicant sold the property to the 2nd Applicant after settling the loan balance outstanding with SHDC in the sum of Rs56, 547. Thus, it is contended that the 1st applicant has deprived the respondent and her family of their interest in the said property.

In view of all the efforts made during those years and monies so spent to put the house to its present standard, the respondent contends that it is just and necessary that the part whereupon the house stands be surveyed and transferred onto her and her husband.

In the circumstances, the respondent urged the Court to dismiss the Applicants' application with costs and for an order that the property whereupon the house stands surveyed and transferred to the respondent and her husband.

I meticulously perused the affidavits, the counter-affidavits and other documents adduced by the parties in this matter. Needless to say, the general principles governing the writ of Habere Facias Possessionem are well settled by our case laws. As I have observed in **Mary Dubignon V**

Antonio Mann- Civil Side No: 9 of 1999, following are the cardinal principles normally considered and applied by the Court in determining the writs of this nature: -

1. *The Court in granting the writ Habere Facias Possessionem acts as a Court of equity rather than a Court of law and exercises the equitable powers conferred on it by Section 6 of the Courts Act- Cap52.*

Those who come for equity should come obviously with clean hands. There should not be any other legal remedy available in law to the applicant who invoke an equitable remedy.

An equitable remedy is available to the applicant whose need is of an urgent nature and any delay in obtaining the remedy would cause irreparable loss, hardship, or injustice to him.

Before granting the writ of Habere Facias Possessionem , the Court should be satisfied that the respondent on the other hand has no serious defence to make; and

If the remedy sought by the applicant is to eject a respondent occupying the property merely on the benevolence of the applicant then that respondent should not have any right or title over the property.

Bearing the above principles in mind, I carefully analyzed the evidence adduced by the parties through their affidavits filed in this matter. On the face of the affidavits on record, it is evident that the respondent does not claim any right based tenancy or contract in respect of the property in question. The applicant has obviously, permitted the respondent to live with him in his house on account of their personal relationship as father and daughter respectively. Such permission granted by the father to his adult daughter for occupying the family home cannot create any right or obligation either contractual or otherwise for or against any party. The permission thus granted only amounts to a license in law. The respondent is only a licensee in the eye of law. Now, the licensor namely, the applicant has expressly revoked the license. Therefore, the respondent's continued occupation of the house is obviously illegal and so I find. As regards, the repayments the respondent alleged made towards the housing loan are not supported by any documentary proof. In any event, even if any such repayments had been made by the respondent towards housing loan, in the absence of any agreement between the parties, those payments cannot give rise to any contractual obligation on the part of the applicant to transfer the house or the land on which the house stands or any part thereof to the respondent. Moreover, I find there is no

evidence on record to show that the respondent entered the property as a tenant or by virtue of any agreement with the applicants at any point of time before or after the 2nd applicant purchased the land from the 1st applicant. Furthermore, I find no accuracy or correctness in the averments made by the respondent in her affidavit in respect of her claim that the 1st applicant has deprived the respondent and her family of their interest in the said property. In the circumstances, I find that the respondent is presently in illegal occupation of the property without any colour of right.

As regards the respondent's claim of "interest" in the property, I find there is no evidence documentary or otherwise on record to my satisfaction in support of her claim in this respect. Indeed, the applicants are the lawful owner of the property in question. The respondent is occupying the said Parcel C1841 and the house standing thereon illegally following the revocation of the license by the applicants. Notices have been sent to the respondent on numerous occasions to vacate the premises but she has failed to do so. Obviously, the respondent is now a trespasser who is liable to be evicted, as she has no serious and bona fide defense in this matter. Besides, I find that the respondent did not make any contributions towards the construction of the house as it was built by SHDC for the 1st applicant and his wife who thereafter repaid the housing loan in full. Consequently, I hold that the respondent does not have a serious defence to make in this matter. In my judgment, the claim made by the respondent in her counter-affidavit is not tenable either in law or on facts. On the face of the averments contained in the affidavits, simple justice demands that this application should be granted. Indeed, no owner should be deprived of his right to have exclusive possession and enjoyment of his property.

In fact, when an applicant applies for possession by summary procedure of application for the writ of *Habere Facias Possessionem* and his affidavit shows prima facie entitlement to that writ, it behoves the respondent to such application to condescend to details in showing by his counter affidavit that he has a real defence to the claim for possession **vide Casino des Seychelles Limited Vs. Companie (Seychellois) Pty Limited SCA No: 2 of 1994 per Ayoola J.** As I see it, the respondent in this case has failed to show in her counter-affidavit that she has a real and serious defence to the claim for possession. Also, I note that mere inconvenience or hardships are not valid grounds to induce the court to take away from a successful party the benefit of a judgment **vide Jacqueline Mousmie v/s Daraley Mousmie C.A No. 248 of 2001.**

In the final analysis therefore, I find the respondent does not have a serious defence to make to this application. In the circumstances, I allow the application, grant the *writ* and order the respondent to leave, quit and vacate the house situated on Title C1841 at Au Cap, Mahé on or before 30th of June 2009 and deliver vacant possession of the same to the 1st applicant thenceforth. Having regard to all the circumstances of this case, I make no order as to costs.

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D. KARUNAKARAN

JUDGE

Dated this 4th Day of May 2009