

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: 11/2015 and 12/2015 consolidated.

[2017] SCSC 780

Linda Katz	Plaintiff
versus	
Michelle Ward	First Defendant
Natalie Weller	Second Defendant

Heard: 8, 9, 11 May 2017 and 14 June 2017.

Counsel: Mr. Frank Ally for the Plaintiff
Mr. Frank Elizabeth for the Defendant

Delivered: 4 September 2017

JUDGMENT

M. TWOMEY, CJ

Background

[1] The parties were siblings, the daughters of one Gabriel Richmond Brendan Hoarau who died on 12 December 2009 (hereinafter the Deceased) and the two present suits brought by the Plaintiff concern the estate of the Deceased. The Defendants are the executrixes of the Deceased's estate.

[2] It is not disputed that at the time of his death the Deceased owned land at Anse Bazarka namely Parcels T3356, T3357, T3358, T3359, T3360 and T3361 which had been subdivided from a parent parcel, namely T1985.

- [3] In a judgment by consent dated 26 January 2015 and entered as a decision of the Supreme Court in CS 33/2014, the parties' shares in the Deceased's estate were established as 18.75% in each of the properties to the Plaintiff and 27.0833% in each of the properties to each Defendant and another sibling, one Deborah Gaitanou.
- [4] In the Plaintiff of CS 12/2015, the Plaintiff averred that she had entered into a written agreement with the Deceased on 25 April 2002 (Exhibit P. 17) in which he had agreed to sell and transfer a parcel of land of about two acres (to be distracted from Parcel T1985) to her for Pound Sterling 20,000. It was a term of the agreement that the Plaintiff would pay Pound Sterling 5,000 on the signature of the agreement and that after the distraction and transfer of the said parcel to her she would pay a further sum of Pound Sterling 15,000 to the Deceased.
- [5] The Deceased passed away before the contract could be effected and the Plaintiff claims that the Defendants are obliged as executrices of the Deceased's estate to fulfil the agreement he concluded with her.
- [6] Further, in the Plaintiff of suit CS 11/2015, the Plaintiff avers that the Defendants ought to fulfil their duties in terms of the distraction and transfer of the property as per the agreement with the Deceased and to distribute the remainder of the estate in accordance with the rules of intestacy and the terms of the judgment by consent where their respective shares are set out by the court.
- [7] In both suits the Defendants deny that such an agreement was ever made, that it was forged, and that in any event it is prescribed by law. They claim that the Deceased had divested himself of ownership of the property before his death by a will dated 17 October 2009. They further claim that in any case it was in the best interests of all the heirs that the property should be sold and the proceeds distributed to the heirs in accordance with their respective shares as established.

The Issues to be determined by the Court

- [8] The Parties articulated the issues to be decided by the Court as follows:

1. Was there an agreement between the Deceased and the Plaintiff to distract and transfer two acres of land from Parcel T1985 to the Plaintiff?
2. If so, should the subdivisions to Parcel T1985 made subsequent to the agreement be cancelled?
3. If the agreement between the Deceased and the Plaintiff is valid how should the Defendants now distribute the estate?

The Evidence

- [9] The Plaintiff testified that she brought the actions against the Defendants in their capacity as executrices of their father's (the Deceased) estate. When he passed away he owned Parcel T1985 which comprised about 10 acres of land. The same has since been subdivided into six plots. None of the parcels have been transferred to anyone although the Defendants have indicated that they want to sell them. She did not want her share of the land transferred as she had since 1991 indicated her intention to return to Seychelles to live. She has secured her interest in the land by registering a caution thereon.
- [10] It was also her case that prior to the written agreement with the Deceased, she had orally agreed to purchase two acres of land from the Deceased. She had further agreed to construct at her own cost a water reservoir and a road running from the main road through about three acres of Parcel T1985 and that these easements would be granted to her by the Deceased once the subdivision of the land had been effected. She also had signed a promise of sale on 19 February 2002 with the Deceased to this effect.
- [11] The Deceased had to obtain permission from his siblings to construct the road as it traversed some of their land. Such permission was obtained and the construction agreed. She had enjoyed a close relationship with her father who had lived with her in Eastbourne and then had subsequently moved back to Seychelles. He had also assisted her in buying her first flat in Putney, London and when she sold it in 2000 she had given him Pound Sterling 20,000 from the proceeds. Her father had been a declared bankrupt and had lived in her husband's flat which was also shared by the First Defendant and sometimes would also live with her.

- [12] She had given her father a cheque at the signing of the contract but he had mislaid it. She had then transferred Pound Sterling 5,000 telegraphically through his lawyer, Bernard Georges. She supported this testimony with the duplicate copy of the telegraphic transfer dated 27 May 2002 (Exhibit P 9). She had deposited the remainder of the purchase price in anticipation of the completion of the contract with her solicitors Berger Oliver on the 19 February and 22 February 2002.
- [13] She had travelled to Seychelles on 19 April 2002 with a friend to ensure that the oral agreement was reduced in writing. The contract was signed by herself before Mr. Bonté, who was her attorney at law and in the presence of Mr. Bernard Georges (the Deceased's attorney-at-law). She was then asked to go for coffee and to return after the Deceased had signed the same in order to collect a copy of the agreement which she did. She now only had a certified true copy of the agreement in her possession as Mr. Bonté had undertaken to have the same registered and had done so but had only retained an office copy which he had subsequently given to her.
- [14] It was also her evidence that she had spent over USD 95,000 (SR506, 624.20) for the road on the land but for which she had invoices for only that amount (Exhibit P 14).
- [15] In cross examination, she stated that her plans had been to build two houses, one for herself and her father to reside in and the other for renting so that she and her father could live off the income. She had however not been able to make contact or spend time with her father on her visit to Seychelles. She was grieving for her husband who had just passed away and she wanted to honour a promise she had made to her husband to have the agreement signed to secure their investment.
- [16] Previous to that, the Deceased and she had met the surveyor in January 2001 to execute the survey work for the subdivision and road as planned in their oral agreement of 1991 but then the Deceased had left Seychelles and the planning application for the same had not materialised. However, a letter from Mr. Bernard Georges, the Deceased's attorney in November 2002 (Exhibit P16), did state that he was expecting the subdivisions and retrospective planning permission for the road which had been built to be completed by December 2002.

- [17] In the end the reservoir was constructed in May 2001 and the road construction completed at the end of July 2001.
- [18] She wrote to the Deceased in 2003 and gave the letter to the Second Defendant to pass on to him. She also wrote personally to the Second Defendant as she had been very close to her. In the letter which she wrote a few weeks before her husband died, she suggested that the land be given to her officially as her inheritance. She explained the circumstances in which the statement by her father was made asking for a further Pound Sterling 30,000 in order to sign the agreement. In his estimation he wanted to give Pound Sterling 10,000 to each of his other three daughters to compensate them for the fact that the parcel he was ceding to the Plaintiff was beachfront property.
- [19] She agreed that the Deceased had stopped talking to her after April 2002 probably because he was offended by being asked to sign the agreement to confirm what was agreed orally. She categorically denied forging her father's signature on the agreement.
- [20] Mr. France Bonté, attorney and notary testified. He confirmed that both the Deceased and the Plaintiff had signed the contract dated 25 April 2002 (Exhibit P. 17) and that he had it registered as was evidenced by the transcription in the Land Register dated 8 May 2002 (Exhibit P.24). He stated that the Deceased and Plaintiff had not signed the contract in each other's presence because they were at loggerheads. He stated that the agreement was that a two-acre beachfront plot would be carved out of the whole property and transferred to the Plaintiff. He understood that money had previously been paid by the Plaintiff and the Defendant then refused to proceed with the sale. Mr. Georges intervened to settle the disagreement.
- [21] Mr. Terry Biscornet, an urban planner and consultant to the Planning Authority testified. He recalled a subdivision application made in November 2001 by the Deceased which was partly processed by the Authority. When further information was requested from the owner regarding access to the property and this was not forthcoming, the application lapsed. The agent acting as surveyor for the Deceased was Mr. Leong from G and M Surveys. The application was to divide the land into two plots – one abutting the road and

the beach comprised 7,560 square metres (about 2 acres) in size, and the other, the remainder of the land.

- [22] In 2009, there was a further application for the subdivision of Parcel T 1985 into 6 plots by the Deceased and approval was granted on 11 August 2009. These subdivisions were registered on 5 September 2012.
- [23] The Second Defendant also testified. It was her case that the Plaintiff was not included in the Deceased's will as they had been at loggerheads. Subsequently it was agreed that the Plaintiff would be entitled to 18.75% of the property. She had not been aware of the agreement between the Deceased and the Plaintiff. It was the Deceased's wish and that of hers and her sisters' that all of the land in Deceased's estate be sold as it was unrealistic to keep it. She did not think it possible to conveniently divide the land between the heirs as the division would be unequal and unfair.
- [24] She had witnessed the Plaintiff forging the Deceased's signature on many occasions. She could not in any event trace the Pound Sterling 5000 in her father's account that had been paid by the Plaintiff.
- [25] In cross examination, she stated that she was not aware of the agreement between the Plaintiff and the Deceased. It was her testimony that the road on the estate had been built by the Deceased from his own means. He had raised the money, Pound Sterling 20,000 from his share in the proceeds of sale of a flat in Eastbourne. This money was changed on the black market to raise more rupees for the construction of the road.
- [26] After her father's death she had not contacted his lawyer, Mr. Georges. She agreed that it was her father's intention to sell the lower part of the property. A Mr. Walsh wanted to develop the bottom part of the property but this did not materialise.
- [27] She stated that there are debts and expenses of about Pound Sterling 15 to 20,000 in relation to the Deceased's estate and that the property would have to be sold for the debt to her to be repaid.

[28] She admitted that she had on dictation from the Deceased typed a fax to Bernard Georges asking for his Pound Sterling 5,000 but this could have been for a jeep that Mr. Gorges was selling for him.

[29] Mrs. Carol Hoareau also testified. She had previously been married to the Deceased. During the time she was separated from her husband she remained a partner in business with him. They were both signatories to the accounts of the business. She witnessed the Plaintiff signing cheques using the Deceased's signature on many occasions.

[30] In cross examination she admitted that she was not close to the Plaintiff. She had worked for the Plaintiff's company but her employment had suddenly ceased as had her income.

Discussion and findings

[31] I now turn to the issues to be decided in this case.

Issue 1

1. Was there an agreement between the Deceased and the Plaintiff to distract and transfer two acres of land from Parcel T1985 to the Plaintiff?

[32] It is pertinent at this stage to bring to view the salient terms of the contested written agreement between the Parties, namely:

"1. The vendor is agreeable to sell, subject to permissions for the subdivision being granted, a parcel of land of the approximate extent of two acres to be extracted from Parcel T1985 at Anse Bazarka on the following terms:

2. The purchase price is Pound Sterling Twenty Thousand (20,000). A deposit of Pound Sterling 5,000 will be paid on signing of this agreement and the balance of Pound Sterling 15,000 will be paid forthwith upon signature of the instrument of transfer of the parcel."

[33] Article 1134 of the Civil Code of Seychelles provides generally for the effects of obligations as follows:

“Agreements lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorises.

They shall be performed in good faith.”

[34] Barry Nicolas states in “The French Law of Contract” that:

“The conventional treatment of the obligatory force of the contract deals with it first as between the parties and then as regards the judge.”

[35] Hence, of paramount importance in the law of contract is the recognition of the principle that as between the parties their wills are autonomous and the obligatory force of their agreement must be given effect. The court is therefore bound to interpret the terms of the contract as concluded by the parties. In the event of a conflict between the parties as to their intention as expressed, it is the contract that prevails (*Ladouceur v Bibi* (1975) SLR 278).

[36] The Plaintiff’s evidence is supported by the evidence of Public Notary France Bonté and the registered agreement transcribed in the Land Register dated 8 May 2002 (Exhibit P.24). It is further supported by the evidence of Mr. Biscornet that there had been an application for a subdivision of Parcel T1985 to extract from it two acres of beachfront land. It is further supported by the letter of the Deceased’s own attorney Mr. Bernard Georges, that the subdivision would be completed by December 2002. There is further support of the agreement by the fact that a deposit of Pound Sterling 5000 was transferred by the Plaintiff and the fact that the remainder of the purchase price was held in escrow in the account of her lawyers Berger Oliver.

[37] Against this formidable evidence the Defendants claim that the Plaintiff forged the Deceased’s signature on the agreement and that she had in any case been used to forging his signature.

[38] 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.”

[39] *Hoareau v Hoareau* (1984) SLR 108 and *Albert v Rose* (2006) SLR140 are authorities for the principle that there is a presumption in cases of authentic documents that what is contained therein denotes the agreement and is proof of the agreement. In *Ladouceur (supra)*, Sir George Souyave C.J. explained that there were two rules that qualified the court’s recognition of a freely negotiated agreement between parties, namely:

“(a) the rule that the correctness of the statements recorded in a notarial deed and attested by the notary can only be impugned by the procedure of “*inscriptio falsi*” as required by Article 1319 of the Civil Code

(b) the rule of non-admissibility of oral evidence against or beyond the contents of a deed or as to what is alleged to have been said before, at the time of or after the drawing of the deed (Article 1341)”

[40] Insofar as the principles above are concerned, the Plaintiff’s Counsel did not object to oral evidence being produced against the notarial document but did challenge the Defendant’s evidence of forgery by the Plaintiff.

[41] The legal presumption of proof referred in Article 1319 of the Civil Code imposes a burden on the party who impugns the document, in this case the promise of sale, to prove its falsity. Article 1116 of the Civil Code provides that fraud shall not be presumed but must be proved. Hence, positive evidence must be adduced in such cases (*Hoareau v Hoareau* (2011) SLR 47. Such proof is to be admitted by the Court subject to the rules of evidence.

- [42] In this context, it is trite that it is the duty of the parties to prove their case and the standard in civil cases is on a balance of probabilities if they are to succeed. However, where fraud is alleged a higher degree of probability is required but not so much as is necessary in a criminal case (*Renaud v Ernestine and anor* [1979] SLR 121, *Bason v Bason* (2005) SLR 129).
- [43] There is no positive or direct evidence on the threshold of proof required that the Plaintiff forged the document. The only evidence bought by the Defendants is that the Second Defendant and her mother on separate occasions witnessed the Plaintiff previously forging the signature of the Deceased on cheques. This circumstantial evidence is not only self-serving but is also well under the standard of proof required to prove forgery and to challenge an authentic document. There is in the circumstances no proof of the allegation of fraud by the Defendant but only of the speculative belief of the Second Defendant. I am therefore not persuaded by this evidence.
- [44] In these circumstances the authentic document continues to have validity and full effect. On the first issue to be decided, that is, as to whether there was an agreement between the Deceased and the Plaintiff to distract two acres of beachfront land from Parcel T1985 and transfer the same to her I find the answer to be yes.

Issue 2

- [45] To the question therefore, as to should the subdivisions made subsequent to the agreement be cancelled, the answer is also yes.

Issue 3

If the agreement between the Deceased and the Plaintiff is valid how should the Defendants now distribute the estate?

- [46] As I have already stated above, the Civil Code of Seychelles is categorical about obligations arising from lawfully contracted agreements; they are binding. In relations to sales, Article 1582 provides that:

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

[47] It is also the law of Seychelles that a promise of sale is equivalent to a sale (Article 1589 of the Civil Code). Article 1583 also 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.”

[48] *Hoareau v Gilleaux* (1978-1982) SCAR 158, is authority that when the parties have agreed on the thing and the price, a promise to sell property subject to registration, is complete and effective as between the parties. In the present case, given the fact that the promise of sale was registered, not only was the promise of sale binding between the Plaintiff and the Deceased and his heirs and assignees but also to third parties.

[49] In closing submissions the Defendants raise two legal issues: that the action is prescribed by law and that the agreement of 25 April 2002 would amount to a *donation déguisée*.

[50] Insofar as prescription is concerned, as is submitted by the Plaintiff’s Counsel, the promise of sale concerned immovable property, such actions are categorised as real actions and the real rights therein are only prescribed by the twenty year limitation rule (Article 2262). I need not therefore explore other arguments and submissions on this issue.

[51] In regard to the Defendants’ Counsel’s submission on the promise of sale amounting to a *donation déguisée*, no evidence on this issue was adduced nor was it pleaded. It is therefore clearly *ultra petita* and cannot be considered by the court.

[52] Having found that the agreement to sell was valid, I find in answer to the question of how the estate should be divided as follows: after distraction and transfer to the Plaintiff of the two acre beachfront or road front property as agreed in the promise of sale of 28 April 2002, the remainder of the estate is to be divided among the four heirs of the Deceased in

the proportions as agreed in the judgment be consent dated 26 January 2015 and entered as a decision of the Supreme Court in CS 33/2014, that is 18.75% to the Plaintiff and 27.0833% each to the two Defendants and Debra Gaitanou.

Orders of the Court

[53] As concerns the prayers of the two consolidated plaints I make the following orders:

1. The subdivisions of Parcel T1985 into Parcels T3356, T3357, T3358, T3359, T3360, and T3361 are declared cancelled with notice of this cancellation to both the Planning Authority and the Registrar of Lands.
2. The Survey Division of the Planning Authority is hereby ordered to survey parcel T1985 in accordance with the application lodged to their department in November 2001, that is, to distract 7,560 square metres from the same as indicated in the application with a right of way demarcated.
3. The Registrar of Lands is thereafter ordered to register the subdivided parcel of land distracted from Parcel T1985 in the name of the Plaintiff, Debra Katz after proof of payment by the Plaintiff to the Defendants of the sum of Pound Sterling 15,000; and to register a grant of easement to the water supply and the right of way as demarcated in the survey plan and in accordance with the registered Agreement dated 25 April 2002.
4. Upon the completed survey distraction and transfer of the subdivided plot of land from Parcel T1985, the Defendants as Executrices of the Estate of the late Gabriel Richmond Brendan Hoarau (the Deceased) are ordered to proceed to distribute the Deceased's estate in accordance with the decision of the Supreme Court in CS 33/2014, that is 18.75% to the Plaintiff and 27.0833% each to the two Defendants and Debra Gaitanou.

5. The Defendants are ordered to pay the costs of this suit.

Signed, dated and delivered at Ile du Port on 4 September 2017.

M. TWOMEY
Chief Justice