

REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES HOLDEN AT VICTORIA

Civil Side No 07 of 2008

Winsley Coopoosamy
Petitioner

versus

Claire Lise Serret
Respondent No. 1
Giselle Poppeneau
Respondent No. 2

Mr. Rajasunduran for the Petitioner

Mr. William Hermine for the Respondents

JUDGMENT

Egonda-Ntende, CJ

1. This is a petition for sub division of property. The petitioner and the respondents are siblings with the same mother and father. It is the contention of the petitioner that the parties hereto are the sole legal heirs to the estate of the late Emmanuel Coopoosamy and in particular to the property comprised in V 9167 at St Louis Mahe, Seychelles. The property has a three bedroomed house and a small retail shop thereon.
2. After the death of Emmanuel Coopoosamy Mrs Solange Coopoosamy, the deceased's wife, was appointed executor for the said estate. She also died. The residential house is occupied or enjoyed by the respondents and the small retail shop is in possession of the petitioner. The petitioner petitions this court for an

order of sub division of the said property V 9167 into three equal parts for each of the parties hereto to which each one of them is entitled to. Secondly the petitioner prays that a land surveyor be appointed to carry out the sub division. And thirdly the petitioner prays that the Registrar of Lands be directed to register such sub division and the new owners thereof.

3. The respondents resist this petition and contend that the petitioner has no interest at all in the land in question though he owns a small shop thereon. The respondents contend that they alone are the sole owners of V 9167 by virtue of having obtained the same through a will dated 21 September 2006 and registered on the 25 April 2008 in Register A.54 No 189 and transcribed in Volume 84 of No 237 at the Land Registry. The respondents prayed that this petition be dismissed with costs.
4. The Petitioner testified in support of his case. He stated that his father was Emmanuel Coopoosamy and the mother was Solange Coopoosamy. The father died on 18 July 1983. He left behind property known as V 9167. His mother was the executor of his father's estate. The respondents are his sisters. Mrs Coopoosamy sold V 9166, formerly belonging to the Emmanuel Coopoosamy , to the petitioner and Ms P Leon, his concubine for SR 20,000.00. The respondents consented to the said sale in writing on the deed of transfer. Subsequently she died too on 13 August 2007.
5. Parcel V 9167 is developed with a 3 bed roomed house now occupied by the respondents. The house was built by their father. There is also a small shop owned by the petitioner. He is now seeking a share in V 9167 which he proposes should be sub divided in such a manner that he obtains on third share of the the land and the house built by his father. He would wish to retain in proportion the land upon which his small shop is standing. He prays that this court should appoint a

surveyor to carry out the subdivision.

6. With regard to the respondents' defence that they own V 9167 by virtue of a will of their mother, the petitioner stated that this land did not belong to the mother. She was only an executor of the estate of the owner. She had no power to dispose of the said property by will. Secondly he testified that he was not sure if the signature on the will was the signature of his mother, as on the date it is alleged she signed, she was very sick and in Victoria hospital.
7. In cross examination he stated that V 9166 belongs to J Leon and himself. They purchased this land from his mother. It was her share and she acted on her own behalf and as executor of the estate of the late Emmanuel Coopoosamy. As Mrs Solange sold her share of the estate (V 9166), she did not have any personal interest in the remaining land and could not transfer the same to her daughters as her land. It was not her land. It belonged to the estate of the late Emmanuel Coopoosamy.
8. Defence witness one was the respondent no.1, Ms Claire Lise Serret. The respondent no.2 was her sister and the petitioner her brother. She stated that V 9167 belonged to the heirs. Their mother died and she left the property by will to the respondents. The petitioner has already received his share of the estate in the form of V 9166. The will of their mother has been registered. She opposes the petitioner's application to partition V 9167 as the petitioner has no share in it. He had already received his share. The will was tendered in evidence.
9. In his final addresses to the court Mr. William Hermine, learned counsel for the respondents submitted that there was only issue to be decided in this case upon which this case turned. And that is whether parcel V 9167 had been properly transferred through a will to the respondents. He submitted that the will was

drawn up by a competent Notary whose competency has not been challenged. Neither has the will been challenged. It has been registered as it is required by law to be.

10. Mr. S Rajasunduran, learned counsel for the petitioner, submitted that on the evidence adduced before this court, the mother of the parties, Mrs Solange Coopoosamy, was only an executor in respect of parcel V 9167, and not an owner, in her personal right. The property belonged to the heirs of the late Emmanuel Coopoosamy. She had no right to dispose of this property by will as if it was hers, which it was not.
11. Secondly he submitted that the registration of the will of the parties' mother which was done in April 2008 was done, not in accordance with the Land Registration Act, hereinafter referred to as the Act, but merely for purposes of paying Stamp Duty under the Stamps Duty Act, in order that it may be admissible in evidence. This was done only in April 2008, in spite of the mother having died in 2007, only because the petitioner had filed this case. There was no registration under the Act transferring ownership. Indeed in the records of the land registry the property was still registered in the names of Solange Coopoosamy as an executor of the estate of late Emmanuel Coopoosamy. The respondents are not the registered owners of the property.
12. Mr Rajasunduran further submitted that no executor had been appointed to the estate of the late Solange Coopoosamy. There was no confirmation of such executor by a court of law, as ought to have been the case. He prayed that this court should declare that the petitioner is entitled to one third share in Parcel V 9167 and that a surveyor be appointed to delineate the petitioner's interest in the said parcel and a subdivision be ordered.

13. In spite of the heat that surrounded the trial of this case the essential facts in issue upon which this case shall turn are simple and clear. The late Emmanuel Coopoosamy, the father of the parties hereto, had apparently 2 parcels of land, V 9166 and V 9167. He died intestate. The wife, Solange Coopoosamy, was appointed an executor to the said estate. In her lifetime Solange sold V 9166 to the petitioner and his common law partner for SR 20,000. The said property had an outstanding mortgage of SR 147,000.00. I take it that this was assumed by the new owners. The respondents consented in writing to the said sale and transfer.
14. Parcel V 9167 was purportedly disposed of by will by Solange Coopoosamy to the respondents. It is clear that V 9167 was not owned by the Solange in her own right and in law could not be disposed of as such. Article 895 of the Civil Code of Seychelles, hereinafter referred to as the CCS, states,

'A will is an act whereby a testator **makes a disposition of the whole or part of his property** to take effect upon his death, with power to revoke.'

15. Article 913 of CCS restricts the right of disposal under a will to only one fourth of the property of the testator where the testator has three or more children, with the rest of the property reserved for the off spring. Even if one assumed that Solange Coopoosamy had a right to dispose of the property in question that would be limited to only one fourth of that property given that she had three children. Such a will as that presented in this case would in those circumstances be a nullity in so far as it purportedly disposed of more than the disposable portion.
16. This parcel continued and continues to be part and parcel of the unalienated estate of the late Emmanuel Coopoosamy. In fact it has been shown in evidence that the respondents are not the registered owners of the land in question. It is still in the names of Solange Coopoosamy as executor of the estate of Emmanuel

Cooposamy.

17. Nevertheless even if it could be assumed that the respondents were registered as the owners of the property in accordance with the Land Registration Act, that act of registration in itself would not have conferred on the respondents unimpeachable title. The respondents would not be 'home and dry'. The fact of registration is not dispositive of the issue here. Section of 72 of the Land Registration Act is relevant. It states,

'(1) When a proprietor dies the persons who under the will or the law relating to succession on intestacy, as the case may be, are entitled to any land, lease or charge registered in the name of the deceased proprietor shall, upon production and filing of an affidavit by them in the prescribed form, be registered as the proprietors of the land, lease or charge for the interests and in the shares shown in the affidavit.

(2) The person or persons registered under this section shall hold the land, lease or charge subject to any liabilities, rights or interests which are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same but for the purpose of any dealing shall be deemed to have been registered as proprietor or proprietors thereof with all rights conferred by this Act, on a proprietor who has acquired land, a lease, or a charge, as the case may be, for valuable consideration.' (Emphasis is mine.)

18. The respondents have not shown that they complied with Section 72(1) of the Act. In fact the respondents are not the registered proprietors of the land in dispute. The land is still registered in the names of Mrs Solange Cooposamy as executor of the estate of the their late father Emmanuel Cooposamy. The duties of an executor are clearly set out in article 1027 of the CCS which states,

'The duties of an executor shall be to make an inventory of the succession, to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will, as the case may be.'

19. The distribution of the remainder cannot be effected by will as if the executor is the owner thereof. It is evident that Mrs Solange Cooposamy did not distribute the remainder as she was obliged to do under the law. Contrary to the applicable law she treated the property in question as her own and attempted to dispose it of by way of will. Such disposal cannot be good at law.

20. Even if the respondents had been registered as the new owners thereof that registration would, under Section 72(2) of the Act, be subject to any existing interests which in my view would include the kind of claim as brought by the petitioner in this case.
21. Of course Mrs Solange Coopoosamy was entitled to a share in her husband's estate which she appears to have obtained and sold off. This is V 9166. The remainder of the estate of Emmanuel Coopoosamy, (assuming that V 9166 was 50% of the estate of Emmanuel Coopoosamy) would then be liable to be inherited by the other heirs, who are the parties hereto. It is apparently on that assumption that this action has been brought.
22. I find that on the evidence before this court the petitioner has established his right to a share in V 9167 as this parcel is part of the estate of the late Emmanuel Coopoosamy, the father of all the parties hereto, just as the respondents are individually entitled to an equal share of the same, being all heirs in the same degree. Accordingly this action succeeds and the declaration sought is granted accordingly. It follows too that the petitioner is entitled to a subdivision of the property and his share alienated to him, including registration of the same in accordance with the law.
23. I offer the parties hereto an opportunity to agree upon one valuer who shall value parcel V 9167, report on whether the property in question can be conveniently divided in kind or not, and propose the mode of division of the said property into three equal shares taking account the value of the three bed roomed house occupied by the respondents but excluding the little shop that belongs to the petitioner. Upon such a report being filed in this court, I shall hear the parties on the report and make further orders with regard to the sub division of the parcel

V9167 as well as on the issue of costs of these proceedings. I so order.

24. Before I take leave of this case I note with regret the failure of learned counsel to avail to the court the applicable law or make any mention of it in their final addresses. Counsel are retained on the assumption that they will be diligent in their representation of their clients bringing to the attention of the court the applicable law and any authorities on the points in issue whether in support or against their client's case.

Signed, dated and delivered at Victoria this 24 day of September 2010

FMS Egonda-Ntende

Chief Justice