IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS125/2012

[2017] SCSC 326

Alexander Ugnich — Plaintiff

versus

1. Anna Lavrentieva
2. Nathalie Legg — Defendants

Heard: 27 September 2013 – 26 January 2017

Counsel: Joel Camille for plaintiff

Anthony Derjacques for defendant

Delivered: 3 April 2017

JUDGMENT

M. TWOMEY, CJ

[1] The Parties were married in 1998. Their relationship bore them four children. They holidayed in Seychelles frequently and in 2005, the first Defendant had a transfer of property at Les Cannelles, Mahé more fully known as Parcel C2914, executed into her name.

[2] It is the Plaintiff's contention that as a non-Seychellois he was unable to acquire the property and had the same transferred onto the First Defendant who is a Seychellois, on the basis that when he acquired Seychellois nationality he would be able to have the property transferred back to him.

[3] The Parties divorced in Russia in February 2012. It is a further contention of the Plaintiff, that following the institution of divorce proceedings in Russia in 2011, the First Defendant fraudulently transferred the property in which he had beneficial ownership, to the Second Defendant, the mother of the First Defendant to alienate his rights therein and deprive him of the benefit of his investment.

[4] The First and Second Defendants have filed a joint Statement of Defence in which they deny any fraudulent act and state that any agreement for the Plaintiff's retention of beneficial ownership in Parcel C2914 is illegal and against public policy and is therefore null and void.

[5] The matter was partly heard by my brother Karunakaran and given his inability to complete the case the parties opted for the evidence so far adduced to be adopted by this Court and also for the rest of the hearing to be completed by this Court.

[6] I took over the matter on 20 October 2016 and proceeded to hear the rest of the evidence on 26 January 2017.

[7] The evidence in this case was taken out of turn as the First Defendant testified before the Plaintiff, the reason being her availability to give evidence on 27 September 2013 while the Plaintiff who had also travelled to Seychelles for the purpose of the trial had left Seychelles just before that date after being informed by another sitting judge that the case was going to be adjourned due to the absence of Judge Karunakaran.

[8] Be that as it may, the First Defendant testified that after marrying the Plaintiff she gave birth to their four children in the United States and that the children continue to live with the Second Defendant, their guardian and custodian who was in the United States then and still resides there.

[9] It must be noted that in her Statement of Defence filed in January 2013, the First Defendant did not admit that she was divorced from the Plaintiff and put him to strict proof of the same. Yet, when she testified she herself produced the Certificate of Dissolution of Marriage (Exhibit D7) dated 30 January 2012. At that early stage this inconsistency affects the credibility of the First Defendant, since the function of evidence voluntarily adduced during the trial is to corroborate the facts as set out by the party in his/her pleadings.

[10] The First Defendant also produced a promise of sale in respect of Parcel C2914 dated 3 February 2005 between Harry and Margaret Savy and herself and the transfer deed in respect of the same dated 6 April 2005. She subsequently transferred the property to her mother, the Second Defendant on 25 March 2011 for SR 1. The Plaintiff's Counsel moved to have a restriction placed against the property on 18 September 2012.

[11] The First Defendant was adamant that the property in issue was gifted to her by the Plaintiff and that the purchase price was from a joint account held with a Swiss Bank. However, she could not produce any details of the transfer of funds, nor could she remember by how many instalments and for how much the instalments were for. She also stated that although the work for a swimming pool and a veranda was through an agreement between the Plaintiff and one Placide André, the contract price for the works was paid for from a joint account in Switzerland.

[12] She explained that the transfer of the property to her mother was by mutual agreement with the Plaintiff for the purpose of providing some financial security to the Second Defendant who was caring for their children.

[13] In his testimony, the Plaintiff stated that after his marriage in Russia in 1998 to the First Defendant he continued to visit Seychelles with the First Defendant at least twice a year. In 2005 he decided that instead of staying in hotels it would be best to buy a house. He had an account in his sole name with the UBS Bank in Switzerland and transferred Euro 375,000 to the account of Mr. Harry Savy and Euro 22,000 to the lawyer Serge Rouillon. He could not register the house in his name as he was still waiting for Seychellois citizenship so it was transferred in the name of his wife. He produced documentary evidence of the transfers of money.

[14] Learned Counsel for the Defendants objected to the oral evidence and documentary evidence of these transactions on the grounds that it breached the provisions of Article 1321(4) of the Civil Code. I overruled the objection and reserved my reason for so doing. I provide it now: the provisions of Article 1321(4) are not applicable to the oral evidence and documentary evidence produced as the registered agreement for sale being impugned in the present case is not one to which the Plaintiff is party or privy to.

[15] Article 1321(4) provides:

> *"Any back-letter or other deed, other than a back-letter or deed as aforesaid, which purports to vary, amend or rescind any registered deed of or agreement for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease or charge of or on the immovable property to which it refers."*

[16] Learned Counsel for the Defendants also relied on the authorities of *Guy v Sedwick* (2014) SLR 147 and *Adonis v Larue* (unreported) SCA 39/1999. In *Guy v Sedwick*, the Court of Appeal referred to the dicta of Ayoola J in *Ruddenklau v Botel* (unreported) SCA 4/1995 in which he stated:

> *"..[I]t is pertinent to observe that it is difficult to fathom what useful purpose article 1321(4) which, as has been seen in this case, is capable of producing harsh and unexpected results, is designed to serve... The clear and unambiguous provisions of article 1321(4) are so sweeping that it will be a daring and unnecessary piece of judicial legislation to restrict the effect of the nullity they declare of back-letters which offend the provisions of article* 1321(4) to third parties only while making them valid as between the parties."

[17] In *Guy v Sedwick* the Court of Appeal went on to state that:

"The addition of Article 1321(4) to our Civil Code therefore, further limits the admissibility of oral evidence under article 1341 insofar as contracts relating to immoveable property are concerned. In the light of the above, we hold that the following legal propositions should follow: 1. Back-letters are admissible against agreements (subject to certain conditions) except where these agreements concern deeds relating to immoveable property. 2. In such cases, a back-letter cannot be proved by oral testimony as it is a formal and not an evidentiary requirement. 3. Written back-letters are only admissible where they have been registered within 6 months of the making of the deed or agreement relating to immoveable property. The above falls in line with what is decided in the case of Hoareau v Hoareau [(unreported) SCA 38/1996]: It is only where the requirement of writing is only evidential that beginning of proof in writing and oral evidence can be accepted in substitution of writing."

[18] The authorities cited above continue to be good law until and unless the law is amended to temper the draconian provisions of the Civil Code but they can be distinguished from the present case. In the present case, the oral evidence being admitted is not against the transfer of sale to the First Defendant. That deed is not being impugned. Indeed it was intended that the property be transferred onto the First Defendant and the deed of sale correctly and officially witnessed this transaction. The oral evidence being objected to concerns the second transfer from the First Defendant to the Second Defendant.

[19] Hence, as was the case in *Aarti Investments Ltd v Padayachy and another* (unreported) SC 5/2012, there is no question of a simulation between the Plaintiff and the First Defendant in parallel to the overt transfer and registered deed. What is being impugned is the registered deed from the First Defendant to the Second Defendant for SR1, when there was no such agreement between the Plaintiff and the First Defendant and by which it would seem that the matrimonial home, albeit a holiday home, was being alienated to the detriment of the Plaintiff.

[20] In respect to that transfer to which the Plaintiff was not party, the oral evidence of the Plaintiff is admissible and was allowed.

[21] Counsel for the Defendant has also submitted that it would be against public policy to accept the evidence of the Plaintiff that there was an agreement between him and the First Defendant that she should transfer the property to him once he had acquired Seychellois nationality. I am unable to accept this proposition. It is not shown how he tried to circumvent the law or public policy by agreeing that his wife have the property transferred into her sole name.

[22] The Plaintiff has alleged that the transfer by the First Defendant to the Second Defendant of Parcel C2914 for SR1 is fraudulent. He has proved to the court that the transfer was by the First Defendant made after divorce proceedings were instituted in Russia. The transfer is for a pepper corn rate.

[23] Article 1116 of the Civil Code provides:

> *"Fraud shall be a cause of nullity of the agreement when the contrivances practiced by one of the parties are such that it is evident that without these contrivances, the other party would not have entered into the contract. It must be intentional but need not emanate from the contracting party.*
>
> *It shall not be presumed it must be proved."*

[24] In *Labonté v Bason* (unreported) SCA14/2005), Domah J stated that in cases where fraud in a transaction is alleged, after the party alleging the fraud has provided evidence of the fraud, the burden shifts onto the other party to show that they were purchasers in good faith and for value. He added that where fraud is established and not rebutted, the transaction will be declared a nullity. So much for the procedure.

[25] I have to decide whether evidence of fraud was adduced. I have already referred to the fact that, an expensive villa (to all extents and purposes) with swimming pool and sea views valued at USD850, 000 (see Exhibit P2) was transferred for SR1. And that the transfer was while divorce proceedings were being conducted in Russia and matrimonial property being divided between the parties.

[26] The credibility of the First Defendant was already at issue in her non-admittance of the divorce and then her own subsequent production of the divorce certificate at trial.

Further, her ignorance of the details of the transfer of the monies and the mode of payment for the property, her refusal until cross examination in accepting that she and her ex-husband had visited properties together before they settled on the one at Les Cannelles are all examples of her untruthfulness.

[27] She also states that the house was a gift from her husband while at the same time stating the money for its purchase was from a joint account she held with her husband.

[28] I also do not accept her version of the facts that she decided together with her ex-husband to sell the property to give her mother security. That statement is completely illogical. She admits that she is renting out the property and I do not see how her mother is less secure by that fact. Nor do I accept that she advertised the property for sale only to seek its value. A property valuer could have told her what the value was; in any case why did she want to know the value of the property if not to sell it.

[29] The Second Defendant did not testify. On a question by the Court on this issue as to whether the Second Defendant was adopting the evidence of the First Defendant Counsel answered in the affirmative. This does not however amount to evidence capable of rebutting the allegation of fraud which has been alleged. There is clearly bad faith on both Defendants.

[30] This case is on all fours both on facts and law with that of *Labonté* (supra). On the facts Domah J in that case stated:

> *"She knew of the husband's equity in the property both by virtue of his total contribution for its purchase, by its status as a matrimonial home and the fact that it was being occupied by the respondent. She chose to dispose of it in complete disregard of those rights on the eve of her flight by night. She left default in the case below. Accordingly the learned Judge had unrebutted evidence of her "dol" involving her brother and sister-in-law to whom the property was sold not at the open market value"* (parag 6).

[31] On the law, the learned appeal judge cited Dalloz:

> *"Dans les rapports entre les parties avec des tiers, la mauvaise foi du débiteur qui entre en collusion avec un tiers pour se soustraire à l'éxécution de ses obligations constitue une fraude qui entache son acte de nullité…"* Encycl. Dalloz, Vol. I. Bonne Foi, § 21.

[32] According to Lord MacNaghten in *Reddaway v Banham* [1896] A.C. 199:

> *"[F]raud is infinite in variety. Sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it."*

[33] I have no difficulty in concluding that this audacious and unblushing act on the part of the First Defendant in transferring the matrimonial property to the Second Defendant is a fraud on the right of the Plaintiff and I so find.

[34] In the circumstances I also find that the second transaction, that is the sale of Parcel C2914 by the First Defendant to the Second Defendant, is a nullity and I hereby issue such notice to the Land Registrar.

[35] The Plaintiff has claimed for loss of the property, the villa and the swimming pool. Given my decision those particulars are not claimable. I do not grant him any damages for breach of agreement either given my final order below. I do however grant him damages in the sum of SR50, 000 for inconvenience, anxiety and distress and the costs of this suit against the two Defendants.

[36] I need to point out that the Court cannot at this stage grant the prayer of the Plaintiff to transfer the property into his sole name. Essentially this is relief claimable under the Matrimonial Causes Rules. He will have to register his divorce in Seychelles and file a claim for ancillary relief as regards the matrimonial property in Seychelles. It is in those circumstances that he may then as a non-Seychellois attract the dispensation from government sanction for the transfer of the property under section 3(1)(a) of The Immoveable Property(Transfer Restriction) Act 1963 as amended.

[37] In the circumstances I make the following Orders:

1. The Land Registrar is directed to transfer Parcel C2914 back into the name of Anna Andreevna Lavrentieva and to maintain the restriction on the said title until further order of this Court.

2. The Defendants are jointly and severally ordered to pay the Plaintiff SR 50,000 damages together with costs of this suit.

Signed, dated and delivered at Ile du Port on

M. TWOMEY
Chief Justice