

THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES HOLDEN AT VICTORIA

CIVIL SIDE NO. 245 OF 2001

George Gomme

Plaintiff

Versus

Gerard Maurel

Defendants

Antonia Harrison

Frank Elizabeth for the Plaintiff

Lucie Pool for Defendant No.1

Frank Ally for Defendant No.2

JUDGMENT

Egonda-Ntende CJ

1. Initially this suit was commenced by 2 plaintiffs. Plaintiff no.2, a concubine of the plaintiff No.1, has since passed on. It is now being prosecuted by Plaintiff No.1. By his plaint the plaintiff contends that he purchased 2 plots of land from a one Mr. Antoine Collie on or about 15 June 1990. These plots of land are parcels V6331 and V6431. The purchase price was SR 60,000.00 and SR 90,000.00 respectively.
2. The defendant no.1 is a public notary. It is contended that he witnessed the purchase. By mistake it is contended that the defendant no.1 registered the plaintiff no.1 and his deceased concubine, as proprietors of only V6431, and omitted to transfer title V6331 to the plaintiffs.
3. The plaint further contends that the defendant no.1 on 11 June 1999 transferred parcel V6331 to the defendant no.2. The plaintiff contends that Mr. Antoine Collie has never transferred the said title to the defendant no.2 and that the transfer and registration thereof is 'a sham and fraud'.
4. The plaintiff seeks 3 prayers. Firstly that this court declares that the transfer of plot No

V6331 to the defendant no.2 is null and void for fraud. Secondly declare that there has been a sale to the plaintiffs. And lastly order rectification of the land register by ordering the Registrar of Lands to register title No. V6331 in the names of the plaintiffs.

5. Defendant No.1 opposed this action both in *limine litis* and on the merits. In the plea *limine litis* the defendant no.1 contended that this suit was *res judicata* by virtue of the judgment of the Supreme Court in Goergie Gomme and Lorita Gayon v Antoine Collie C S No. 215 of 1999 delivered on 15th March 2001. Secondly that this suit is prescribed since the alleged cause of action arose in June 1990.
6. On the merits defendant no.1 contends that Mr. Antonie Collie only sold to the plaintiffs parcel V6431 for SR 150,000.00 which sale the defendant no.1 witnessed as a notary public. He denied any allegations of a mistake as well as allegations of fraud with regard to the transfer of V6331 to defendant no.2.
7. The defendant no.2 opposed this action both in *limine litis* and on the merits. In *limine litis* the defendant no.2 contended that this suit was prescribed and that it disclosed no cause of action against her.
8. On the merits the defendant no. 2 contends that she purchased title no. V6331 from Mr. Antoine Collie in June 1999, and has been the sole lawful registered owner thereof.
9. The defendant no.2 further contended that contrary to the plaintiffs' present averments regarding the purchase of V6331, in action against Mr. Antoine Collie in C S No. 215 of 1999, they had alleged and deponed under oath, that they had not purchased title V6331 by reason of a breach of contract by the defendant. That action was dismissed with costs.
10. Defendant no.2 specifically denied that there was any error, mistake or omission in respect of V6331 as alleged by the plaintiff. She denied the allegations of 'a sham and a fraud' with regard to her registration as owner of V6331 and contended that this allegation is vague and does not disclose the necessary material facts, required by law to sustain the action. She contends that she is the owner of V6331 and her title cannot be challenged by the plaintiffs.

11. The plaintiff testified in support of his case. He stated that on the 15 June 1990 he and his deceased concubine purchased 2 plots of land V6431 and V6331 for SR 90,000.00 and SR60,000.00 respectively from Mr. Antoine Collie. Defendant no.1 was the Notary Public who executed the transfer document, exhibited and marked as P4 for V6431. To the plaintiff's surprise in 1996 he received a letter from Jack Hodoul, an attorney at law, written on behalf of defendant no 2, informing him that the land V 6331 did not belong to him. Subsequently he came to understand that title V6331 was registered in the names of defendant no.2 on 11 June 1999.
12. In cross examination by counsel for the defendant no.1 the plaintiff stated that there was a big mistake in not transferring title V6331 to him. In cross examination by counsel for defendant no.2 he stated that he filed an action against Mr. Antoine Collie to recover title V6331 in the Supreme Court. He lost before the Supreme Court and appealed to the Court of Appeal. There was a road constructed V6331 leading to defendant no.2's house on the adjoining plot of land.
13. Defendant no.1 called 1 witness in addition to his own testimony. DW1 was Mr. Barry Cesar currently an Accountant with the Ministry of Education. At the material time he was working with SHDC. He testified that the plaintiff and his wife Lorta Gayon took a loan to purchase a property. The procedure was for the application for the loan to start at the district and then it would be considered by SHDC. They would consider the document relating to the value of the property and the loan would be based on the household income of the applicants.
14. In the instant case the plaintiff and his wife were given a loan of SR90,000.00. They brought the transfer document for the property in question and a charge was placed on it by SHDC.
15. Defendant No1 stated that he is an attorney at law and a notary public of some 20 years standing. He knew the plaintiff who was a security guard at the Central Bank, opposite his office. He recalls that the plaintiff came to his office with instructions to do a transfer of land which he did in exhibit P4. It was for transfer of land from Antoine Collie to the plaintiff and Lorna Gayon. He explained the contents of exhibit P4 to the plaintiff and

Lorna Gayon. They signed the same with no complaints. Exhibit P4 was drawn up according to the instructions he received from the parties. There was no mistake in the said document.

16. In cross examination the defendant no.1 stated that the transfer deed he drew was for one parcel of land and there was no mistake in it.
17. Defendant No.2 testified and called one other witness in support of her case. She stated that she is the owner of V 7895 as well as V 6331. V6331 was previously owned by her Uncle Antoine Collie. She needed V6331 to be able to build a road on it to her house. Her house stands on V 7895. She signed the transfer document in Hull while Antonie Collie signed in Australia. She paid a thousand pounds for it. She denied that the document was forged.
18. Mr. Aman Chang Seng was the last witness for defendant no. 2. He stated he is a neighbour to the plaintiff and defendant no.2. He was asked by defendant no.2 to construct a road on V 6331 to her house. He drew up plan for the road and obtained planning permission and approval. He built the road and completed it. He was not cross examined.
19. Mr. Frank Elizabeth, learned counsel for the plaintiff, submitted that there is evidence to show that the plaintiff paid Mr. Collie SR 60,000.00 for V6331 but either by mistake or fraudulent design that parcel of land was not transferred to him. This sale was complete in terms of Article 1583 of the Civil Code. After a sale is concluded the same property cannot be sold to another person. Under Section 89(1) of the Land Registration Act this court can order for rectification of the register and order the rightful owner of V6331 to be registered as the proprietor of the said parcel of land.
20. Ms Lucie Pool, learned counsel for the defendant no.1, submitted that the plaintiff had failed to establish his case. The evidence on record shows that he purchased one plot of land, V6431 which was transferred to him. The oral claims to V6331, unsupported by any written evidence, were inadmissible, in light of the provisions of Article 1341 of the Civil Code. It is inconceivable that the plaintiff, a former member of the British army, who knew how to read and write, would not have

read and understood exhibit P4 which he signed.

21. Mr. Frank Ally, learned counsel for the defendant no.2, submitted that this case was *res judicata*. The plaintiff in a previous suit had filed an action in contract against Mr. Antoine Collie, to recover the said parcel of land or in the alternative the price he claimed to have paid for it. This action was dismissed by the Supreme Court on its merits after a full trial. There was an appeal to the Court of Appeal that was also dismissed. He failed to maintain a title against Mr. Collie. This action is therefore *res judicata*.
22. Mr. Frank Ally submitted that Article 1583 of the Civil Code should not be looked at in isolation. It should be read together with Article 1589 which provides that for an agreement of sale to bind third parties this is so only from the date of registration. He attacked the credibility of the plaintiff. Given that he appeared to be a reasonable person it is inconceivable that he would not have realised that the deed he signed was for one parcel of land and not two parcels.
23. With regard to the claim that the transfer of the land in question to defendant no.2 was 'a sham and fraud' Mr. Frank Ally submitted that no evidence had been adduced to show that the transfer was fraudulent.
24. It is the duty of the plaintiff to prove his case and the standard in civil cases is on a balance of probabilities if he is to succeed. However where fraud is alleged a higher degree of probability is required but not so much as is necessary in a criminal case. See Gaetan Renaud v Richard Ernestine and Anor [1979] S C R 121.
25. The plaintiff's testimony with regard to the alleged purchase of V6331 runs afoul of Article 1341 of the Civil Code. Such testimony, as was submitted by Ms Lucie Pool was inadmissible. Mr. Frank Elizabeth submitted that it fell under one of the exceptions under Article 1371 as there was some evidence in writing of the same, and he referred to the 2 cheques for SR 30,000.00.
26. Article 1347 of the Civil Code states,

'The aforementioned rules shall not apply if there is a writing providing initial proof.'

The term describes every writing which emanates from a person against whom the claim is made, or from a person he represents, and which renders the facts alleged likely.’

27. The writing that would qualify to provide an exception must be from the person against whom the claim is now made or from a person he represented. Secondly that writing must point to the likelihood of affirming the facts in question as likely to be true. Exhibit P1 and P2 are not from any of the defendants in this case or from Mr. Collie.
28. There is nothing on the face of those documents to link them with the alleged sale of V6331. On the contrary those payments are consistent with the case that they were part payment of SR 150,000.00 for V6431. In my view there is no exception that would save, and make admissible the plaintiff’s oral testimony about the alleged sale of V6331. Even if such testimony is on record, the court cannot have regard to it, as it cannot be relied upon at law. There is simply no evidence before the court which supports the plaintiff’s case.
29. However, even if regard was to be had to that testimony, which I have found to be clearly inadmissible, that evidence is not credible. The plaintiff’s case is contradicted by exhibit P4 which was introduced in evidence by the plaintiff himself. Exhibit P4 is a record of the transaction between the parties in this case. It is clear that the price for the V6431 is SR150,000.00 and not SR90,000.00 as orally claimed by the plaintiff. Other than his word to the contrary there is simply no iota of evidence to suggest that the plaintiff purchased parcel V6331.
30. A reasonable man, and I assume that the plaintiff is a reasonable man, embarking on the purchase of a property or properties as he has claimed he bought, ought to surely look at the piece of paper that he is signing. The plaintiff is clearly literate. I find no convincing explanation as to how he could have appended his signature to a document which was contrary to his express instructions to the Notary Public.
31. In addition to the exhibit P4 there is the testimony of the defendant no.1 who witnessed the transaction between the Mr. Collie and the plaintiff and his concubine. He has testified that his instructions were to draw a transfer for one parcel of land and the cost was SR150,000.00. This testimony is consistent with Exhibit P4.

32. On a review of the evidence adduced in this case I am satisfied that the plaintiff was not truthful in his testimony. The plaintiff and his concubine bought from Mr. Collie only parcel V6431 for which they paid SR150,000.00. There was no mistake at all in exhibit P4. Had there been a mistake one of the parties would have seen the same before or during the signing of the same. The claim that the plaintiffs purchased from Mr. Collie V6331 is a figment in the plaintiffs' imagination.
33. Having found that the plaintiff did not buy parcel V6331 from Mr. Collie or any other person, it is clear that the plaintiff has no right or cause of action whatsoever to pursue against the defendants but more so particularly defendant no.2. Having no colour of right over V6331 he cannot pursue any action against anyone asserting a non-existent right in contract. It would appear, given the fact that no relief was claimed against defendant no.1, that no cause of action was made out against defendant no.1 on the pleadings. To establish a cause of action a party would have to show 3 elements on his or her pleadings. Firstly that the plaintiff enjoyed a right. Secondly that such a right was violated by the defendant. Thirdly that the plaintiff is entitled to relief against the defendant for violation of the right in question.
34. Notwithstanding the foregoing, I agree with Mr. Frank Ally that there is no evidence to establish any fraud on the part of the defendant no.2. The testimony of the plaintiff, the only evidence called in this case for the plaintiff, has no scintilla of evidence to bear out the claim that the transfer of parcel V6331 to the defendant no.2 was ' a sham and a fraud.' In his testimony the plaintiff, with prompting from his attorney, seemed to suggest that because the transfer deed for the transfer to defendant no.2 was signed by the parties in England and Australia, fraud must be presumed. Fraud cannot be presumed. It must be proved. In this case fraud has not been proved.
35. In any case it is not contested that the plaintiff did bring an action against Mr. Collie for recovery of parcel V6331 or the alleged purchase price. This was Civil Side No. 215 of 1999. It was heard on its merits. The Supreme Court found as a fact that the plaintiff and his concubine had not purchased parcel V6331. The Supreme Court found as a fact that the plaintiff had purchased only parcel V6431

at the price of SR 150,000.00. The plaintiff was not satisfied with that decision. He appealed to the Court of Appeal. The Court of Appeal heard his appeal and dismissed the same, affirming the decision of the Supreme Court.

36. For *res judicata* to apply there must be three fold identity of subject matter, cause and parties in the first and the subsequent case. This was ably explained by Sir Georges Souyave, CJ, in Hoareau v Hemrick [1973] SLR 272 at 273.

‘For the plea of *res judicata* to be applicable, there must be between the first case and the second case the threefold identity of “objet”, “cause” and “personnes”.

The “objet” is what is claimed. “La cause” is the fact, or the act, whence the right springs. It might be shortly described as the right which has been violated.’

37. In this case defendant no.2 derives her right to V6331 as a successor in title to Mr. Collie who was the defendant in the first case. That, in my view, establishes the identity of the parties. The subject matter in the previous case and in this case is parcel V6331. This is the ‘objet’, in so far as it what is claimed in this suit and in the previous suit.. The relief sought in the previous case was for the plaintiff to recover parcel V6331 and be registered by way of rectification of title as the owner of thereof. This is the same relief sought in the current case against the registered proprietor, defendant no.2, the successor in title to the registered proprietor, Mr. Collie in the previous case. ‘La cause’, or ‘from whence the right springs’ in both cases is the alleged sale of V6331 by Mr. A Collie to the plaintiff and his concubine.

38. The defendant no.1 was only a notary public, a witness to the transaction between the parties. The transaction now in question was the transaction in question in the first suit. Even though admittedly the defendant no.1 was not a party to the first suit this second action is simply a ruse to have a second bite at the cherry after a final decision had been made by the courts ruling that the plaintiff had not purchased parcel v6331. There is no relief claimed against defendant no.1 in this case. The relief claimed here is the relief claimed in the first case, and it is against the successors in title, to Mr. Collie, who was the defendant, in the first case. I would therefore hold that this suit is *res judicata* against both defendants.

39. For the reasons I give above I hold that the plaintiff’s suit has no merit. It is dismissed. The plaintiff shall pay the defendants’ costs incurred in defending this action.

Signed, dated and delivered at Victoria this 22nd day of January 2010

FMS Egonda-Ntende
Chief Justice