

IN THE SUPREME COURT OF SEYCHELLES

Alise Weyman

Electing her legal domicile in the Chambers of
Frank Ally of Suit 213, Premier Building

Victoria
Plaintiff

Vs

Glanluca Valentino
of Cote d' Or. Praslin
Defendant

Civil Side No: 449 of

2006

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Mr. F. Ally for the plaintiff

Mr. P. Pardiwalla for the defendant

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D. Karunakaran, J.

JUDGMENT

The plaintiff in this action seeks the Court for a declaration that the purported transfer/sale of an immovable property - Title PR3299 - by the owners to the defendant is a nullity and of no effect. The plaintiff also seeks

an order directing the Land Registrar not to register the said transfer in the Land Register.

On the other side, the defendant not only denies the plaintiff's claim but also makes a counterclaim in this action. He prays the Court for a declaration that the purported transfer of the usufructuary interest in the said Title made by the owners in favour of the plaintiff is a nullity and of no effect. Consequently, he seeks the court for an order directing the Land Registrar to register him as the absolute owner/proprietor of the Title PR3299.

The facts of the case as transpire from evidence on record are as follows:-

At all material times, one George Marcel Aimable and his wife Marie-Claire Aimable, both Seychellois Nationals - hereinafter jointly referred to as "the couple" were co-owners of a parcel of land comprised in title PR3299 hereinafter called the "suit-property", situated at Praslin. They purchased the suit-property from the Government of Seychelles on 21 June 2001, on a condition-subsequent that they should not sell it to any third party for five years from the date of purchase, without making the first offer of sale to the Government of Seychelles. In pursuance of the said condition-subsequent, the Land Registrar accordingly, entered a restriction against the suit-property preventing the registration of any dealing at the Land Registry in respect of the suit-property for a period of five years from the said date of purchase.

On 4 February 2003, before the expiry of the said restriction-period, the couple acting as joint Fiduciaries signed a promise of sale to sell the suit-property for the price of Rs 220,000/-to the defendant, who was then a non-Seychellois but awaiting the citizenship certificate. The couple also acknowledged receipt of the price in full from the defendant on the same date-vide exhibit D1, the Ruling of the Land Registrar dated 8 June 2006. It is also not in dispute that the Couple by a Notarial deed dated 4 February 2003,

purportedly sold the suit-property for a valuable consideration to the defendant. The purported sale is evident from the unregistered transfer deed dated 4 February 2003 - hereinafter called the “deed in dispute” - vide exhibit P4 - duly signed by the Couple as “transferors” and the defendant as “transferee”, which was executed before the Notary, Mr. Gerald Maurel. The evidence given by Mr. Maurel in this respect runs thus (in verbatim):

“All three of them (the Couple and the defendant) came together to my chambers. They asked me to draw up document, a transfer deed. There was an agreement between them. Therefore, I drew up the document. They knew Mr. Valentino (the defendant) was not a Seychellois but he had (that time) applied for (Seychellois) citizenship and he said that anytime he would be granted citizenship. ...They agreed that Mr. Valentino (would) wait for his citizenship... the parties were aware of the fact that the defendant was a non-Seychellois and that there was a restriction of five years...”

Be that as it may. Almost a year later, on 9th March 2004 the defendant acquired Seychellois Citizenship vide Exhibit P6. He became eligible to purchase immovable property in Seychelles without Government’s sanction. However, the defendant could not register the said “deed in dispute” at the Land Registry. He had to wait for the completion of the five-year-restriction period. In the mean time, on 16th of November 2004, before the expiry of the said restriction period, the Couple did something to prevent the defendant from registering the “deed in dispute” at the Land Registry. In fact, the couple authorized in writing or presumably colluded with or to say the least encouraged a third party - one Alise Weyman, a non-resident Seychellois- who is none else than the plaintiff in the instant action, to apply under Section 84 of the Land Registration Act, for a restriction to be entered in the Land Register against the suit-property. This application was obviously, intended to prohibit the

registration of all or any dealings with the suit-property by anyone without the plaintiff's consent, who in fact, did not have any lawful interest in the suit-property on the material date. However, when this application for restriction was pending before the Land Registrar for orders, the Couple again, without the defendant's knowledge, executed another document on 18 November 2004 granting the usufructuary interest in the suit-property to the plaintiff for her lifetime, free of any consideration. The couple also caused registration of that document - exhibit P2 - at the Land Registry on 25th of November 2004. It is also pertinent to note that on the same day the plaintiff caused registration of the restriction against the suit-property - in exhibit P3, through the plaintiff. Interestingly on the same day, the couple executed and caused registration of yet another document in exhibit P1 at the Land Registry whereby the couple being co-owners of the suit-property revoked their own appointment as joint-fiduciaries and appointed the plaintiff admittedly, a non-resident as the fiduciary in respect of the suit-property. Thus, the plaintiff, who claimed under oath that she had no knowledge about the previous sale of the suit-property to the defendant, allegedly acquired usufructuary interest in the suit-property, changed her status as fiduciary for the suit-property and also entered a restriction against the suit-property to prevent the defendant from registering the "deed in dispute" at the Land Registry. Hence, the defendant is still unable to get the "deed in dispute" registered at the Land Registry to confirm his right in rem as proprietor of the suit-property.

In the circumstances, the plaintiff now prays this Court for a declaration and an order first above-mentioned. As a consequential relief, the plaintiff also seeks an order directing the Land Registrar not to register the defendant as proprietor of the suit-property.

On the other side, the defendant contends in essence, that there is a valid promise of sale between the couple and the defendant, which is binding the parties. The transfer-restriction stipulated under the provisions of the Immovable Property Act against the defendant based on his non-Seychellois status and the 5-year restriction periods imposed by the Government of Seychelles when originally sold the property to the couple are no longer relevant or valid. According to the defendant, the condition-subsequent mentioned supra has already been satisfied. In the circumstances, the defendant claims that he is entitled to have the “deed in dispute” registered at the Land Registry and to have ownership of the suit-property registered in his name. According to the defendant, all the suspicious documents executed and registered by the couple and by the plaintiff subsequent to the promise of sale, seemingly encumbering his rights in the “suit-property” are invalid. Therefore, the defendant seeks relief in his favour as first above mentioned.

I diligently, sieved through the entire pleadings, evidence and all the documents adduced in evidence. I gave careful thought to the submissions made by both counsel on points of law as well as on facts.

Obviously, there are four fundamental issues that arise for determination concerning the validity of four transactions, which the plaintiff and the defendant had separately entered into, with the couple, in respect of the suit-property. At the outset, I must say that it is important to enumerate those transactions in the chronological order as they took place and should determine the issues as well in the same order, as the determination of one issue in the sequence would inevitably have an impact on the outcome of the subsequent issue.

The impugned transactions in the sequence are:

- (i) the promise of sale by the couple in favour of the defendant dated 4th February 2003 - in exhibit P4

- (ii) The restriction entered by the plaintiff in the Land Register dated 16th November 2004 - in exhibit P3.
- (iii) The grant of usufructuary interest by the couple in favour of the plaintiff dated 18th November 2004 - in exhibit P2;
- (iv) The appointment of plaintiff as Fiduciary made by the couple on 19th November 2004 - in exhibit P1 .

It is evident that the last three transactions, which the couple had entered into, with the plaintiff, in respect of the suit-property, have all taken place subsequent to the first transaction namely, the “promise of sale”, which the couple had already entered into, with the defendant. Indeed, the documents in exhibits P1, P2 and P3, which evidence the transactions with the plaintiff, were all executed and registered at the Land Registry subsequent to the said Promise of Sale. The defendant was not a party to any of those transactions. He had no knowledge whatsoever about those transactions nor did he ever rescind the promise of sale nor did he authorise the couple, the promisor to transact with the plaintiff eschewing the said promise of sale. Therefore, it is important to examine first, the legality of the promise of sale before considering the legality of the other transactions the couple entered into with the plaintiff subsequent to the execution of the promise of sale. Now, two basic questions arise for determination:-

- (i) *Is the promise of sale by the couple to the defendant as evidenced by the “deed in dispute” dated 4th February 2003, a nullity/invalid since it was concluded subject to a condition subsequent? and*

- (ii) *Is the promise of sale a nullity by virtue of Section 3 (1) (a) of the Immovable Property (Transfer Restriction) Act, since the defendant was a non-Seychellois at the material time?*

Question No: 1

The first question obviously, involves a point of law and answer lies in Article 1584 of the Civil Code, which reads thus:

“A sale may be concluded either purely and simply or subject to a condition precedent or subsequent”.

Therefore, I find that the purported promise of sale concluded between the parties on the 4th February 2003 in this matter is valid in law, though it had been subject to a condition- subsequent to the effect that the defendant should register the “deed in dispute” under the Land registration Act only after acquiring Seychellois Citizenship and after the expiry of the restriction-period of five years in respect of the suit-property.

Moreover, it is also relevant to note that *“A promise of sale is equivalent to a sale if the two parties have mutually agreed upon the thing and the price”* **vide Article 1589 of the Civil Code.** Undisputedly, the couple and the defendant have mutually agreed upon the thing and the price. Besides, the couple has also received the price in full from the defendant.

In the circumstances, I find answer to question No 1 above in the negative. That is, *the promise of sale by the Couple to the defendant in respect of the “suit-property” as evidenced by the “deed in dispute” dated*

4th February 2003 is not a nullity or invalid in law for having been concluded subject to a condition subsequent.

Question No: 2

Moving on to question No 2, it is true that as rightly submitted by Mr. F. Ally, Learned Counsel for the plaintiff, Section 3(1) (a) of the Immovable Property (Transfer Restriction) Act as amended by SI 2/8/1994 prohibits the purchase by a non-Seychellois of any immovable property situated in Seychelles or any rights therein without the prior sanction of the Government. Indeed, this Section reads thus:

3. (1) *A non-Seychellois may not -

- (a) purchase or acquire by any means whatsoever and whether for valuable consideration or not, except by way of succession or under an order of the court in connection with the settlement of matrimonial property in relation to a divorce proceedings any immovable property situated in Seychelles or any right therein; or
- (b) lease any such property or rights for any period; or
- (i) enter into any agreement which includes an option to purchase or lease any such property or rights, without having first obtained the sanction of the Minister.

(2) For the purposes of subsection (1) it is immaterial whether the purchase takes place as the result of an agreement or of an auction or of a judicial sale or through a person who himself is not prevented from purchasing without

sanction, provided that there is an ultimate transfer for valuable consideration to a person who is prevented from purchasing without sanction.

However, as wisely bifurcated by Justice Souzier in the case of ***Abdou v Winstanley vide case No: 14 (1978- SLR) a promise of sale*** between the seller and the buyer constitutes two components:

- (i) a promise by the seller to sell the property to the buyer; and
- (ii) a promise by the buyer to purchase the property.

In the instant case, the promise of sale between the couple (the seller) and the defendant (the buyer), obviously, constitute the following two components:

- (i) a promise by the couple, the Seychellois to sell the suit-property to the defendant; and
- (ii) a promise by the defendant, a non-Seychellois to purchase the suit-property subject to acquiring Seychellois Citizenship and to have the transfer registered at the Land Registry after the restriction period.

Evidently, the second component namely: promise by the defendant, which is by virtue of section 3(1) (a) of the Act unlawful and void. However, such promise to purchase had no effect on the promise of the couple to sell their land to the plaintiff, as the sale of land by a Seychellois to a non-Seychellois was not prohibited or restricted by law. Any pre-contract ('avant contrat') leading up to a sale was not thus prohibited or restricted. Therefore, the promise of sale of the plaintiff accepted by the defendant in this matter, has all the force and effect of a ***unilateral promise of sale*** in spite of the fact that the corresponding promise to purchase by the defendant was void and of

no effect. The agreement of the parties was thus severable for all legal intents and purposes.

A unilateral promise of sale constitutes a personal obligation on the part of the promisor. It does not create any real right, but only an 'obligation de faire'. Breach of this obligation by the promisor undoubtedly, would render him liable to damages. Such unilateral promise shall remain effective during the time agreed by the parties, and if no time had been agreed, expressly or tacitly, until the promisor served a notice on the promisee giving him a reasonable time to exercise the option, or until the promisee expressly or impliedly renounced the option. However, in the case on hand, no time-limit was agreed upon by the parties.

It should also be noted that a unilateral promise of sale might expose even a third party to damages, if that third party had associated or colluded with the promisor to breach the promise or who simply knew of the existence of the promise when dealt with the promisor. In certain circumstances, even if the promised-property had subsequently been sold to a third party, such sale being unlawful, might even be rescinded.

Hence, I conclude that the agreement between the couple and the defendant constitutes a valid ***unilateral promise of sale***, which is in force and binding the parties. Therefore, I find answer to question No: 2 also in the negative. That is, *the promise of sale in question, is not a nullity by virtue of Section 3 (1) (a) of the Immovable Property (Transfer Restriction) Act, although the defendant was a non-Seychellois at the material time.*

Having said that, I find that all three transaction, which the couple had purportedly, entered into with the plaintiff in respect of the suit-property, subsequent to the promise of sale to the defendant, are null and void, For, the first transaction, the promise of sale was valid and was in force, when the subsequent transactions were entered into with the plaintiff.

Accordingly, I find that the following transactions encumbering the proprietary interest of the defendant in the suit-property are null and void and of no effect:-

- (i) The restriction entered by the plaintiff in the Land Register against Title PR3299, vide document dated 16th November 2004, registered at the Land Registry on 25th November 2004.
- (ii) The grant of usufructuary interest by the couple in favour of the plaintiff vide document dated 18th November 2004, registered at the Land Registry on 25th November 2004;
- (iii) The appointment of plaintiff as Fiduciary for Title PR3299 made by the couple vide document dated 19th November 2004, registered and transcribed at the office of the Registrar General on 25th November 2004.

For the reasons discussed hereinbefore, I enter judgment for the defendant as follows:

- (i)** I hereby declare that the defendant **Glanluca Valentino** of Cote d' Or, Praslin is the absolute owner/proprietor of the immovable property comprised in Title PR3299, situated at Praslin.

- (ii)** I also declare that the transfer deed dated 4th February 2003 and 10th March 2004, executed by the transferors George Marcel Aimable and Marie-Claire Aimable in favour of the transferee **Glanluca Valentino** in respect of Title PR3299, before the Notary Gerald Morel, is lawful and valid in law.
- (iii)** Accordingly, I direct the Registrar of Land to effect registration of the said transfer deed referred to in paragraph (ii) above, upon payment of the necessary stamp duty and registration charges by the defendant **Glanluca Valentino**, after removing the restrictions if any, entered against the said title. For the avoidance of doubt, the Stamp Duty Commissioner/Land Registrar in exercise of his powers under Section 23(1) of the Stamp Duty Act, may assess the amount of duty chargeable on this instrument in accordance with his finding on the present market value of the suit-property.
- (iv)** Furthermore, I declare that the following transactions registered at the Land Registry are null and void ab initio.
- ❖ The restriction entered by the plaintiff Alise Weyman against Title PR3299 - vide document dated 16th November 2004 - registered at the Land Registry on 25th November 2004;
 - ❖ The grant of usufructuary interest by the couple, George Marcel Aimable and Marie-Claire Aimable in favour of the plaintiff - vide document dated 18th November 2004 - registered at the Land Registry on 25th November 2004; and
 - ❖ The appointment of plaintiff as Fiduciary for Title PR3299 made by the said couple - vide document dated 19th

November 2004 - registered and transcribed at the office of the Registrar General on 25th November 2004;

(v) I award costs in favour of the defendant.

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D. KARUNAKARAN

JUDGE

Dated this 16th day of November 2011