

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 148/2010

[2016] SCSC 101

SONNY SAUZIER

Plaintiff

versus

FERINA AMADE

Defendant

Heard: 8 April 2011, 12 March 2013, 8 April 2015, 8 October, 2015.

Counsel: N. Gabriel for plaintiff

S. Rajasundaram for defendant

Delivered: 24 February 2016

JUDGMENT

Dodin J

[1] The Plaintiff, Sonny Sauzier, claims that by a transfer deed dated 25th July, 2005, he purchased parcel title C1841 situated at Au Cap, Mahe from Edouard Mousmie, now deceased. The said Edouard Mousmie had purchased the said land title from one Gerard Belle by transfer deed dated 20th February, 1987. The Plaintiff further claims that the late Edouard Mousmie further executed a promise of sale of the house situated on parcel C1841 in his favour, the same to be executed on or before 15th September, 2006.

[2] The Plaintiff claims that to date he has not been able to enter onto and to enjoy the land since the Defendant is still in occupation of the house thereon. The Plaintiff claims that the Defendant is a trespasser and in unlawful occupation of the land and house and she has deprived him of his right to quiet and peaceful enjoyment of his property.

[3] The Plaintiff now claims from the Defendant loss and damage as follows:

(a) Trespass	Rs 30,000
(b) Penalty under the Promise of sale agreement	Rs 64,000
(c) Loss of rent	Rs 86,000
(d) Moral damage for distress and inconvenience	Rs 100,000
Total	Rs 280,000.

[4] The Plaintiff moved the Court to:

- (a) order the Defendant to vacate and give possession of the house and land to the Plaintiff
- (b) give judgment in favour of the Plaintiff in the sum of Rs 280,000 with interest and necessary adjustments; and
- (c) order costs in favour of the Plaintiff.

[5] The Defendant maintains in her defence that she is in lawful occupation of the house situated on parcel C1841 by virtue of rights she acquired as a joint purchaser holding $\frac{1}{2}$ share of the land in addition to the payment by her of the bulk of the housing loan taken for the construction of the house.

[6] The Defendant maintains that by virtue of her contribution towards the purchase of the land, the loan repayments and her investments in upgrading and keeping the house in good stead, she has acquired in addition to any rights she may have, at least a “*droit de superficie and a droit de detention*” and therefore she is rightfully on the property and cannot be a trespasser.

[7] The Defendant further claims that the Plaintiff’s claims for loss and damage are not maintainable against her and more specifically since the late Edouard Mousmie died

without executing the promise of sale, any cause of action should be against the estate of the late Edouard Mousmie represented by the executor and not personally against her.

- [8] The Defendant hence moved the Court to dismiss the Plaintiff in its entirety with costs.
- [9] Winsley Mousmie testified that he is the son of the late Edouard Mousmie and brother of the Defendant. He was appointed executor of the estate of the late Edouard Mousmie by Order of the Supreme Court dated 10th December, 2009. He agreed that the land parcel C1841 was transferred on the joint names of Edouard Mousmie and Ferina Amade for ½ share each but he maintained that the Defendant tricked their father to get ½ share for herself. With respect to the loan of Rs 132,000/- he agreed that the Defendant made part payment but maintained that his late father also made payments and that the outstanding balance was paid by the Plaintiff as he wanted to purchase the land and house but the land was still subject to the charge. He maintained that his father wanted to sell the land to the Plaintiff for the sum of around Rs 300,000 but had to clear the charge and evict the Defendant first as per the promise of sale agreement.
- [10] He testified that his father brought a case CS No 411/2006 before the Supreme Court for a *Writ Habere Facias Possessionem* against the Defendant and a Ruling was given in his favour but on appeal, the Court of Appeal overturned the Supreme Court's Ruling and gave judgment in favour of the Defendant in case SCA No 10/2009.
- [11] Sonny Sauzier , the Plaintiff, testified that he purchased land namely parcel C1841 situated at Au Cap from the late Edouard Mousmie on the 25th day of July, 2005. On the same day they signed a restrictive agreement with regards to the house which was to be sold and transferred to him at a later date. Although not included in the agreement, he testified that he had agreed with the late Edouard Mousmie that the house was to be transferred for the sum of Rs 140,000. He paid a deposit of Rs 14,000/- and has still Rs 126,000/- outstanding. In addition he paid off the balance of the charge on the land which amounted to the sum of Rs 56, 964.34 cents.
- [12] The Plaintiff maintained that he was not aware that the Defendant was once the owner of ½ share of the property or that she was paying the housing loan. He was however aware that she was in occupation of the house and he admitted that he had once told her that she

may continue to stay in the house but should not cut anything on the land as he owned the land. The Plaintiff maintains that he only wants to Court to determine for whom the house is and if it is his, to whom he should pay the balance of Rs 126,000/- outstanding on the house and he wants damages as prayed for all the years that the Defendant has remained in the house on the land.

- [13] For the Defendant, Elvis Barreau, a debt recovery officer employed by the Housing Finance Company (HFC), testified that according to the records held at HFC the loan of Rs 132,831.80 cents was granted to Ferina Amade and Lewis Mousmie and that the guarantor was Simon Amade. The loan was repaid by Ferina Amade and Simon Amade and the balance of Rs 56,964.34 was cleared by a cheque deposited by Attorney-at-law Daniel Belle on the 3rd August, 2005.
- [14] The Defendant Ferina Amade, testified that she purchased land parcel C1841 together with her late father, Edouard Mousmie for a sum of Rs24,000 in February, 1987. She paid Rs10,000 and Edouard Mousmie paid the difference of Rs 14,000. The property was transferred onto their joint names for ½ share each. They then entered into negotiations with the Seychelles Housing Development Company (SHDC), now HFC for the construction of a 3 bedroom house on the land. Once construction was completed, she lived in the house with her husband, children, father and mother.
- [15] The property was charged in favour of SHDC for the sum of Rs 132,891.80 cents and since her father was a pensioner, she undertook to pay and paid the loan together with her husband Simon Amade who had signed the agreement as the guarantor. They had paid over Rs 98,000 when the remainder was paid off. She maintained that during the time they were in the house she started having problems with the rest of the family and in the year 2004 her father asked her to transfer her ½ share onto him so that he can execute a transaction. She agreed because she was expecting her father to subdivide and share the land amongst them but instead her father transferred the whole land to Mr Sauzier, the plaintiff. However the house was not transferred and she continued to live in the house to date.
- [16] Learned counsel for the Plaintiff admitted that the Plaintiff purchased the bare land but entered into an agreement to purchase the house for the sum of Rs 140 000 out of which

Rs 14 000 was deposited with the late Edouard Mousmie. Learned counsel submitted that since Article 553 of the Civil Code of Seychelles act states that all buildings, plantations and works on land or under the ground shall be presumed to have been made by the owner at his own cost and to belong to him unless there is evidence to the contrary and the Defendant has not proved the same to the satisfaction of the Court, therefore the Court must find in favour of the Plaintiff on the issue of ownership of the house and land.

- [17] From that, learned counsel concludes that since the owner of the land is also the owner of the building thereon and since the Defendant has no agreement to stay in the house, she must vacate the house and the Defendant shall pay the balance of Rs 126 000 to the estate of the late Edouard Mousmie.
- [18] Learned counsel for the Defendant on the other hand submitted that the Plaintiff by his own admission agrees that he is not as yet the owner of the house. Therefore the Defendant cannot be a trespasser with regards to the Plaintiff. Learned counsel submitted that the Seychelles Court of Appeal has already ruled in its judgment SCA NO 10 of 2009 that the Defendant is not a trespasser and must have either a *droit se superficie* or a *droit de retention* on the house.
- [19] Learned counsel submitted further that it is admitted facts that the Defendant contributed towards the purchase price of the land and paid most of the loan for the construction of the house. Furthermore, the Plaintiff paid for the purchase of the land and made the deposit for the future purchase of the house solely to the Defendant's father whilst the Defendant had transferred her share in the land to her late father for the nominal value of only R1.
- [20] Learned counsel further submitted that under Article 555 of the Civil Code of Seychelles Act, since the Plaintiff does not own the house which was built with money contributed by the Defendant, the Plaintiff must reimburse the Defendant at the current market value of the house thereon otherwise the Defendant has the right of retention until compensation is paid.

[21] Learned counsel hence submitted that since the Plaintiff has failed to establish unlawful trespass whilst the Defendant in her defence has established that she has a right of retention over the property, this plaint should be dismissed with costs.

[22] Article 553 of the Civil Code of Seychelles Act states:

“All buildings, plantations and works on land or under the ground shall be presumed to have been made by the owner at his own cost and to belong to him unless there is evidence to the contrary; this rule shall not affect the rights of ownership that a third party may have acquired or may acquire by prescription, whether of a basement under a building in the ownership of another or of any other part of the building.”

[23] Article 555 of the Civil Code of Seychelles Act states:

“1. When plants are planted, structures erected, and works carried out by a third party with materials belonging to such party, the owner of land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them.

2. If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of land.

3. If the owner elects to preserve the structures, plants and works, he must reimburse the third party in a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of such reimbursement, after taking into account the present conditions of such structures, plants and works.

4. If plants were planted, structures erected and works carried out by a third party who has been evicted but not condemned, owing to his good faith, to the return of the produce, the owner may not demand the removal of such works, structures and plants, but he shall have the option to reimburse the third party by payment of either of the sums provided for by the previous paragraphs.

5. Where an owner, who is subject to a condition subsequent, has caused plants to be planted, structures erected and works carried out, he shall be presumed to have acted in good faith, unless he actually knew when such acts were performed that the events, which was the subject of the condition, had already occurred. This rule shall not apply to a

usufructuary or a tenant unless specific permission to plant, erect or construct had been given by the owner.”

- [24] It is obvious that the root of the problem in this case was the manner in which the original and subsequent land transactions were made and were further compounded by the transactions between the late Edouard Mousmie and the Plaintiff. The first transfer of land from Gerald Belle was to Edouard Mousmie and Ferina Amade, the Defendant to take in the proportion of ½ each. There is uncontested testimony by the Defendant that she paid Rs 10,000 and her father paid Rs 14,000.
- [25] There is also uncontested evidence that the Defendant and her husband paid the bulk of the housing loan, Rs 98,000 and the remainder Rs 56,964.34 was paid by the Attorney-at-law Daniel Belle, but it is not clear whether that sum was directly from the Plaintiff or was from the money paid to the late Edouard Mousmie for the purchase of the land.
- [26] There is also uncontested evidence that the Plaintiff paid to the late Edouard Mousmie the sum of Rs 160,000 for the transfer of the land but on the same day the Plaintiff entered into an agreement to purchase the house by a separate agreement and that the house was reserved for the transferor, the late Edouard Mousmie. This is clear evidence that both the Plaintiff and the late Edouard Mousmie were aware that the house could not have been transferred at the time for reasons that the Defendant was occupying the same.
- [27] This is further reinforced by the Court of Appeal which stated:

“In this case, with respect to the right of the 1st Respondent (Edouard Mousmie), it should be noted that the eviction is sought on the house rather than on the property in question, it is obvious that the appellant (Ferina Amade) must have either a droit de superficie or a droit de retention on the house or some other right.”

- [28] I am also of the same view, considering the considerable contributions that the Defendant made towards the purchase of the property, the construction of the house and the payment of the housing loan as well as the maintenance of the house to date. Upon the death of Edouard Mousmie, who died without having transferred the house to the Plaintiff, all the rights of Edouard Mousmie are automatically transmitted to his heirs. The Defendant

retains all the rights she has acquired by virtue of her contributions to the purchase of and construction on the property in addition to acquiring her inheritance as a heir.

- [29] Considering the clear findings of the Court of Appeal it could have only been proper for the Plaintiff to attempt to settle this matter in line with Article 555 of the Civil Code of Seychelles Act and to seek specific performance of the agreement to sell the house against the heirs of the late Edouard Mousmie. It seems that in complete disregard to the considered view of the Court of Appeal the Plaintiff's prayer is only for the eviction of the Defendant and for damages against the Defendant, who incidentally is not the executor of the estate of the late Edouard Mousmie. This Court cannot on its own motion decide on issues outside the pleadings unless such issues are essential to the determination of the real issues pleaded.
- [30] Consequently, I find that the Defendant has a right of retention of the property and that the Defendant cannot be evicted without due compensation for her contributions to the purchase of the property and the construction thereon.
- [31] I further find that since the Defendant is not a trespasser, the claim for damages against her cannot be sustained.
- [32] Without proper pleadings and evidence to determine the extent of rights of the parties and compensation due to the Defendant who incidentally did not file any counterclaim to that effect, this Court can only conclude that this plaint is misconceived.
- [33] Consequently, this plaint is dismissed. I award costs to the Defendant.

Signed, dated and delivered at Ile du Port on 24 February 2016.

G Dodin
Judge of the Supreme Court