

# OCEANICA (PROPRIETARY) LTD v LAND REGISTRAR

(2011) SLR 134

F Ally for the applicant  
A Madeline for the respondent

## **Ruling delivered on 16 May 2011 by**

**EGONDA-NTENDE CJ:** The applicant is seeking a writ of mandamus to compel the respondent to register a transfer of land in favour of the applicant from Cable and Wireless (Seychelles) Ltd which was presented on 26 May 2009 over title H 110. Initially the respondent refused to register the transfer on the ground that Sunset Beach Hotel had applied for a restriction in dealing with the land in question on 18 May 2009. The respondent notified Cable and Wireless (Seychelles) Ltd of the application for a restriction order in a letter dated 8 June 2009, requiring it to respond.

Cable and Wireless (Seychelles) Ltd responded with their letter of 16 June 2009 and indicated that they wished to oppose the application for restriction. They requested for a copy of the application to enable them respond. It is not clear from the record availed to this Court whether this request was complied with or not. There is an affidavit sworn by Mr Hammond for Cable and Wireless (Seychelles) Ltd dated 7 July 2010. Subsequent to that on the record there are handwritten notes in English that show there was a hearing where both parties were represented and a 'ruling' drafted. The hearing was before Mr Brassel Adeline, Deputy Land Registrar. The notes are not dated. Neither is the 'draft ruling'. Nor is the 'draft ruling' signed by anyone.

The purported ruling is short. I shall set it out in fully;

On account of the fact that there is already a plaint filed before the Supreme Court over the matter in contention in respect of this application for the imposition of a restriction against title H 110 the Assistant Land Registrar rules that there be no dealings with title H 110 until the court determines the issues in contention between the parties.

On 22 July 2009 acting for the applicant, Mr Frank Ally wrote to the Land Registrar requiring him, inter alia to register the transfer in question. He received a response vide a letter dated 30 July 2009, signed by Mr Brassel Adeline, Deputy Registrar, which states;

RE: Transfer of Title H 110

I am in receipt of your letter dated the 22<sup>nd</sup> of July 2009, pertaining to a deed of transfer of the title specified above, between Cable and Wireless (Seychelles) Limited and Oceanica (Pty) Limited.

I advise, that the question of whether or not a restriction application is unfounded and devoid of any merit is a question of fact, and that it is only

when the facts are known that the Registrar would be in a position to make such a finding.

To this end, I further advise that the restriction application made by Sunset Beach Hotel is still being processed in accordance with the procedures set by law, and that the Land Registrar is handling the case in good faith, and within the provisions of the Land Registration Act.

You will however be notified of the outcome of the application in a not too distant future.

It is not clear whether at the time of writing this letter the proceedings referred to above and purported ruling had occurred or not, given the absence of a date on those proceedings. Ms Alexandra Madeleine, counsel for the respondent stated from the bar that the proceedings before the Registrar took place on 9 July 2009. In any case the letter of 22 July 2009 from the Deputy Registrar of Lands seems to be the last communication from the Land Registry on the above subject. The further notification of the outcome of the application for a restriction that was promised did not occur.

Ms Alexandra Madeleine, counsel for the respondent, objected to this application with a plea *in limine litis*. I dismissed those objections at the hearing and now will proceed to give my reasons for doing so.

Firstly she submitted that this petition is time barred in light of rule 4 of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995, which states;

A petition under rule 2 shall be made promptly and in any event within 3 months from the date of the order or decision sought to be canvassed in the petition unless the Supreme Court considers that there is a good reason for extending the period within the petition shall be made.

She submitted that the refusal to register the transfer was clear as at 30 July 2009, given the letter the Deputy Registrar wrote to the petitioner's counsel. Presumably time started to run from this point and by the time this petition was filed on 9 July 2010 a year had elapsed. This petition was therefore out of time.

Secondly Ms Madeleine submitted that *ex facie* there is no arguable case for the exercise of supervisory jurisdiction. An order of mandamus would be available only instances where a public body has abused its power and it may then be compelled to exercise the power according to law. She referred to the case of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. The Registrar had not abused his powers. In accordance with the law he decided to deal with a restriction application first, and had thus not abused his powers. This petition was in the circumstances unwarranted.

Thirdly that the petitioner had failed and neglected to exhaust adequate alternative remedies. She submitted that the ordinary rule as established in *R v Rent Board* (1973) SLR 353 that an order of mandamus would not be granted if there was an alternative remedy which is not less convenient, beneficial and effective. Under

section 96(2)(a) of the Land Registration Act there is a specific right of appeal for any person aggrieved by a decision of the Land Registrar. This right of appeal had to be exercised within 30 days from the time decision was made. The petitioner had an alternative remedy which was not less convenient, beneficial and effective than judicial review.

The letter of 30 July 2009 by the Deputy Registrar of Lands cannot, as Ms Madeleine would have it, be the date of the 'order or decision' being canvassed in these proceedings. It is neither a decision nor an order. It promises that a decision will be forthcoming in the not too distant future;

To this end, I further advise that the restriction application made by Sunset Beach Hotel is still being processed in accordance with the procedures set by law, and that the Land Registrar is handling the case in good faith, and within the provisions of the Land Registration Act.

You will however be notified of the outcome of the application in a not too distant future.

Time cannot start to run as in fact no decision has ever been made and or communicated. What the Registrar has done is keep quiet, taking no action either on the request for transfer or on the application for restriction. There is just no merit whatsoever in the plea *in limine litis* that this petition is out of time. As regards the other two points those cannot be raised as pleas *in limine*, given that leave was granted for this application to proceed. These points can only be canvassed on the merits of the main application. Whether an order for mandamus is appropriate in the facts of this case and whether there are other alternative remedies which are not less convenient, beneficial and effective are matters to be considered on the merits of the main application and not as a plea *in limine litis*. They go to the merits rather than a preliminary issue that would dispose at this stage the petition. For those reasons I dismissed the pleas *in limine litis* raised by the respondent.

I now turn to the merits of the application. Before the Registrar were two matters in respect of title H 110 which he had to deal with. There was an application for restriction filed on 18 May 2009. Secondly there was a transfer lodged on 26 May 2009. Presumably (as stated by counsel from the bar) this application for restriction was heard on 9 July 2009. No ruling has been ever made and or delivered by the Registrar. In the meantime by a letter to the petitioner herein dated 30 July 2009, who had earlier on complained about the delay in transfer of the land in question to the purchaser (vide its letter dated 22 July 2009), the Registrar had communicated to the petitioner that a decision has never been made or never communicated.

There has been no attempt whatsoever to justify the conduct of the respondent in so far he/she failed to make a decision on the application for restriction. The approach of the respondent has been that it had made a decision by letter of 30 July to refuse to register the transfer of ownership on the deed presented on 26 May 2009. I have already found that the letter makes no such decision. It promises to make a decision in the not too distant future which has never been made, almost two years (less three months) later!

I must be very clear about the conduct of Registrar in this matter. It is inexcusable that he/she chosen not to, as the law requiers he/she to do, determine the application for restriction in a timely manner. It amounts to an abuse of his power under the Act.

The Registrar should note that under section 84 of the Act that allow him to impose restrictions also sets the ground upon which such action shall be imposed. It must be on account of prevention of 'fraud, improper dealing or other sufficient cause'. The existance of a suit in itself, of which the subject matter is land or title to land, the subject matter of a restriction hearing, is no ground for imposing a restriction. Where there is a court case the Registrar must be in mindful of the fact that the court itself has the power under section 76(1) of the Act to impose an inhibition in dealing with respect of the land and Registrar would have to comply with that order.

I have persued the application for a restriction filled in this matter and note that it does not allege as a ground for imposing restriction prevention of fraud. Neither do the facts show improper dealing in land. It contends that there is promise of sale from the registered proprietor of title H 110 to itself. And that they intend to proceed to the Supreme Court for specific performance. The Supreme Court has extensive powers including annulment of title on final adjudication or inhibition as an interlocutory relief. It is not for the Registrar of Land to anticipate a decision of the Supreme Court and delay the exercise of his own powers. I find nothing in the application for restriction that would have warranted the issue of a restriction in this matter.

The Registrar is authorised under section 6(c) of the Act to;

Refuse to proceed with any registration if any instrument or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed.

It has not been alleged that the petitioner has ran foul of this provision. The Registrar has failed to register the transfer presented without invoking the power granted in the said section.

Ms Madeleine submitted that I should look at the whole Act rather than this section only to find that the Registrar had powers to decline to register the transfer. I agree to the extent that I must look at the whole Act and interpret every part of the Act in the context of the whole Act in order to give effect to the true legislative intent of the Act. It is clear that the Registrar did not invoke the powers he had under section 6 of the Act; neither did he make any finding that a restriction was necessary to prevent fraud or improper dealing or other sufficient cause. In fact the Registrar did not impose a restriction under section 84 as he could have done.

In absence of exercising powers under either sections 6 or 84 of the Act, it has not been pointed out by the respondent which provisions of the Act have allowed or empowered him/her not to register the transfer presented. It seems safe to conclude that the Registrar has acted outside the Act to refuse to register the transfer presented to him almost 2 years from now on 26 May 2009. The Registrar was under a duty to act within the Act as provided by law. The Registrar did not act in

accordance with any provision of the Act when he refused or failed to register the transfer of title H 110. Given this egregious delay and refusal in doing his duty, I am satisfied that the Registrar has grossly abused his authority.

I now turn to the question of relief. Ms Madeleine submitted that mandamus should not be issued as it is a discretionary remedy and the petitioner had another remedy which he could have exercised. The petitioner could have appealed under section 96 of the Act. An appeal would not have been less convenient, beneficial or effective than an order for mandamus.

Mr Frank Ally, counsel for the petitioner submitted that Ms Madeleine was stating the position at English law, with regard to prerogative writs, applied prior to the promulgation of the 1993 Constitution. Since the promulgation of the new Constitution and the provision of a constitutional basis for the supervisory jurisdiction of the Supreme Court no such pre-conditions were set by article 125 of the Constitution or any rules made thereunder.

Prerogative writs under English law were creatures of the common law. It cannot be assumed, as Mr Frank Ally pointed out, that supervisory jurisdiction granted to the Supreme Court under article 125 of the Constitution imported with it the pre-conditions applicable in England to application for prerogative writs that were essential under common law. It is the Constitution and the rules made thereunder that are applicable in this jurisdiction. The Supreme Court (Supervisory Jurisdiction over Subordinate Court, Tribunals and Adjudicating Authorities) Rules, SI No 40 of 1995 sets out the practice and procedure for the exercise of supervisory jurisdiction. It does not provide that mandamus would not be available if there was an alternative remedy.

One should be careful to avoid importing into the new jurisdiction mandated by the Constitution rules that have not been given legislative force. A constitutional remedy should not be limited by application of common law rules developed in a country where parliamentary sovereignty is the rule rather than supremacy of the Constitution as is the case here.

It appears to me however that even if one imported those rules as applied in Seychelles prior to the enactment of our Constitution as Ms Madeleine would have this Court do, it may not make a difference in the final result of this case.

In *R v Marine Board Ex parte Voss* (1950) SLR 201 the Supreme Court held that in order for a mandamus to issue, respondents must have had a duty, not a discretion to act; that such duty sought to be enforced could not be enforced by any other legal remedy equally convenient, beneficial and appropriate; that there must be a distinct demand that such duty be carried out; that duty must be a public or quasi-public duty not of uncertain nature and that an order would be effectual.

Of the foregoing Ms Madeleine basically raised only the question of an alternative remedy of appeal. However it is only possible for an appeal to lie where the decision maker has made a decision, published it, and announced reasons for that decision made. In the case before me the Registrar refused to make a decision on either the restriction or the transfer but promised to make one in his letter of 30 July 2009. The

Registrar did not announce any decision. There was nothing against which to file an appeal. I see no other remedy that is equally convenient, beneficial and appropriate as the one now sought.

The Registrar was a public servant doing a public statutory duty. The Registrar was obliged to register the transfer unless there was some impediment in law against doing so. If there was any impediment, it goes without saying that the Registrar was under a duty to communicate his decision and the reasons therefor, as mandated by the law, to the transferor and transferee.

The petitioner in his letter dated 22 July 2009 made a demand that the Registrar complies with his duty and register the transfer of title H 110. This fulfils the requirement that there must be demand that the public duty be carried out. I am satisfied that an order for a mandamus is an effectual remedy in this case to compel the Registrar carry out his/her public duty.

I issue the writ of mandamus directing the Registrar to register the transfer of title H110 that was presented to him on or about the 26 May 2009 within 7 days from today unless there is some lawful reason not to do so.

The petitioner has claimed US\$90,000 being damages on account of the failure to register the transfer. In the supporting affidavit, this claim was couched in the following words;

That as a result of the respondent's failure to register the transfer document the petitioner's development of title H110 is on hold and the petitioner is suffering loss and damage, which it estimates in the sum of US\$7,500 per month representing interest at the rate of 20% per annum on the purchase price and continuing.

The foregoing is the only evidence in relation to the claim for damages. It is not sufficient in my view to establish a claim for damages as claimed. There is no evidence of a loan having been taken and at the rate of interest claimed. And even if it were so I am not sure that interest that the petitioner may have agreed to in any case with someone else should necessarily constitute the damage suffered on account of the respondent's failure in his duty in this particular case, without more. I accordingly decline to award this claim of damages.

I order the respondent to pay the petitioner's costs.