IN THE SUPREME COURT OF SEYCHELLES

YOLA AH-TIME
ANTOINE AH-TIME
(*Rep. by the lawful appointed fiduciary Yola Ah Time)*

Vs

DANIEL MANCIENNE
RICHARD MANCIENNE

Civil Side No: 70 of 2007
==========

Mr. Rouillon for the plaintiffs
Mr. Sabino for the defendants

JUDGMENT

In its Preliminary Order dated 2nd September, 2011 the Seychelles Court of Appeal stated that –

> "*we have landed against one predicament which in our view should be overcome first before anything else might be envisaged. This is a threshold issue very much arising in this appeal which exacts up-front determination before the rest may be considered.*"

The Seychelles Court of Appeal went on to state that –

> "*The issue is, as follows: the appellants at ground 3 above submit as follows:*

(a) *That they had asked in their action Specific Performance of the contract which respondents had breached;*

(b) *That, indeed, the Court found that there was a breach and awarded damages;*

(c) *That the award of damages was* ultra petita;

(d) *That, in the circumstances, the Court may be called upon to pronounce itself on the issue of Specific Performance, in the light of its finding that there was breach of agreement of sale.*

The Seychelles Court of Appeal has requested this Court to answer:

> *"**Whether this Court would conclude that, in the absence of a claim for damages by the Mancienne, which remedy was granted ultra petita, it would or would not have granted specific performance of the contract as a remedy in the light of the fact that he found as a fact that there was a breach of the promise of sale."***

Learned Counsel for the respective parties were allowed to make their respective submissions on that particular issue.

When delivering my original judgment I addressed what in my view were the issues raised by the pleadings with regard to the counter-claim. I stated, *inter alia*, that in my view, this Court has simply to find whether the Defendants constructed on the property of the Plaintiff. Secondly, I had to find that if they so constructed, whether the Defendants have legal authority from the Plaintiffs to carry out any constructions on the property of the latter. Thirdly I had to determine whether the constructions carried out by the Defendants on the Plaintiffs property caused any damage and if so how much. Fourthly, whether I

should grant the remedy sought by the Plaintiffs, namely to order the Defendants to remove their constructions on the Plaintiffs property.

In the evidence before the Court I took note of the letter dated 15th February, 2005, (**Exhibit P10**) worded as follows:

> "*We the undersigned hereby confirm to have received the sum of twenty thousand Seychelles Rupees (SR25,000.00) as a deposit for the purchase of a portion of parcel No. V8279 situated at Beau Vallon from Mr. Richard Mancienne.*
>
> *We hereby promise to sell to Mr. Mancienne the portion of land described below for a sum total not to exceed SR500,000.00. Mr. Mancienne hereby promises to buy the portion for that sum.*
>
> *This deposit renders this agreement binding for both parties and as such is accepted as a legally binding promise of sale signed in good faith.*"

This document was signed by the Plaintiffs and one Mr. Jules Fernandez as well as **Mr. Richard Mancienne.** That document was thereafter registered on 5th December, 2006.

At the bottom of that document there is a handwritten description of the purported plot of land to be subdivided and is said to have been **made by the 2nd Defendant (Mr. Richard Mancienne)**. It states thus –

> *"Plot in question refers to Cadastral Plan 2690W.*
>
> *Proposed New Plot to be sold shall cover the land from JB706 to TD43; from TD43 to TD16; from JB706 to new post beacon which is going to be approximately 14.28 metres from TD16*"

I must here emphasize that the postscript supra to the typewritten "promise of sale" was handwritten and none of the parties subscribed to it.

There was another letter that was produced in evidence also dated 15th February, 2005, (**Exhibit P10**) whereby the Plaintiffs and Mr. Fernandez wrote to **Mr. Richard Mancienne** worded, as follows:

> "*This letter is to confirm our verbal agreement regarding the land that you are buying from me.*
>
> *I have agreed that Parcel number V8279, presently belonging to me, is to be subdivided and one of the subsequent plots which you are using as* ***garage/parking*** *will be sold to you at the price of SR500,000.00 plus survey/subdivision fees, registration fees, lawyers fees and other related fees associated with this sale.*
>
> *You have agreed to pay a deposit of SR25,000.00 on 16th February, 2005 and the balance of R475,000.00 is to be paid when the transaction is finalized which would be not later than 30th April, 2005."*

These two documents dated 15th February, 2005 referred to above, were registered on 5th December, 2006.

Exhibit D2 is a letter dated 9th November, 2005 from the 1st Plaintiff to the **1st Defendant** worded as follows:

> "***Re: Encroachment on Plot V8279***
>
> *"You are aware that you have encroached on the above parcel, previously belonging to Mr. Jules Fernandez and Antoine Ah-Time, and now owned by me, Yola Ah-Time.*
>
> *The plot is presently being sub-divided so that the subsequent portion can then be sold to you. In this respect I shall be grateful if you could make a deposit which will then be deducted from the selling price once finalized.*

I shall be grateful if you could finalize and pay the deposit before you leave the country, in view that you do not live in Seychelles. Otherwise I shall have no alternative, but to ask you to demolish the wall and the garage that you have built on the encroached area within 14 days".

The **1st Defendant** did not respond to the above letter and as such no promise of sale was entered between the Plaintiffs and the 1st Defendant.

Permission to Build

In addressing my mind to above mentioned documentary evidence I found that there is no evidence, be it oral or in writing, impliedly or tacitly, that the Plaintiffs at any time authorized the Defendants to carry out any constructions works or to trespassed, as they did, on the Plaintiff's property. I am satisfied, on the basis of evidence before me, that none of the construction works so carried out by the Defendants were in existence before the Plaintiffs purchased their property. At the *locus in quo* I noted that these were all recent constructions.

At the time of delivering mu original judgment it was clear in my mind that the question of permission to build on another's land is a completely different issue from the question of promise of sale. Permission to build is provided for by Article 555 of the CCSey and matters relating to Promise of Sale and consequence for breach thereof is governed by Articles 1589 and 1590 of CCSey. The documents before the Court relate to **Promise of Sale** with conditions precedent and were not **Permission to Build**. A Promise of Sale does not in any way authorize the promisee to enter on the property of another and to build without an express agreement as required by law.

The Defendants therefore did not and do not have any legal authority from the Plaintiffs to carry out any construction works or any right whatsoever to trespass in any way on the property of the latter.

Specific Performance of Promise of Sale

Article 1589 of CCSey sates that -

> "*A promise to sell is equivalent to a sale if the two parties have mutually agreed upon the thing and the price.*
>
> *However, the acceptance of a promise to sell or the exercise of an option to purchase property subject to registration shall only have effect as between the parties or in respect of third parties as from the date of registration*".

Article 1590 of CCSey states that –

> *"If the promise to sell is accompanied by a deposit, each of the contracting parties shall be free to withdraw, the person who has paid the deposit shall lose it, the person who has received it shall return double the amount."*

It was part of the agreement between the **Plaintiffs** and the **2nd Defendant** only that there was a deposit to be made by the latter. That deposit was duly made by the 2nd Defendant and accordingly acknowledged by the Plaintiffs. The provision of **Article 1590** is clear and unambiguous and needs no further clarification. The promise to sell having been accompanied by a deposit, either of the parties to that promise of sale is legally free to withdraw from that promise of sale. However, the withdrawal of either of the parties carries a legal consequence and the consequence envisaged by law is that the party who has paid the deposit shall lose it and the party who has received it shall return double the amount. In the circumstances of this case, if the 2nd Defendant had chosen to withdraw from the Promise of Sale he would have forfeited his deposit. As it was the Plaintiffs who had opted to withdraw the consequence is that the Plaintiffs should pay back to

the 2nd Defendant double the amount of the deposit that the latter made. Hence, that was the ultimate of my original judgment on that issue.

In the CCSey there is a provision in **Article 1140** states that –

> "*The effects of the obligation to give or to deliver immovable property shall be regulated under the Title* Sale *and the Title* Privileges and Mortgages".

Another relevant provision is to be found in **Article 1142** of CCSey which states that –

> *"Every obligation to do or to refrain from doing something shall give rise to damages if the debtor fails to perform it*".

When delivering my original judgment I gave consideration to both of the above stated provisions of the CCSey and found that in the circumstances of this case such provision are not applicable as there is a specific provision in the our Civil Code which deals with the issue of the consequence of withdrawal by either party from a "Promise of Sale", and that is Article 1590, which I accordingly applied to this case. When there is both general and specific provision in law relating to an issue, the specific provision shall be applied.

I therefore found that there was no necessity for me to give further consideration to the issue of specific performance raised by the Defendants and as I did not record such determination in my original judgment, I hereby do by answering the question raised by the Seychelles Court of Appeal.

In the light of my foregoing reasoning I would under no circumstances have granted, as a remedy, “specific performance” of the “Promise of Sale” even though I had found as a fact that there was a breach of that “Promise of Sale”.

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B. RENAUD
JUDGE

Dated this 3 December, 2012