

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS170/2011

[2017] SCSC 66

LOUIS MICK BOUCHEREAU

Plaintiff

Versus

CHARLES JENNY BOUCHEREAU

**MARIE EUGENIE ROSEMARY BOUCHEREAU
NO. 15 TOWN FIELD WAY, ISELWORTH, MIDDLESEX UNITED
KINGDOM**

Defendants

Heard: 14th day of March 2014 and 1st day of June 2016

Counsel: Mr. F. Bonte for Plaintiff

Mr. J. Camille for the Defendants

Delivered: 27th day of January 2017

JUDGMENT

Govinden-J

- [1] This is a suit for a declaration seeking to annul a deed of transfer in respect of an immoveable property for an alleged fraud. The Plaintiff in his capacity as the 'former owner' of Parcel H 6753 (as per amended Plaintiff and hereinafter referred to as "the property"), seeks this Court

for a declaration that the deed of transfer in respect of the Property dated the 15th day of October 2009 and registered on the 13th day of January 2010 (hereinafter referred to as “the Transfer”), is null and void ab initio as the purported transfer made there under was a fraudulent one. In the end result, prayers that this Court orders the Defendants to transfer the land back to the Plaintiff; that the Defendants pay the Plaintiff the sum of S.R. 1,100,000 for alleged moral damages, fraudulent transfer and loss of property with interests and costs and for any other Order that the Court deems fit in the circumstances.

- [2] On the other side, the Defendants deny the Plaintiff’s claim in its entirety contending that the transfer is valid, effectual and genuine and not a fraudulent one.
- [3] This case was originally allocated to Learned Judge E.S. Desilva who heard the evidence of the parties as per Records of Proceedings of the 14th day of March 2014 but in view of his departure from Jurisdiction he was unable to finalise the matter hence reallocation to me, undersigned Judge of the Supreme Court for purpose of continuation and this upon agreement of all parties as above-referred for adoption of previous proceedings and continuation of the hearing as duly evidenced by virtue of Records of proceedings of the 18th day of November 2015.
- [4] It is not in dispute that the Plaintiff is the brother of the first Defendant and brother in law of the second defendant; that the Plaintiff resides in the United Kingdom and that prior to the Transfer Plaintiff was the registered owner of the Property.
- [5] The facts of the case as transpired from evidence are in essence in a gist as follows.

[6] With reference to the Plaintiff's evidence that the Plaintiff resident in the United Kingdom arrived in Seychelles in January 2009 and left in January 2009 but mention is also made of March 2009 by the Plaintiff in evidence. That during the said visit to Seychelles he was "not blind" as it transpired to have been the case at the time of the hearing as above-referred. In the course of above-specified time spent in Seychelles the Plaintiff admitted in cross-examination to have gone to the office of Lawyer Wilby Lucas in January 2009 "to sign some document described by him as 'immigration papers' and not the Transfer for according to him same was never his intention and he was tricked into signing same. The latter evidence was in direct contradiction to the Plaintiff's evidence in Examination in Chief that he never visited the Office of lawyer Wilby Lucas and he did not know him at all and further that he never signed an affidavit in support of an application for removal of usufructuary interest as an encumbrance of Title H.169 made on his behalf by lawyer Wilby Lucas of the 13th day of January 2009, namely exhibit P2. The Plaintiff further testified that the transfer is a fraud in that he was not in the country on the 15th day of October 2009 when same was purportedly signed by him. He contested signing the transfer on or before that date either in the presence of lawyer Wilby Lucas (subject to my observations as above-referred). The Plaintiff thus contested the authenticity of the transfer in terms of not knowing lawyer Wilby Lucas and or visited his office at all, the date of transfer for he was not in Seychelles and also as to his signature having been forged thus moving the Court for the afore-said declaration.

[7] With reference to the evidence of the Defendants, it transpires from the Records as above-indicated, that the first Defendant also resident in the United Kingdom and brother of the Plaintiff owns a parcel of land adjoining that of the Property. Same was confirmed by the second

Defendant wife of the first Defendant and sister in law of the Plaintiff. It is borne in evidence that the Defendants were all in Seychelles during the same period that the Plaintiff was in Seychelles namely 3rd to the 31st January 2009. Both Defendants testified that it was on the 29th day of January 2009 or around that time, that the transfer was executed between the parties before lawyer Wilby Lucas in his Law Chambers and lawyer Wilby Lucas was personally present and explained to the them the contents of the Transfer and that the consideration of S.R. 60,000/- was paid in cash before lawyer Wilby Lucas to the Plaintiff namely the sum of Seychelles Rupees Sixty Thousand (S.R. 60,000/-). The first Defendant further testified that upon signing of the Transfer and exchange of the consideration, the Defendants left the transfer document “undated at the time but signed” with lawyer Wilby Lucas to do the needful for registration and for them to collect after for they were leaving the Seychelles on the 31st day of January 2009. It followed that the date of the 15th October 2009 ought to have been inserted by lawyer Wilby Lucas for document was in his possession. Both Defendants testified that the stance of the Plaintiff giving rise to the court matter arose only after the signing of the Transfer due to certain family dispute. And that they did not commit any fraud whatsoever.

- [8] It is revealed on the Records of Proceedings further that lawyer Wilby Lucas was unable to be produced before the Court as witness for the Defendants albeit several adjournments due to ill-health leading to impossibility of attendance as a witness.
- [9] Both Learned Counsels were invited by the Court to file written submissions in view of the history of this matter and Learned Counsel for the Defendants filed his on the 23rd day of May 2016 whereas Counsel for the Plaintiff waived his right to file submissions on the 6th day of December 2016. The Court takes due notice of the contents of

the submissions as filed for the purpose of this Judgment and of which contents is also subject to certain observations hereunder.

[10] Having examined closely and thoroughly the Record of Proceedings afore-mentioned (upon consent of the parties) as well as the duly admitted exhibits on Record and also the submissions afore-mentioned, to my mind, there are two fundamental issues arising for determination in this matter in line with the Pleadings as filed which are namely:-

(i) Did the Plaintiff sign the Transfer and paid the consideration as specified in the Transfer in dispute before lawyer Wilby Lucas on the 29th day of January 2009; and

(ii) If the answer to the first issue is in the affirmative, then did the insertion of the date of the 29th day of October 2009 vitiate the authenticity and the validity of the Transfer as duly registered in the names of the Defendants.

[11] Obviously having set out the main issues which to my mind is pertinent to consider in this case, there is no need to consider issues extraneous to the pleadings. To the latter effect, I am making direct reference to the submissions as filed by Learned Counsel for the Defendants (supra) addressing specific points of law more particularly arising by virtue of the provisions of Article 1370 (2) of the Civil Code of Seychelles Act (Cap 33 and hereinafter referred to as “the Act”) and the form and contents of the Pleadings as filed which ought to have been raised at the stage of the filing of the statement of defence so as to give the other party the right to be heard on the points of law rather than choosing to unilaterally consider those points of law at the stage of submissions.

[12] Be that as it may and albeit not reflected in the Statement of defence as filed by the Defendants but appear and raised only at the stage of submissions and not having been contested by the Plaintiff’s Counsel

who had sight of the submissions of Learned Counsel for the Defendants prior to the fixing of the Judgement date and also in the light of the Ruling in the case of **[Banane v/s Lefevre (1986) SLR 110]** and **[Bogley v/s Seychelles Hotels (1991), Ayoola 231/15]**, to the effect that *“A court or Tribunal should not ignore a point of law even if not raised by the parties, if to ignore it would mean a failure to act fairly or to err in law”*.

Bearing in mind the above guidance, I will consider also as part of this Judgement the points of law as raised and same before I consider the merits proper.

[13] The Defendants argued as follows on the points of law as raised:

- (i) Firstly, that the Plaintiff falls foul to Article 1370 (2) of the Civil Code in that the amended Plaintiff alleges two causes of action namely one founded on contract and the other in delict. The reason for such an assertion is due to the contents of paragraph 3 of the amended Plaintiff wherein the Plaintiff avers that: “his land had been transferred to the Defendants by deed dated the 15th October 2009. This is a fraud and thus obtained the fraudulent transfer of Parcel H 6753 from the Plaintiff to the Defendants.” That Plaintiff further avers at Paragraph 7 that the purported Transfer “is null and void ab initio and the land be “restituted back to its owner that is the Plaintiff”. That at Paragraph 8 the Plaintiff further seeks another cause of action which is that of delict in alleging that the act of the defendants “are a faute in law for which defendants are liable to the Plaintiff in damages.”

- (ii) Secondly, that the Plaintiff does not clearly identify the Parcel number of the land being claimed by the Plaintiff. Whereas the statement of defence clearly admits the suit property to be that registered as H 6753, Plaintiff has by way of averments in paragraphs 5 and 7 of his amended Plaintiff claimed ownership and transfer back of a property registered as parcel H 1753.
- (iii) Thirdly, that should the Plaintiff rely on the cause of action of fraud, Plaintiff's Plaintiff must be dismissed as it does not sufficiently particularize the alleged fraud as per requirement of law on pleadings alleging fraud and relying in support thereto the Judgment in **[SCA No. 13 of 1996 Jacqueline Labonte & Anor v/s Robert Bason]**.

[14] In line with the above points of law as raised and illustrated in a "streamlined" manner by myself for sake of clarity, the Defendants moved this Court to dismiss the Plaintiff as it was bad in law and discloses no reasonable cause of action as averred at Paragraph 7 of the Plaintiff.

[15] Now a careful scrutiny of the averments of the Plaintiff and Reply of the Defendants reveal that the subject matter treated by both parties as the cause of action in the Plaintiff is "fraud and or fraudulent transfer" and this to my mind does not give rise to any ambiguity as to the main cause of action in this case. The averments of the Plaintiff is clearly particularised to the standard required at the stage of filing of Pleadings for the purpose of the cause of action being "alleged fraud" due to contest of signature of the Plaintiff as well as non-payment of the consideration price. To that matter it boils down to the very basis of the absence of a cause of action based on contract. It would be misleading to read the averments of one Paragraph of the Plaintiff in isolation to others as cited

for doing so would inevitably lead to the impression of two causes of action being raised.

[16] I am however, of the view that this impression on the part of the Defendants is untenable in line with the averments at Paragraph 3 of the amended Plaintiff alleging fraud hence nullity of Transfer and giving rise to “alleged fault” as a direct result claimed alleged damages” at Paragraph 8 of the Plaintiff.

It follows, that I find the cause of action in the amended Plaintiff is clearly that of delict based on an “alleged fraud” hence the first point of law as raised being devoid of merits.

[17] Secondly, with regards to the second point of law as raised by the Defendants (supra), I refer to the proceedings of the Court of the 30th day of January 2012 before Learned Judge Renaud and on the 14th day of March 2014 before Learned Judge De Silva, which proceedings clearly indicate that the said Learned Judges allowed Motions for amendment of the original Plaintiff filed on the 26th day of August 2011. In fact, Learned Judge De Silva endorsed the amendments as to the change of Parcel No. from H. 1753 to H. 6753 personally on the Plaintiff itself by initialling and dating the said amendments.

[18] To my mind therefore, there is really no need for this Court to go on and consider the issue of “ultra petita” as dealt with in the cited case of **[Hunt v R SCAR 160 and Krishnamart v Insurance (2000) SLR 46]**. The ratio decidendi of that case needs to be looked at in the context of “filed” pleadings and contents of records of proceedings and not just for sake of arguments.

I thus find that on the basis of the above explanations, the second point of law is also devoid of merits and fails accordingly.

[19] Vis-à-vis the third point of law as raised by the Defendants (supra). Again in that respect I refer to the averments at Paragraphs 3, 4 and 6 of the amended Plaintiff which illustrate clearly the basis of the Plaintiff's cause of action. The cause of action as stated above is that of "fraud of an alleged transfer" and its particulars have been clearly particularized as averred namely "forged signature of the Plaintiff" for he denies his signature and "absence of physical presence from Seychelles" on the date of the transfer'. Should the Defendants have felt that they required further particulars to answer to the amended Plaintiff they ought to have followed the procedure as laid out in the Seychelles Code of Civil Procedure and sought for further and better particulars prior but they rather opted to file a reply in the form of their Statement of defence denying the "fraud" and further averring that the Transfer was "authentic" and legally executed.

[20] Again, it is to be noted further in the latter respect, that the ratio decidendi in the case of **[SCA No. 13 of 1996 Jacqueline Labonte & Anor v/s Robert Bason]**, which states therein, *"it is trite that fraud must be specifically alleged and proved". That fraud cannot be presumed and the requirement that fraud must be pleaded with particularity means that the acts of the alleged fraudsters relied on must be pleaded*", has been duly considered by this Court in the context of the pleadings as filed in this case. It follows from a careful examination of the averments of the amended Plaintiff that the Plaintiff is alleging fraud by the Defendants in terms of "questionable date of transfer" and "Plaintiff's signature". It is the humble opinion of this Court that those averments fulfil the requirements of the above-cite Authority based on the "nature of contents of pleadings where allegations of fraud arise as cause of action".

[21] On the above basis, I find that the amended Plaintiff is sufficiently particularized for the purpose of the cause of action as anticipated by

the amended Plaintiff and does not fall short of the requirements of pleadings alleging fraud as above canvassed.

[22] Now, to come back to the most essential and fundamental issues arising for determination in this case as stated at Paragraph 10 of this Judgment (supra), I note with particular importance the evidence of the Plaintiff and both Defendants in this case as referred.

[23] As follows, I will treat the two fundamental issues in chronological order as it appear at Paragraph 10 above.

[24] The first issue being whether the Plaintiff signed the Transfer and was paid the consideration as specified in the Transfer in dispute before lawyer Wilby Lucas on the 29th day of January 2009?

[25] Answering this question, obviously involves a question of fact and depends completely on the evidence oral and documentary on Records proving the existence of the Transfer amongst the parties namely the Plaintiff and the Defendants.

[26] The Plaintiff has not contested that he was not blind in January 2009 and that he did not meet with lawyer Wilby Lucas on the 29th day of January 2009 but rather attempted to try and convince the Court that he was there for another reason rather than to sign the Transfer and “tricked into signing the Transfer”. That particular admission of the Plaintiff came only during cross-examination for he vehemently denied in examination in chief of not knowing and or meeting lawyer Wilby Lucas at all. What is interesting with regards to the Plaintiff’s evidence however is that he did not deny that he was in Seychelles on the 29th January 2009 and left on the 31st January 2009 but he denied to signing a removal of usufructuary interest document on another of his own property H 169 (exhibit P2) done before the same lawyer Wilby Lucas duly dated signed and registered on the 13th day of January 2009. The

Plaintiff further denied obtention of S.R. 60,000/- as consideration from the Defendants, his whereabouts and or knowledge of lawyer Wilby Lucas and their relationship albeit duly authenticated documents on Records hence I do not find him a convincing witness for he is full of contradictions which is irreconcilable with his evidence in chief and exhibit P1 and P3.

[27] Both defendants on their part testified with complete honesty that they went to sign the Transfer together with the Plaintiff before lawyer Wilby Lucas on the 29th day of January 2009 and that contents of the Transfer was duly described and explained to them all and thereafter signing and exchange of consideration price was made in cash as averred in the sum of S.R. 60,000/-. In the latter respect, the Court is left to decide on the issue of credibility of the witnesses as far as the exchange of consideration is concerned in the absence of the testimony of lawyer Wilby Lucas on medical grounds. Further, it was admitted also by the Defendants that albeit signing of the Transfer on the 29th day of January 2009, the document was left undated with lawyer Wilby Lucas who was to do the needful to date and register the document. They did not contest the non-physical presence of the Plaintiff in Seychelles on the 15th day of October 2009 neither of theirs.

[28] On the basis of the evidence of the Defendants which I consider was given with honesty and certainty as to the date of the signing by the parties of the Transfer and their presence before lawyer Wilby Lucas who endorsed the Transfer by means of his signature and seal of office I find no reason (albeit the absence of testimony of lawyer Wilby Lucas) to doubt the veracity of the evidence of the Defendants who maintained their versions of events throughout examination and strenuous cross-examination in contrast to the evidence of the Plaintiff which was uncertain and ever-changing and contradictory in terms of his knowledge of the Transfer and the existence of lawyer Wilby Lucas.

[29] The evidence of the Plaintiff shows that in January 2009 he was of sound mind and not blind and did visit lawyer Wilby Lucas in his Chambers (albeit for contested reasons as raised by the Plaintiff), which I hereby consider not plausible based on the whole of the evidence as analysed above.

[30] Needless to say, that the Transfer in question is an authentic document in terms of the provisions of Articles 1317 and 1319 of the Civil Code.

Section 1317 provides that:

“An authentic document is a document received by a public official entitled to draw-up the same in the place in which the document is drafted and in accordance with the prescribed forms.

Article 1319 provides that:

“An authentic document shall be accepted as proof of the agreement which it contains between the contracting parties and their heirs or assignees.

Nevertheless, such a document shall only have the effect of raising a legal presumption of proof which may be rebutted by evidence to the contrary. Evidence in rebuttal whether incidental to legal proceedings or not, shall entitle the court to suspend provisionally the execution of the document and to make such order in respect of it as it considers appropriate.”

[31] The legal presumption of proof referred in Article 1319 of the Civil Code lays a burden on the party who impugns the document in this case the Transfer to prove its falsity and in this case the Plaintiff. Such proof is to be administered by the Court subject to the rules of evidence.

[32] The Transfer has been signed before lawyer Wilby Lucas Attorney at Law and Notary Public as attested by contents of Exhibit P1. The contents of the authentic document/ Transfer clearly indicates at its penultimate part that: *"Signed by the said Louis Mick Bouchereau, Charles Jenny Bouchereau and Marie Eugenie Rose Mary Bouchereau who are known to me in my presence."* As admitted by the Defendants whose evidence I believe, the Transfer was not registered immediately as per the provisions of the Land Registration under the provisions of the Land Registration Act, but was done after the date of the signing of the Transfer in January 2009 by all parties. Non registration in my humble opinion cannot invalidate any contract of sale or any agreement for that matter. All agreements lawfully concluded shall have the force of law for those who entered into them. They shall be revoked except by mutual consent or for causes which the law authorizes. They shall be performed in good faith in terms of Article 1134 of the Civil Code. It follows therefore that based on the evidence as accepted before this Court, there arises a rebuttable presumption of law in favour of the genuine signature of the parties evidencing the transaction it embodies. As the maxim goes: *"That all legal acts are presumed to have been done rightly and regularly"*.

[33] Hence, as it would be evident, the evidential burden of proving the alleged illegality or invalidity of this authentic document exhibit P1 and rebutting the presumption in this respect lies with the Plaintiff as he is repudiating the validity of the contract of sale in toto. And I have illustrated through examination of the evidence of the Plaintiff and the Defendants above, of which the former I did not consider credible for reasons given, I find that the Plaintiff has failed to discharge the required evidential burden in this respect.

[34] It is also crucial to note that as regards the insertion of the date of the 15th day of October 2009 by lawyer Wilby Lucas who without contest

had possession of the Transfer prior to registration (and nothing was proven otherwise by the Plaintiff), the provisions of Articles 1582 and 1383 of the Civil Code are clear.

Article 1582 provides that:

“Sale is an agreement whereby one party binds himself deliver something and the other to pay it. The contract may be made by an authentic document or a document under private signature”.

Article 1583 provides that:

“A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid.”

[35] Analysis of the above-cited provisions of the Civil Code in the light of the evidence as believed credible by this Court as above-illustrated, it leads me to conclude firstly, that the Transfer of the Property namely Parcel H 6753 executed by the Plaintiff and the Defendants in Exhibit P1 was duly signed and dated by lawyer Wilby Lucas and registered with the Land Registry on the 13th day of January 2010 and is a valid transfer in the eyes of the law. Secondly, that the delay which occurred in the insertion of the date of the 15th day of October 2009 by lawyer Wilby Lucas and subsequent registration was explained clearly by the Defendants and this cannot invalidate or annul the sale as duly agreed upon and signed on the 29th day of January 2009 by the parties before the said lawyer Wilby Lucas.

[36] For the reasons stated hereinbefore, I dismiss the amended Plaintiff.

[37] Further, noting the close relationship of the parties and in an attempt to put closure towards any existing family estrangement given rise by

this matter and in the interest of justice noting more particularly the age of the plaintiff and his medical condition, I make no Order as to costs.

Signed, dated and delivered at Ile du Port on 27th day of January 2017.

Govinden-J
Judge of the Supreme Court