IN THE SUPREME COURT OF SEYCHELLES

1. Joachim Joseph
2. Philomena Joseph

Both of Takamaka, Mahé **Applicants**

Vs

Barry Joseph of

Takamaka, Mahé

Respondent

Civil Side No: 302 of 2007

Mr. W. Herminie for the Applicants

Mr. B. Georges for the Respondent

D. KARUNAKARAN, J

RULING

This is an application for a writ of *Habere Facias Possessionem*. The 1st applicant Joachim Joseph, the 2nd applicant Philomena Joseph and the respondent Barry Joseph are brothers. They are all residents of Takamaka, Mahe. The applicants are the co-owner of an immovable property registered as parcels T819 and T820, situated at Takamaka. There stand three dwelling houses on the property. The 1st applicant Joachim, the 2nd applicant Philomena and one of their siblings by name Emmy Joseph each own a dwelling house on the property, having been built with their own funds. All those three houses are situated on the land comprised in parcel T819, co-owned by the 1st and the 2nd applicants. Both applicants allege in this matter that the respondent is presently occupying one of the said three dwelling

houses belonging to the 1st applicant, illegally without any colour of right and refusing to move out. And, hence the applicants seek the writ first-above mentioned.

According to the applicants, the respondent came to occupy the house of the 1st applicant, when he was sick sometime ago. The applicants gave permission to the respondent to occupy the house for a while. However, the applicants now claim that they need the house for their own occupation. Hence, they requested the respondent to move out. They even issued a legal notice dated 23rd July 2007 - through their attorney Mr. W. Herminie - to the respondent requesting him to vacate. Despite several requests, the respondent however, refused to vacate and is still in occupation of the house. The applicants therefore, contend that the respondent is now a trespasser. He is in illegal occupation of the house since the license, which had been granted for his occupation has already been expressly withdrawn by the owners, namely the applicants. In the circumstances, they have now come before this court with the instant application for *a writ* ordering the respondent to quit, leave and vacate the property.

On the other hand, the respondent, who is non-else than the brother of the applicant, though admits that he is presently in occupation of the property, resists this application on the ground contending that the house in question is their family home and hence he has an interest in the said property. According to the respondent, his mother sold the property to the applicants by a transfer deed dated 20th January 2006, which sale is a disguised donation of the property to the applicants. According to the respondent, though his mother had ten children, prior to her death she selected only two namely, the applicants among the ten, and has transferred the property to them for a low price or unpaid price. Hence, the respondent claims that he is going to challenge the title of the applicants to the property and therefore, has bona fide right to reside in the house. In the circumstances, the respondent requests the Court to dismiss the instant application.

I meticulously perused the affidavit, the counter-affidavit 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 invokes 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 on tenancy or contract in respect of the property in question. The applicants have evidently, permitted the respondent to live in the house on account of their blood relationship as brothers. Such permission granted by the applicants to their brother for occupying their home cannot create any legal right or obligation either contractual or otherwise for or against any party. The permission thus granted only amounts to a license and the respondent is only a licensee in the eye of law. Now, the licensor namely, the applicants have expressly revoked the license. Therefore, the respondent's continued occupation of the house is obviously illegal and so I find. As regards, the respondent's claim that he has an interest or right in the property is not supported by any evidence except his self-serving averments made in his affidavit to that effect alleging disguised donation. On the contrary, however, there is sufficient evidence on record to show that both applicants are the lawful owners of the land registered as parcels T819 and T820 on which the house stands. In fact, the predecessor in title has legally transferred the land to the applicants as evidenced by the *transfer deed dated 20th January 2006.* It is a well known principle that if one sells land on which a house stands, the sale of the land includes that of the house and it is not

necessary to specify that the house is included *vide the Judgment of A. Sauzier Ag CJ in Colette Gillieaux Vs. Gilbert Hoareau Civil Side Case No. 29 of 1980.* It could be true that the house in question had previously been owned by his mother and used as family home of the respondent. However, the fact remains that the applicants are presently the lawful owners of the house. Even if one assumes for a minute that the mother of the parties has in fact, made ***disguised donation*** of the property to the applicants, in the absence of any tangible evidence to rebut the presumption of legality attached to the transfer deed, which has been duly registered with the land registry, this Court cannot and should not attempt on a speculation to invalidate that transfer and find that the respondent might have a bona fide right to reside in the house. Moreover, I note 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 as a legal heir at any point of time before or after the applicant purchased the land from their mother. 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 "bona fide interest" in the property, I find there is no evidence documentary or otherwise on record to my satisfaction in support of his claim in this respect. Indeed, the applicants are the lawful owner of the property in question. The respondent is occupying the house in question illegally following the revocation of the license by the applicants. Notice has been sent to the respondent to vacate the premises but he has failed to do so. Obviously, the respondent is now a trespasser who is liable to be evicted, as he has no serious and bona fide defense in this matter. In my judgment, the claim made by the respondent in his 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 his counter-affidavit that he has a real and serious defence to the claim for possession.

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 T819, at Takamaka, Mahé on or before 30th June 2009 and deliver vacant possession of the same to the applicants 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 25th Day of May 2009