

IN THE SUPREME COURT OF SEYCHELLES

Civil Side No: 54 of 2015

[2018] SCSC 586

Bernadette Fikion

Plaintiff

Versus

The Estate of the Late Agnes Marie Cecile

First Defendant

The Estate of the Late Michel Itney Cecile

Second Defendant

Ricky Moustache

Third Defendant

Jammy Cecile

Fourth Defendant

Guy Cecile

Fifth Defendant

Marie Cozik (nee Cecile)

Sixth Defendant

Lorna Cecile

Seventh Defendant

Christina Ruffetta

Eight Defendant
Jimmy Cecile

Ninth Defendant

Marie Andre Alcindor

Tenth Defendant

Heard: 19th May 2017; 23rd November 2017; 4th January 2018; 8th January 2018; and 21st February 2018.

Counsel: Mr. Camille for the Plaintiff
Ms. Benoiton for the Third through to Tenth Defendants

Delivered: 21st June 2018

JUDGMENT

ANDRE J

- [1] This Judgment arises out of a *Plaint* (*as amended*) filed before the Supreme Court on the 12th June 2015 by Bernadette Fikion (*“Plaintiff”*), daughter and executrix to the estate of the late Michel Itney Cecile and the late Agnes Marie Cecile (*the “Deceased”*), against these estates (*First and Second Defendants; their grandchildren, Ricky Moustache and Jammy Cecile (Third and Fourth Defendants)*); Plaintiff’s siblings and legal heirs to these estates (Fourth through the Tenth Defendants) (Collectively *“ the Defendants”*), for it is to be noted that the suit was withdraw as against the eleventh Defendant. The Defendants vehemently objects to the averments of the *Plaint* and moves for its dismissal and for costs.
- [2] The hearing took place on the above-mentioned dates and upon completion of the hearing, both parties filed written submissions of the 20th and 21st February 2018 respectively of which contents have been duly considered for the purpose of this Judgment.
- [3] The following is in a gist the relevant factual background as per Pleadings filed on record.
- [4] At the time of the death of the Deceased, they had a four bedroom house situated on land Parcel V2724 at Foret Noire (*the “Property”*). In essence, Plaintiff avers that she approached the Defendants with a view to invest jointly in the improvement and renovation of the Property. However, given their lack of funds or desire to invest, she

alleges that they agreed that she would invest solely and then rent out the Property to tenants, recoup the total sums of investments, and that thereafter the proceeds of rents would be shared equally among the heirs.

- [5] Plaintiff further avers that after investing in these improvements, the Defendants prevented her from approaching the Property and to allow her to rent it out. As a result, she maintains that Defendants are jointly and severally liable for her loss and damages, particularized as loss of investments of sums into the Property namely Seychelles Rupees One Hundred and Ninety Three Thousand Five Hundred and Seventy Six (SR. 193, 576.00/-) and inconvenience, anxiety and distress in the sum of Seychelles Rupees One Hundred Thousand (SR. 100, 000.00/-) hence totaling in the sum of Seychelles Rupees Two Hundred and Ninety Three Thousand Five Hundred and Seventy Six (SR. 293, 576.00/-).
- [6] On the 1st December 2015, Defendants filed a Statement of Defence, wherein they maintain that the Property was not dilapidated, but in fact occupied by some members of the family. Importantly, they essentially maintain that they never agreed to or consented to these renovations.
- [7] The testimonies adduced in a gist in support of Plaintiff and the Defence at the hearing reveal briefly as follows.
- [8] The Plaintiff testified in person and called one witness namely her husband Edward Fikion.
- [9] The Plaintiff testified that her father (Michael Cecile) and mother (Agnes Cecile) left a last Will and Testament (*Exhibit P1 and Exhibit P2 respectively*) and that she was appointed executrix of their estates (*Exhibit P3 and Exhibit P4 respectively*), which included the Property (*Exhibit P5*).
- [10] She testified that the condition of the Property was very bad, the roof was leaking and that the iron sheets were not in the best condition. She testified that she approached her brothers and sisters to repair the house, however, she indicated that some of them said that they did not have the money or had their own houses.
- [11] *She testified that she spoke to the Tenth Defendant (Marie Andre Alcindor), Sixth Defendant (Marie Cozik (nee Cecile), Seventh Defendant (Lorna Cecile), Eighth Defendant (Christina Ruffetta), and Ninth Defendant (Jimmy Cecile). However, she further indicated that she had not spoken to the grandchildren namely, the Third Defendant (Ricky Moustache), Fifth Defendant (Guy Cecile), Sixth Defendant (Marie Cozik (nee Cecile), and Ninth Defendant (Jimmy Cecile). (This inconsistency as to who were allegedly consulted arose in examination and cross-examination of the Plaintiff).*
- [12] More specifically, she testified that Sixth Defendant (*Marie Cozik (nee Cecile)*) did not have money to help, but that she agreed to her proposal of repairing the house, renting it out, and sharing the money. Then, Plaintiff gave evidence that her husband borrowed

money from a bank in Australia and they eventually purchased material to repair the house. The work consisted of removing all the iron sheets, buying all the wood and doors, etc. She testified that the renovations happened around 2010-2011, but that the Defendants, Marie Andre Alcindor (*Tenth Defendant*) and Jimmy Cecile (*Ninth Defendant*) came with cops to tell her she was not allowed to do these repairs. Moreover, she added that no other siblings called or enquired about the renovations.

- [13] After the renovations, Plaintiff testified that she decided to rent the house because she had spoken to her siblings and nobody was interested in renting; so she decided to rent the house, recoup her investment and then share the rent. However, she testified that the first tenant called her stating that Tenth and Ninth Defendants were in the house.
- [14] She testified that she eventually came to know that Third, Fourth and Fifth Defendant were living on the Property. So, she instructed her attorney to write to the Fifth Defendant (*Guy Cecile, her brother*) (*Exhibit P6 dated 13 Dec. 2010*); Third Defendant (*Ricky Moustache*), (*Exhibit P7 dated 13 Dec. 2010*); and Ninth Defendant (*Jimmy Cecile*) (*Exhibit P8 dated 13 Dec. 2010*); and Tenth Defendant (*Marie Andre Alcindor*) (*Exhibit P9 dated 13 Dec. 2010*). In these letters, she informed them of what was happening in the house, but did not reference anything about money.
- [15] She testified that she has still not recuperated her money on the investment and that some of the Defendants still occupy the Property. She testified that she approached her siblings, through her lawyer (*Joel Camille*), to propose a settlement to recuperate her investments (*Exhibit P10 Letters from Joel Camille to Lorna Cecile, Christina Ruffetta, Marie-Andre Alcindor, Marie (Hall/Kozik), and Jimmy Cecile dated 2 Nov. 2012*). She explained that she had proposed to purchase their shares and had done an evaluation of the Property (*Exhibit P11 Evaluation Report dated 30 Oct. 2012*).
- [16] Thereafter, Plaintiff testified that she and her husband Edward Fikion had made several repairs/renovations; and provided receipts in the form of *Exhibit P12 corrugated iron sheets (Invoice No. 5958 from Rapid Roofing dated 29 Mar. 2010)*; *Exhibit P13 Gas cooker and a single bed mattress (Invoice No. L1000847 from AV Group dated 28 Apr. 2010)*; *Exhibit P14 Aluminum cabinet (Invoice No. L1000853 from AV Group dated 29 Apr. 2010)*; *Exhibit P15 Children locker for the house (Invoice No. 050 from Lifestyle Company dated 28 April 2010)*; *Exhibit P16 Wardrobe for the house and cement and crusher dust for the house (Receipt dated 24 Apr. 2010; Receipt 2 dated 22 April 2010)*; *Exhibit P17 disposal of waste (Receipt Nos. 22882, 3293, 3292 from Landscaping Waste Mgmt. Agency dated 27 Apr. 2010)*; *Exhibit P18 release of cargo bundle*; and *Exhibit P19 and Exhibit P20 miscellaneous receipts and receipts for tiles*).
- [17] In addition to the sum of Seychelles Rupees One Hundred and Ninety Three Thousand Five Hundred and Seventy Six (SR 193, 576/-) in repairs, she confirmed that she was also claiming Seychelles Rupees One Hundred Thousand (SR 100, 000/-) for moral damages for the inconvenience, anxiety, distress. She testified that her high blood pressure had worsened and it was inconvenient for her to travel to Seychelles with tickets from Australia costing around Dollars 2000 per person. She gave evidence that she did not

suffer that much distress, but that she suffered stress, headaches and could not eat for about two to three weeks. However, she also indicated that since 2010, the adverse effect did not bother her and that she had no idea how much she would be claiming in moral damages, but confirmed that she was still claiming the Seychelles Rupees One Hundred Thousand (SR 100, 000/-) amount in the Plaintiff.

- [18] *On cross-examination, she testified that she had talked with Marie Cozik (nee Cecile), Lorna Cecile, Christina, Ruffetta Marie-Andre Alcindor and her sister Rose-May (against the claim was withdrawn) regarding the renovations, but had not approached Ricky Moustache, Jimmy Cecile and Guy Cecile though she indicated that they knew that she started to renovate the house. But she testified that she did not get a “full answer from all of them.”*
- [19] *She testified that she finally agreed to fix the house with Marie Cozik (nee Cecile), Sixth Defendant, whereas, the others said that they did not earn enough.*
- [20] *She testified that she borrowed Seychelles Rupees Twenty Five Thousand (25, 000 to 26, 000) Dollars and that some of the money went towards the renovations.*
- [21] *Though she testified that she had spoken to them, she conceded that all the heirs had not agreed to rent the house and only one of them had agreed to renovate the house.*
- [22] *On re-examination, Plaintiff changed her testimony and testified that she had reached an agreement between her and her siblings for her to renovate the house.*
- [23] *Mr. Edward Fikion’s testimony was in a gist that his wife the Plaintiff approached him to fix the Property. He testified that she discussed with her family members and he eventually borrowed 30, 000 Australian dollars for the repairs. When asked what he do in Seychelles, he testified that Guy Cecile (Fifth Defendant) helped with painting and the locks and that Nelson helped with the roof and ceiling board; and that he paid S.R. 15,000 to each or altogether.*
- [24] *In terms of the house, he testified that the iron sheets were all rusted completely and water was leaking from the ceiling boards; he testified that they would have to fix or break it down. He added that they got fencing and locks. He then testified that he paid for the following and provided receipts as follows (Exhibit P21 Shower rings, duty locks, screws (Receipt from Bunnings Warehouse Midland dated 27 Feb. 2010); (Exhibit P22 Brass handles for doors, plastic hold shower items for the bathrooms, toilet brackets, etc. (Receipt from Bunnings Warehouse Midland dated 22 Feb. 2010); (Exhibit P23 Plywood (Receipt (SR 2, 600) from Francourt & Sons dated 3 Apr. 2010); and Exhibit P24 (formerly Item 1) Materials relating to plumbing works and screws (Invoice No. 3940 issued to one Edward Fikion dated 26 Apr. 2010; Invoice No. 1975 issued to one Edward Fikion dated 30 Apr. 2010);*
- [25] *He further testified that he also personally spoke with Marie Cecile Cozik (nee Cecile) and that she said that it was a bit hard for them to get involved with the finances,*

however, she told them to go ahead and that they could work out how to get the money back either by renting the place or something like that.

- [26] *He testified that he spoke with Jimmy Cecile as well, but he told them he did not have much money. He testified that the siblings agreed verbally to the renovations but changed their minds. He testified that it took about two and a half months to renovate the house.*
- [27] *On cross-examination, Mr. Fikion testified that he did not have written proof that he borrowed money from the bank. He testified that he spoke with one sibling regarding renting of the Property, Marie Cozik (nee Cecile); and that his wife spoke to the others. He testified that he did not have written proof of the money he gave to Guy and Nelson either.*
- [28] Moving to the Defendants, at the Hearing, Defendants called Jimmy Cecile (*the 9th Defendant*), Mary Cozik (*nee Cecile*), Jammy Cecile and Marie-Andre Alcindor to testify and in a gist as follows.
- [29] Jimmy Cecile, Plaintiff's brother, categorically denied discussing renovations of the house with Plaintiff. He testified that the house was not deplorable and that his mother was living in it. He testified that he could not comment too much on the state of the house as he did not live there, but that he was not aware of any leaking.
- [30] He testified that Plaintiff had never approached him and told him that the house was ready and for him to start making payments to refund the money. He testified that a week prior to Plaintiff leaving the Seychelles in early May 2010, he expressed his opposition to renting the house.
- [31] On *cross-examination*, he testified that he heard from Marie-Andre Alcindor (*10th Defendant*) that Plaintiff was repairing the house; he testified that he saw Plaintiff do the renovation work. He reiterated that there was no agreement made with the Plaintiff.
- [32] Mary Cozik (*nee Cecile*), testified at the outset, that she was Plaintiff's sister and that she did not have meetings to discuss what would happen to the Property; she added that the house was fine, nobody was complaining about it, and that it was not leaking.
- [33] She testified further, that Plaintiff told her that her husband, Edward Fikion, was going to take out a loan to repair the house. When asked whether Plaintiff had asked her assistance to repay the loan, she testified that she would assist with the bathroom, but that she never heard back from her. She testified that she was not told from the beginning of her intentions of renting the house out and that she only found on when she came on holiday. She testified that Plaintiff took it upon herself to renovate and gave evidence that there was no agreement, written or oral, to renovate the house. She testified that she would never have agreed to rent the Property.
- [34] On cross-examination, she testified that she could not confirm that the house was not leaking in 2010, as she was not there.

- [35] She additionally testified, that she never spoke to Plaintiff's husband about renovating the house.
- [36] On his part, Jammy Cecile(*as amended*), testified, that Plaintiff was his aunt and that the Property was in good normal condition; it was not falling down and that there was no need to do these renovations for he was residing on the Property since childhood. He testified that he lived in the house and the roof was not leaking but that some paint was peeling off the ceiling mainly in the kitchen and then in the hallway.
- [37] He testified that Edward Fikion gave him some money, around Seychelles Rupees Three Thousand Five Hundred (SR 3500/-) or Seychelles Rupees Four Thousand (SR 4000/-) to leave the house. He testified that Plaintiff told him that the renovations was to rent the house, however, he testified that to his knowledge, Marie Andre Alcindor (his mother) and Jimmy Cecile (his uncle) did not know it was to be rented. He testified that he was never part of any agreement to rent the house.
- [38] Finally, Marie-Andre Alcindor, testified that she was Plaintiff's sister and that the house was in good condition. She deponed that she had not come across any leaks in the house and that there was no agreement with Plaintiff as alleged in her Complaint and in her evidence either oral or written. She testified that she would not have agreed to rent the house in any event as this was and is the family home. She testified that neither Plaintiff nor Jammy her son, had never approached her regarding investing in the house.
- [39] Having highlighted the salient evidence relevant to the pleadings as filed on behalf of both parties, I shall now turn to address the legal standards and its analysis based on the evidence led in this matter.*(supra)*.
- [40] The issue framed for this Court's determination is whether the Plaintiff being the Executor to the Estate of the Deceased, ***"had an agreement whether oral or written with all or some of the Defendants as averred in her Complaint and evidence for her to invest in the improvement and renovation of the property solely and thereafter for the Plaintiff to rent out the property to tenants and recoup the total sums of investments there from and thereafter the proceeds of the rent to be shared amongst the legal heirs in equal shares"***.(Paragraph 4 of the Complaint) and ***"hence, arising, the alleged breach of agreement"***, as averred at (Paragraphs 9, 10 and 11 of the Complaint) ***"in the sum of Seychelles Rupees Two Hundred and Ninety Three Five Hundred and Seventy Six (SR 293,576.00/-."***
- [41] First and foremost, noting the written submissions of Learned Counsel for the Plaintiff, I note more particularly the submissions with respect to the Plaintiff "seeking for the reimbursement of the sum invested by her in the property". That is suggesting to my mind a change of the nature of the claim of the Plaintiff's Complaint as filed and turning it into that of "unjust enrichment rather than breach of contract as illustrated above (*paragraph 40 refers*). I find it on the basis of the Pleadings as filed and illustrated above, that it is futile to examine the cause of action on the ground of 'unjust enrichment also

known as an action of *de in rem verso*', which is a cause of action derived from French Jurisprudence and codified at Article 1381-1 of the Civil Code of Seychelles (*the "Code"*). The Court refuses to entertain that change of cause of action at the stage of submissions on the basis that it is settled law that parties are bound by their pleadings as clearly illustrated in the case of (*Antoine Leon v/s Volare (Prop) Ltd [2005] SCCA 3*). It is trite that the Court may not formulate a case for a party after listening to the evidence, nor may it grant relief not sought in the pleadings (*Hunt v/s R [1987] SCAR 160*) (*Vel v/s Knowles SCA 41/1998, 42/1998, LC 136*). And a Judge granting a relief not sought in pleadings acts 'ultra petita' (*Monthy v/s Esparon [2012] SLR 104*). This Court will follow judicial practice and the settled law as indicated and will not entertain that claim as sought by Learned Counsel in terms of the Submissions as illustrated and analyzed.

- [42] Now, to focus on the crux of the current cause of action, being breach of Agreement it is also opportune to briefly touch on the duties of an Executor noting that the Plaintiff was the Executrix to the estates of the Deceased. To put it briefly, The court of Appeal in the case of (*Rajasundaram & Ors v/s Pillay [2015] SCCA 12*), clearly explained the duties of an executor in no uncertain terms, and this in line with the provisions of Article 1027 of the Code which provides that the duties of an executor, ***"shall be to make an inventory of the succession to pay the debts hereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will as the case may be"***. Importantly, the Court in the *Rajasundaram case* stated that, ***"the purpose of an executor appointment is to have the executor share out the succession among the heirs. Winding up a succession estate means evaluating the share of the heirs under the laws of succession and then to propose and make a physical allocation of property to the heirs where that is possible and to sell the land and share out the proceeds of sale to the heirs where partition is impossible. Of course if the heirs disagree with this method of allocation they can resort to court."*** In this case did the Plaintiff as Executrix act in accordance with her duties under the Code and or acted unilaterally into renovating of the Property without consent of other heirs? Or was there a breach of an agreement between the Plaintiff and the Defendants (*Heirs*), hence the cause of action arising?
- [43] Closely considering the evidence of the Plaintiff and the Defendants' witnesses who testified as illustrated above (*Paragraphs 7 to 38 refer*), it is uncontested that the Plaintiff's husband did invest in certain renovations of the Property with the consent of the Plaintiff being the Executrix unilaterally but not with the consent of the other heirs namely the Defendants having an equal say in the Property.
- [44] It is abundantly clear, that the Plaintiff failed to prove on a balance of probabilities in terms of the contradictions on record as to who was contacted and accepted the alleged renovations and alleged agreement as to the renovations of the Property and to be recouped through its ultimate rental to a third party to the benefit the Plaintiff at an initial stage and thereafter the Defendants as heirs. The manner and the circumstances in which the renovations were undertaken especially in that certain family members albeit their being on the Property were told to leave and in fact 'paid' to leave the Property and also the resistance of the (*Ninth (9th) and the Tenth (10th) Defendants*), in allowing progression of the renovations through intervention of the police and also preventing rental of the

property is clearly demonstrative of lack of consent to any alleged renovations by consent of all heirs. All the Defendants who testified and whose evidence could not be contested in cross-examination illustrated a complete denial that there was any agreement to the effect as alleged by the Plaintiff and it is only reasonable in the circumstances to come to the reasonable conclusion that the Plaintiff did the renovations at her own motion in the hope of recouping her investments by renting at a later stage but unfortunately same did not materialize due to the resistance of the heirs as named.

[45] I note in the latter respect that it transpires in evidence, that the Plaintiff could not at any stage pinpoint with certainty the exact terms of the alleged agreement and neither did she manage to at least pin point to exactly whom of the Defendants heirs (if any) who agreed to the renovations,. In that light it is to be noted that not accepting to invest for lack of funds does not mean consent to allow the Executrix to renovate at her own cost and then recoup from rental in the absence of an implied and or express agreement to that effect from the heirs.

[46] I totally disagree with arguments of Learned Counsel for the Plaintiff as to the alleged falsity and ill motive of the Defendants who testified, for it is clearly illustrative in evidence, that there was no agreement between the Plaintiff and the Defendants (*Heirs*) as alleged, But it transpired rather that the Plaintiff who at some point even said she was the owner of the property misconstrued her role as Executrix and rather substituted herself as the Owner rather than that of an Executrix in this case.

[47] I find on the basis of the above analysis in the light of the evidence rehearsed above, that the Plaintiff failed to prove on a balance of probabilities that there was an agreement as alleged in her Plaint (*paragraph 40 refers*) and hence the claim which follows cannot be entertained by this Court on the basis of breach of agreement. The Plaint is thus dismissed with costs to the Defendants.

[48] Having said so however, if the Defendants (*Heirs*) subsequently decide to sell or rent the Property, the Plaintiff may likely have a claim to be reimbursed for her expenses/investment contributed and again if it is demonstrated that the value of the house was improved as a result of the investment and if it is made the house rentable.

[49] The Plaint is thus dismissed with costs in favour of the Defendants and the Plaintiff being the Executrix is advised to give effect to her appointment as per the provisions of the Code as above referred and analyzed in the future.

Dated this..... day of 2018.

ANDRE- J
Judge of the Supreme Court