IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 96/2016

[2018] SCSC 429

STANLEY LESPERENCE
Applicant

versus

CLIFFORD RADEGONDE
ROSANA MARIE
Respondents

Heard: 10, 11 August, 16 October 2017, 7 February, 2018.

Counsel: B Julie for Applicant

V Gill for Respondents

Delivered: 4 April 2018

JUDGMENT

Dodin J

[1] The Applicant Stanley Lesperence, filed an application for a *Writ Habere Facias Possessionem* to be issued by this Court against the Respondents Clifford Radegonde and Rosana Marie who are occupying a portion of his land, parcel PR4568, situated at Baie Ste Anne, Praslin. The Respondents in their affidavit in reply maintained that they were

given written permission by the Applicant over 20 years ago to build a dwelling house on the Applicant's land without any restriction which has permitted them to build the house and have peaceful enjoyment for the rest of their lives. They took two loans to build the house of corrugated iron sheets and bricks. They admitted that their daughter is living in the house allocated to them by PMC. They claim further that the Applicant is prescribed from removing them or if they are removed, that the Applicant pays them compensation so that they can rebuild their house elsewhere.

[2] At preliminary hearings, it was agreed by the parties that a ruling need not be given on the injunction on the undertaking of the Respondent not to do anything further in respect of the extension until the determination of the Court on the application for ***Writ Habere Facias Possessionem.*** Secondly that the case will be heard fully with calling of witnesses and locus in quo to ascertain the real state of affairs between the parties instead of relying on affidavit evidence.

[3] The Applicant and his partner Cecile Ladouceur both testified that sometime in 1994 or 1995 the Applicant gave verbal permission the 2nd Respondent to build a temporary corrugated iron sheet and wooden house on his property. They testified that the 2nd Respondent who was hitherto living on the property of one Mr Walter Green, was being evicted by Mr Green and she had nowhere to go. The Applicant was approached by the then member of National Assembly for Baie Ste Anne, Mrs Mitzie Larue for temporary assistance until the Property Management Corporation (PMC) allocated the 2nd Respondent accommodation at Moulinie Estate.

[4] The Applicant and her partner testified that some years later they enquired about whether the Respondents had been allocated accommodation as promised as they had planned to build 2 bungalows of 2 bedrooms each on the property and the project was ready. They were then informed by Mrs Gendron from PMC that the 2nd Respondent had been allocated a house at Moulinie Estate but that she is refusing to move in. They then instructed their lawyer to write to the Respondents giving them notice to vacate the premises. However immediately after the letter was sent the 1st Respondent started to threaten the Applicant and on one occasion chased the Indian workers clearing the boundaries with a machete.

[5] The Applicant and his spouse testified that he wrote to the Rent Board and was given a date to appear but no further evidence was adduced as to what happened subsequent to that. The Applicant and his partner further testified that a few years ago the 2nd Respondent came to the Applicant's garage and asked the Applicant for permission to extend the house which the Applicant refused by telling her to go to his lawyer, Mr Shelton Jolicoeur. Sometime later when the Applicant noticed that the Respondents were building and extension to the house in bricks. That is when they came to Court to file for injunction and *Writ Habere Facias Possessionem* and for the case to be heard as a matter of urgency. The Applicant and his partner testified that the only condition that was put to the parties at the time when the Applicant agreed to allow the 2nd Respondent to build on his property was that she would build a corrugated iron sheet house and occupied the same until she is allocated her house at Moulinie Estate.

[6] Mrs Anne Marie Gendron, customer services manager of PMC testimony corroborated the testimonies of the Applicant and Cecile Ladouceur that the Respondents had applied for housing assistance and on 16th June 2008 they were allocated a 3 bedroom house at Moulinie Estate which they are paying for. However to date despite several intervention by PMC the Respondents have refused to move into the house giving several excuses as to why they were not ready to move into their house. PMC has learned however that their daughter is living in the house and steps are being taken to revoke the housing purchase agreement with the Respondents unless they occupy their house.

[7] In her testimony, Ms Rosana Marie contradicted herself throughout and testified contrary to her own affidavit in reply. She admitted that there was no written agreement with the Applicant and she never produced any evidence of loan taken to construct the house. She testified that the Applicant gave her permission to build the house because she had worked with him and he had baptised her son and no condition as to when she would leave was made. She admitted that she was allocated a house at Moulinie Estate but maintained that it was her daughter Maria who had applied for a loan to purchase the house. When it was pointed to her in cross-examination that based on the date the house was allocated, Maria was only 16 years old and attending post-secondary school on Mahe, she admitted that herself and her partner made the application.

[8] She further admitted in cross-examination that the Applicant specifically told her to build a house with corrugated iron sheets. She maintained that only the kitchen was partly made of bricks and that the extension which they were building without permission of the Applicant had been stopped until the determination of the case. She further testified that she never received any letter from the Applicant's lawyer to vacate the property and that PMC has never contacted her about the house at Moulinie Estate. She testify that the Applicant wants her to move out because he wants to sell his property and does not want to sell her the portion where she has constructed the house. She testified that in the event she has to vacate the Applicant's property, the Applicant should pay her compensation in the sum of SCR 500,000 for the construction and for keeping the property clean.

[9] Learned counsel for the Respondents in her submission asked the Court to determine:

i. Whether the Respondents have a right to occupy the house as lessees;

ii. Alternatively, whether they have the right to occupy the house as *superficiaire*

iii. Whether prescription has been interrupted; and

iv. Whether the Respondents have a serious defence to make to the *Writ Habere Facias Possessionem*

[10] Learned counsel submitted that the Respondents have been in occupation of the property for more than 20 years as lessees and hence have a serious defence to the writ. Learned counsel submitted that alternatively, the Respondents have *a droit de superficie* as they were not trespassers or squatters, they were given permission to be there "with a clear heart" and they built their house in good faith. Learned counsel submitted that the Respondents have been in occupation for over 20 years without interruption until they were served summons to come to Court. Therefore they have a good defence which gives them reasonable cause to be on the property and therefore serious defence to the *Writ Habere Facias Possessionem.* Learned counsel moved the Court to dismiss the application with costs to the Respondent.

[11] Learned counsel for the Applicant submitted that the Respondents have not provided any valid defence to the *Writ Habere Facias Possessionem.* That the Respondents did not even provided any defence to the evidence adduced by PMC that they were allocated a

house which they are not occupying. That the Respondents only assertion is that the Applicant wants to sell the land and they want the right to buy their portion or be compensated which in any event is not pleaded. Learned counsel referred the Court to the letters written by lawyers to the Respondents and by PMC to the Respondents, all of which the 2nd Respondent maintained that she never received, maintaining that throughout, the Applicant has been acting in good faith whilst the Respondent have been acting in bad faith and not showing any gratitude for the assistance they have received from the Applicant.

[12] Writ *Habere Facias Possessionem*, a Latin term meaning *"that you cause to have possession"* is the name of a writ of execution in an action of ejectment. It gives a successful Applicant the possession of the recovered land unless the Respondent shows that he has a lawful defence to be on the property. In the case of *Veronique Servina, nee Desaubin v Julita Hoareau C. S 213 of 2009* Egonda-Ntende C.J. quoting Bwana J. who in the case of *Maryliane Nolin v Nelson Samson Civil Side No. 171 of 1996 (unreported)* stated:

> *"It is the law that a Writ Habere Facias Possessionem is granted in the following three aspects-*
>
> *i. To eject a person occupying property merely on the benevolence of the owner, or if he is a trespasser. Such person has neither title nor right over the property.*
>
> *ii. If it is the only legal remedy available.*
>
> *iii. If the respondent has no serious defence to make. Should there be one, then the writ is not granted. Instead, the parties are left to resolve their dispute in a regular action."*

[13] See also the case of *Mary Dubignon V Antonio Mann- Civil Side No: 9 of 1999***,** which provided for the followings:

1. *"The Court in granting the writ* Habere Facias Possessionem *acts as a Court of equity rather than a Court of law, in exercise of its equitable powers conferred by Section 6 of the Courts Act- Cap52.*

2. *The one who comes for equity should come obviously, with clean hands. There should not be any other legal remedy available in law to the applicant who invokes an equitable remedy.*
3. *An equitable remedy is available to the applicant whose need is of an urgent nature and any delay in obtaining the remedy would cause irreparable loss, hardship, or injustice to him.*
4. *Before granting the Writ Habere Facias Possessionem , the Court should be satisfied that the respondent on the other hand has no serious defence to make; and*
5. *If the remedy sought by the applicant is to eject a respondent occupying the property merely on the benevolence of the applicant then that respondent should not have any lawful interest, right or title over the property in question."*

[14] I first consider whether the Respondents are lessees. Section 2 of the Control of Rent and Tenancy Agreements Act gives the following distinct definitions of lease and rent;

> *"lease" includes the use and occupation of a dwelling house and "sub lease" and "letting" having a corresponding meaning;*
>
> *"let" includes sublet;*
>
> *"lessee" includes a sub lessee and a widow of a lessee or sub lessee, as the case may be, who was residing with him at the time of his death, or, where the lessee or sub lessee leaves no such widow or is a woman, such member of the lessee's or sub lessee's family so residing as aforesaid as may be decided, in default of agreement, by the Board, and also includes any person enjoying the use and occupation of a dwelling house for which an indemnity is payable or not;*
>
> *"Lessor" means any person who receives or is entitled to receive rent in respect of the letting or sub letting, as the case may be, of a dwelling house, and also includes any persons who allows another person to enjoy the use and occupation of a dwelling house for which an indemnity is payable or not, a sub lessor and any person deriving title from the original lessor;*
>
> *"rent" means any money paid or received in consequence of the letting of a dwelling house and shall include any sum paid for the use or hire of furniture;*

[15] Section 3 states the application of the Act.

> *3. This Act shall apply to a house or part of a house let as a separate dwelling and every such house or part of a house shall be deemed to be a dwelling house to which this Act applies:*
>
> *Provided that*
>
> *(a) this Act shall not, save as otherwise expressly provided, apply to a dwelling house bona fide let at a rent which includes payments in respect of board and attendance; and*
>
> *(b) any land or premises let together with a dwelling house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling house; but save as aforesaid, this Act shall not by virtue of this section apply to any dwelling house let together with land other than the site of the dwelling house; and*
>
> *(c) this Act shall not apply to houses which the Minister may by notice in the Gazette declare not to be affected by the provisions of this Act.*

[16] This section provides cover for the letting of a building or part thereof and extends to land only where such land is agricultural land exceeding two acres in extant and treated as part of the dwelling house. This arrangement between the Applicant and the 2nd Respondent clearly falls outside the provisions of the Control of Rent and Tenancy Agreements Act. This is more akin to an agreement to build with conditions. The conditions were that the building be constructed with corrugated iron sheets and to be occupied until the Respondents were allocated a house at Moulinie Estate. The Respondents therefore cannot claim to be lessees and do not qualify to be treated as such under the Control of Rent and Tenancy Agreements Act.

[17] On the contention as to whether the Respondents have a *droit de superficie* as they were not trespassers or squatters as they were given permission to be there "with a clear heart" and they built their house in good faith, I find this contention untenable in the face of the evidence. The evidence is uncontroverted that the Respondents were given permission to build only a temporary structure of corrugated iron sheets which for all instance and purposes not be a permanent structure on the land. Such construction cannot give any right to land or be considered to be a structure permanently attached to land. Secondly, the evidence showed that whilst the Applicant gave permission in good faith, there was

never any good faith on the part of the Respondents who attempted to extend the structure with bricks without the consent of the Applicant. The contention that the respondents have the right to occupy the house as *superficiaire* is therefore devoid of any basis and cannot be sustained. I reject the same accordingly.

[18] I now consider whether prescription is applicable to this case. Prescription is the acquisition or extinction of rights by lapse of time. Article 2262 of the Civil Code of Seychelles allows for prescription to be pleaded in relation to land occupied for a period of 20 years without interruption. The Article states as follows:

> *"All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not."*

[19] However this Article must be read subject to the other Articles of the Code namely Article 2229 which provides:

> *"In order to acquire by prescription, possession must be continuous and uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of an owner"*.

[20] Article 2232 which states:

> *"Purely optional acts or acts which are merely permitted shall not give rise to possession or prescription*".

[21] Article 2257:

> *"The prescription shall not run:*
>
> *With regard to a claim which is subject to a condition, until that condition is fulfilled;*
>
> *With regard to an action for warranty, until the eviction has been effected;*
>
> *With regard to a claim maturing on a fixed date, until such date arrives."*

[22] A person can only claim prescription as a defence if that person has occupied the land of another without the consent of that person and without interruption of the occupiers' peaceful occupation for a period of at least twenty years. This is not the case here. The

Respondents were granted permission to be on the land for a specific period and until the Applicant revoked his consent to their presence they were not in occupation without the consent of the Applicant. Hence time does not begin to run until then. The evidence shows and the 2nd Respondent admitted in her testimony that they moved onto the land with the oral permission of the Applicant and that as late as 2016 when she wanted to extend the building, she went to seek the permission of the Applicant to do so. Even if the 2nd Respondent denied having received any letter from the Applicant's lawyers or from PMC, her action tells a contrary state of affairs. The Respondents therefore has no defence of prescription and can therefore make no such claim.

[23] Having heard the evidence as rehearsed above in support to the parties respective positions, I am satisfied that the Applicant has been truthful and consistent throughout his pleadings and testimony and the same can be said of the Applicant's witnesses. The same cannot be said of the 2nd Respondent's testimony which was inconsistent and clearly contradicted the Respondents' pleadings. I find that the Respondents have no serious defence to the application for a *writ habere facias possessionem.* I further find that the Respondents are occupying the property merely on the benevolence of the Applicant and hence the Respondents do not have any lawful interest, right or title over the property in question.

[24] I therefore issue a Writ Habere Facias Possessionem as prayed for in favour of the Applicant ordering the Respondents to quit, leave and vacate the Applicant's land, namely a portion of parcel PR 4568 situated at Baie Ste Anne Praslin. I further order the Respondents to demolish and remove from the land of the Applicant any building, structure or outbuildings they have erected thereon.

[25] I give the Respondents 6 weeks to comply with the orders contained in this judgment.

[26] I award costs to the Applicant.

Signed, dated and delivered at Ile du Port on 4 April 2018

G Dodin
Judge of the Supreme Court