

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS. 112 of 2014

[2018] SCSC 645

DORA SHELLY HELENE MARIE NEE ROSELIE

First Plaintiff

JOSEPH MATTHEW ROSELIE

Second Plaintiff

RALPH FRANCIS ROSELIE

Third Plaintiff

JOERAN GONSALVE

Fourth Plaintiff

MARIE CELINE ROSELIE

Fifth Plaintiff

LUCY MARLINE NELLA ROSELIE

Sixth Plaintiff

versus

MOLLY RITA ROSELIE

Defendant

Heard: 20th May 2016; 27th October and 22nd November 2017.

Counsel: Mr. N. Gabriel for the Plaintiffs
Mr. F. Bonte for the Defendant

Delivered: 6th July 2018.

JUDGMENT

ANDRE J

- [1] This Judgement arising out of a Plaint filed before the Court by Dora Shelly Helene Marie (*nee Roselie*) (*First Plaintiff*); Joseph Matthew Roselie (*Second Plaintiff*), Ralph Francis Roselie (*Third Plaintiff*), Joeran Gonsalve Roselie (*Fourth Plaintiff*), Marie Celine Roselie (*Fifth Plaintiff*); and Lucy Marline Nella Roselie (*Sixth Plaintiff*) (*Cumulatively referred to as("Plaintiffs")*), on 28th October 2014 and filed on the 5th November 2014 against Molly Rita Roselie ("*Defendant*"), wherein it is prayed *inter alia*, that **(a) the sale of parcel number C 3387 to the Defendant is null and void and fraudulent and must be returned to the succession; and (b) order payment of costs of the action and any other order that the court may deem fit in the circumstances.**
- [2] On 3rd of March 2015, the Defendant filed a Statement of Defence, wherein she generally denies the averments of the Plaint with further averments as further illustrated in the factual background forming the basis of this Judgement and moves for: **(a) dismissal of the Plaint and (b) to entertain a counterclaim which she raised with costs and the latter counterclaim in that to declare the transfers of the 5th and 6th Defendants to be null and void on the ground of lesion and same returned to the Estate of the Deceased.**
- [2] Thereafter, the matter was heard on the above-mentioned dates and the parties then respectively submitted written submissions of which contents have been duly considered for the purpose of this Judgment.
- [3] The salient factual background as per the records of proceedings for the purpose of this Judgement reveal as follows.
- [4] The Plaintiffs and Defendant are all siblings and Heirs (*Exhibits P1*), of late Helene Roselie who died intestate on the 22nd April 2013 ("*Deceased*") (*Exhibit P2*). At the time of his death the Deceased was the owner of land parcel C1554 ("*Property*"), for which she had bare ownership subdivided into parcels C3385, C 3386 and C 3387 situated at Mont Plaisir, Anse-Royale Mahe.

- [5] In 2009, the Deceased transferred Land Parcel C 3387 to the Defendant for the sum of Seychelles Rupees One Hundred and Seventy five Thousand Rupees (*S.R. 175,000/-*) ("*Defendant's transfer*"). It is averred by the Plaintiffs that the Defendant's transfer was carried out without their knowledge and they were only made aware of the transaction after the demise of the Deceased.
- [6] It is also averred that the Deceased was not in good health since the year 2003 up to the period leading to her passing away hence authenticity of her signature on the Defendant's transfer doubtful in that it is alleged to be different from the ones in the two other deeds of transfer (*Exhibits P5 and P6*), hence indicative of a fraudulent transaction by the Defendant and further in that the purchase price as indicated on the Defendant's transfer was never transferred to the bank account of the Deceased hence the Defendant's transfer amounting to a "*donation deguisee*" with the intention to deprive the Plaintiffs from benefitting from the Deceased Estate.
- [7] The Plaintiffs further averred that they have not been able to persuade the Defendant to transfer back the Defendant's transfer to the succession of the Deceased Estate hence the Plaintiff and prayers afore-mentioned [*paragraph 1*] refers.
- [8] It is to note further that the Plaintiffs aver the Deceased also effected two transfers in the name of the (*Sixth Defendant*) (*Lucy Roselie*) of Parcel C 3385 and (*Marie Celine Roselie*) (*Fifth Defendant*), of the 6th July 1995 and 7th July 1995 and it appears that the said two transfers are not being contested by the other Plaintiffs (*Heirs*) other than the Defendant counterclaiming on the ground of "lesion" and return to the Estate of the Deceased.
- [9] With reference to the counterclaim of the Defendant, the Plaintiffs move for its dismissal on the ground that such a rescission cannot be pleaded by the Defendant.
- [10] In her Statement of Defence, the Defendant as indicated earlier, generally denies the averments of the Plaintiff and further avers that the Deceased was in good health until her

death and that the Defendant's Transfer was done legally before a notary public and witnesses and that the first, fifth and sixth Plaintiffs knew about the said transfer long before it was done and during the Deceased's lifetime and purchase duly transferred as indicated hence "donation deguisee" vehemently denied in the absence of proof to the contrary.

[11] It is further averred by the Defendant that both fifth and sixth Plaintiffs were transferred parcels C3386 and C 3385 and that the Defendant with C 3387 all in the full knowledge of all concerned.

[12] At the hearing, Plaintiffs called five witnesses namely Dora Roselie, Lucy Roselie, Doctor Sahar, Ralph Roselie and Marie Celine Roselie and the Defendant testified on her own behalf and called on witness Mr. Gerard Maurel Notary Public.

[13] Dora Roselie testified in a gist as to the allegations in the Plaintiff as against the Defendant, that after the transfer of the two plots of land to the fifth and sixth Plaintiffs in the year 1995, which transfers she does not contest and accept as genuine, the Deceased was not in good health condition and was unable to walk until she passed away and that the Deceased was medically examined by a doctor which medical Report was produced (*Exhibit P8*) of the 22nd April 2014.

[14] Dora Roselie further testified that the signature of the Deceased on the Defendant's transfer is, "*a bit blurry*"; "*signature of my mum is not the same as the other two*"; "*I do not think my mum signed this paper*" (*Exhibit P7*).

[15] As to the allegations of non-payment of the purchase price by the Defendant, Dora Roselie testified that there was no proof to their knowledge that it was paid and according to her all Heirs should have signed the Defendant's transfer if the Deceased was sick.

[16] Dora Roselie further claimed that she became aware of the Defendant's transfer only upon the return of their brother Joseph Roselie from Canada to Seychelles and herself

together with other Plaintiffs tried to negotiate with Defendant to return the Defendant's transfer to the succession for redistribution to no avail hence the Plaintiff.

[17] Dora Roselie further and finally testified that she was not contesting the transfers effected in favour of her two other sisters namely the fifth and sixth Defendants for according to her, *"I saw them when they went to sign the papers at Mr. Mc Gregor's Chambers together with my mother."*

[18] In cross-examination, Dora Roselie insisted that the Deceased ought to have consulted all the Plaintiffs prior to the Defendant's transfer and that she was however not contesting that the same procedure was not followed for the fifth and sixth Plaintiffs' transfers and which transfers she accept as genuine. Further as to the alleged medical incapacity of the Deceased she testified that she was of the opinion that the medical Report (*supra*) was evidence of the Deceased unsound mind in that she has suffered *"cerebral vascular accident"*.

[19] Doctor Barren Kumar Sahar testified, that he knew Deceased who was a patient prior to her passing away and a medical Report was drawn up as to Deceased medical condition (*Exhibit P8*). Expatiating on the Medical Report with direct reference to the allegations in the Plaintiff (*supra*) vis-a-vis the medical condition of the Deceased, Doctor Sahar testified that the Medical Report was drawn on the 22nd April 2014 and *"it revealed that she was suffering from bilateral ostriatis of the knee most probably because of obesity and the age. The later developed hypertension and heart disease which was also found out later on and she was getting treatment for that. Then I think on 2013 she was admitted in the hospital where the vascular accident was diagnosed. Like a stroke we say in common language."*

[20] Doctor Sahar continued testifying further that there was nothing indicative in the Report that the Deceased was unable to travel from home to the clinic or elsewhere but that in 2003 she was seen at her residence rather than her coming to the clinic.

- [21] As to the medical condition of the Deceased after the stroke, Doctor Sahar testified that “I cannot comment on that because I never saw the patient I just compiled a report according to the notes”.
- [22] In cross-examination, Doctor Sahar further testified that as to the allegation of the Deceased being of unsound mind, “*I would not remember, but if there was something I would have mentioned because generally when I am writing a report go through the whole file*”; “*no, otherwise I would have mentioned.*”
- [23] Lucy Roselie on her part testified that she was an heir of the Deceased and also owner of parcel C 3385 (*Exhibit P5*), transferred to her by the Deceased in 1995 prior to her death. She further claimed that contrary to the purchase price as indicated on the transfer she did not pay anything to the Deceased and that the Deceased was willing to transfer the said parcel in her name and that she has already built her dwelling house on the property.
- [24] Lucy Roselie simply endorsed her examination in chief in cross-examination confirming that she never paid for transfer (*Exhibit P5*) but was contesting the Defendant’s transfer for according to her it was done without her knowledge.
- [25] Ralph Roselie testified in a gist that he was the brother of the Defendant and the other Plaintiffs and that he was contesting the Defendant’s transfer for he claims his share to the Estate of the Deceased and that he was unaware of the transfer to the Defendant in that, “*there are eight of us, we want all eight of us to get each our shares.*”
- [26] Ralph Roselie further testified that he personally did not benefit from any transfer of land from the Deceased and that the Deceased died intestate.
- [27] Marie Celine Roselie on her part finally testified that she was the fifth Plaintiff and sister of the Defendant and contesting the Defendant’s transfer on the ground that it was done without her knowledge of its signature and neither payment of the purchase price. She confirmed knowledge of (*Exhibits P5 and P6*), latter being transfer of Parcel C 3386 in

her name. She however testified that she was in agreement to transfer back her share in the Estate to be redistributed.

[28] Upon cross-examination, the witness further confirmed transfers to herself and the 6th Defendant by the Deceased (*Exhibits P5 and P6*), but contested Defendant's transfer (*Exhibit P7*), on the basis that the Deceased was sick and bedridden and that her signature is not the same as on her transfer document (*Exhibit P6*). In cross-examination, it should be noted Marie-Celine Roselie testified that the transfer done in her name by the Deceased was valid contrary to that of the Defendant for reasons given.

[29] The Defendant as indicated testified on her own behalf and called one witness Mr. Gerard Maurel Notary Public.

[30] Molly Reselie, the Defendant testified that the Defendant's transfer is genuine and was performed by the Deceased to her (*Exhibit P7*) before Notary Public Gerard Maurel. That the Notary came to their residence at Anse Royale for the signature.

[31] Upon cross-examination, Molly Roselie further confirmed the location of the signature of (*Exhibit P7*) and further confirmed that the Deceased "*condition which was quite good and she was moveable but the assistance of a carer but her medical and mental condition were good.*" And also confirmed that in 2012 his mother could not sign hence thumbprint (*Exhibit D1*). It was further confirmed that all the Plaintiffs knew of her transfer (*Exhibit P7*) and the Deceased informed them too and that it was in fact the sixth Plaintiff who brought all the documents to start the process from Praslin and that her to the contrary was not aware of the fifth and sixth Plaintiffs' transfers as exhibited but she further testified in answer as to whether she was informed that, "*No, we were not informed but we were like brothers and sisters, it was not an issue*".

[32] Mr. Gerard Maurel being the Notary Public who attested to the signature of the Deceased with reference to (*Exhibit P7*) confirmed same and further testified that he prepared and attended to the signature of the Defendant's transfer and the Deceased was "*natural*" her

mind was sane and he did not find anything wrong in her mind when she was signing or talking to him.

[33] Upon cross-examination, Mr. Gerard Maurel further testified that the transfer was signed in the year 2009 as per (*Exhibit P7*) and confirmed sanity of the Deceased at the time of signature.

[34] I shall now move to consider the legal standard and analysis.

[35] As indicated at [*paragraph 1*] (*supra*), the Plaintiff's prayer as per filed *Plaint* is to the following effect ***that (a) the sale of parcel number C 3387 to the Defendant is null and void and fraudulent and must be returned to the succession; and (b) order payment of costs of the action and any other order that the court may deem fit in the circumstances.***

[36] The Defendant on her part denies the above allegations and counterclaims “*lesion*” in respect of the fifth and sixth Defendants’ transfers (*Exhibits P5 and P6*).

[37] Now, the relevant issues to be decided by this Court for the purpose of this Judgement are namely; *firstly, whether the Defendant’s transfer was legally transferred by the Deceased to the Defendant; Secondly, whether, the purchase price “which allegedly” was never transferred amounted to “a donation deguisee” with the intention of depriving the other heirs from benefitting from the relevant parcel of land; thirdly, whether there was “lesion” as claimed in terms of the counterclaim of the Defendant and response of the Plaintiffs thereto.*

[38] Before considering the issues, it is trite law that “*he who asserts must prove*” and this is clearly evident in the matter of (***Gopal & Anor v Barclays Bank [2013] SCCA 23***) and applies to both the Plaintiffs in terms of their *Plaint* and Defendant in terms of her Counterclaim.

[39] As follows, I will treat the relevant issues in chronological order as it appear at [paragraph 37] hereof.

[40] The first issue being, ***whether the Defendant's transfer was legally transferred by the Deceased to the Defendant and answering this question obviously involves a question of fact and dependent completely on the oral and documentary evidence adduced as to the existence of the Defendant's transfer.***

[41] As per the evidence on record and illustrated on the Plaintiffs side, the Deceased who owned parcel of land C 1554 prior to her death subdivided same during her life time in three parcels of land namely C3385, 3386 and 3387 and thereafter transferred the first two parcels to the fifth and sixth Plaintiffs which transfers are accepted by all the Plaintiffs but that with reference to the Defendant's transfer it is contested on ground of fraud in that the Deceased was not in good health since 2003 up to the period leading to her passing away (*Exhibit P2*) and that the Deceased signature on the Defendant's transfer as compared to the other transfers are dissimilar indicative of fraudulent transaction hence prayers afore-said.

[42] It is evident as above-referred from the first Plaintiff's evidence that she testified in cross-examination that nowhere on the medical report (*Exhibit P8*) is it indicated that the Deceased was mentally incapable of signing a transfer deed in favour of one of her children during her lifetime but that there was proof of her not being well physically. Doctor Sahar who also testified on behalf of the Plaintiff and produced the medical Report testified that nowhere in the medical file and notes of the Deceased could he find and prove that the Deceased was not of sound mind in the year 2009 and or in the course of her treatment since 2003 up to the death in 2013. The other Plaintiffs who testified in this case as per evidence illustrated above, could not in any prove insanity of the Deceased either.

[43] The Defendant on her side testified in no uncertain terms that her mother was medically fit and could understand what she was signing excepted physical incapacity which

warranted the signature at her residence at Anse-Royale. Same was corroborated by the evidence of Notary Public Gerard Maurel who is the one who attested to the Defendant's transfer and he clearly testified that the Deceased was sane and understood what was happening and what she was doing at the relevant time of signature.

[44] Needless to say, based on the evidence of Notary Public Gerard Maurel, the Defendant's transfer is an authentic document in terms of the provisions of Articles 1317 and 1319 of the Civil Code ("the Code").

[45] Article 1317 of the Code 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".

[46] Article 1319 of the Code on the other part 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."

[47] The legal presumption of proof referred to in Article 1319 of the Code lays a burden on the party who impugned the document in this case the Defendant's transfer to prove fraud in terms of signature not being that of the Deceased and insanity of the Deceased and in this case, the Plaintiffs. Such proof is to be administered by the Court subject to the rules of evidence [Paragraph 38] refers.

[48] Now, concluding on the first issue with respect to the evidence of the Plaintiffs as to medical condition of the Deceased not being consonant to insanity and or mental incapacity to sign the Defendant's transfer [Paragraph 42] and also the medical Report produced (Exhibit P8) not proving the said allegation of mental incapacity, it is apparent that there is not an iota of evidence in support of mental incapacity of the Deceased at the time the Defendant's transfer was executed hence, for this reason as per the provisions of Article 1108 of the Code, the contract was a valid one in that, the Defendant's transfer deed was executed by the deceased and did not lack consent which is a very crucial element of the validity of a contract.

[49] Secondly, with respect to the authenticity of the signature of the Deceased being impugned by the Plaintiffs in this matter, again in line with the evidence of the Notary Public Gerard Maurel who attested to the execution of the Defendant's transfer by the Deceased (Exhibit P7), it is clearly indicative the transfer was signed by the Deceased in his presence and he endorsed his attestation by his Seal of Office as proof of genuineness and thereafter forwarded same for registration under the Land Registration Act. Having thus shifted the burden to the Plaintiffs to prove illegality and invalidity it is evident that the Plaintiffs failed miserably to prove otherwise hence failure to discharge the required evidential burden in this respect.

[50] It follows, on the basis of the above analysis, that the first issue as raised namely, "*illegality of the Defendant's transfer*" is without any legal basis and is hereby dismissed.

[51] With regards to the second issue in that, ***whether, the purchase price "which allegedly" was never transferred amounted to "a donation deguisee" with the intention of depriving the other heirs from benefitting from the relevant parcel of land.***

[52] The Plaintiffs testified that the Defendant never transferred the said amount to the bank account of the Deceased or at all. That the said One Hundred and Seventy Five Thousand

(S.R. 175,000/-) transfer amounts to a “*donation deguisee*” with the intention of depriving the other heirs from benefitting from the said land parcel.

[53] It may occur that a person wishing to prefer one child to others will transfer property during his or her lifetime to the child in the expectation that this will not count towards the Estate after death as clearly illustrated in the matter of (***Contoret v/s Contoret [1971] SLR 257***). Such gifts are subject to being annulled at the stage of opening of the succession if they are disguised donations “*donations deguisee*”. The donation itself will not be valid and void ab initio and the property transferred will simply be reduced to the disposable portion of the reserved Heirs. Usually the donation will be disguised as a sale of the property. In such a case, a Court seized to decide on such an issue will have to decide whether the sale was indeed a donation disguised as a sale or whether it was a genuine sale. The consideration for the transaction, the proximity of the transaction to the eventual death of the Deceased (donor), the reasons for the transfer all pointers as to whether the transfer was a disguised donation or not.

[54] Generally, to prove a disguised donation, the Plaintiff ought to have proved bad faith and a fraudulent intention on the part of the testator as clearly illustrated in the matter of (***Pragassen v/s Vidot [2010] SLR 163***) where it was held that:

“To invoke “donation deguisee”, bad faith on the part of the de cuius and for that matter fraudulent pretence not only be averred but must be proved against the defendant. In this case, none of the elements which constitute “donation deguisee” has been proved nor is apparent in the pleadings. It is clear that the lease agreement was a legally executed legal document as far as competence of the parties to it and its form is concerned hence the issue of disguised donation does not arise at all unless proved otherwise”.

[55] In this matter, the Plaintiffs are alleging that the Defendant acted in bad faith and or under fraudulent pretence to prevent them from inheriting their reserved portions of the succession and it is incumbent upon the Plaintiffs therefore to prove that element but

unfortunately after having analyzed the evidence of the Plaintiffs above they have not succeeded in doing so to the required standard in law.

[56] Now, if a donor transfers immovable property but retains the usufructuary interest thereon, the law will regard this as an irrebutable presumption that the transfer was a disguised donation and this in terms of Article 918 of the Civil Code (“Code”) as clearly illustrated and ruled upon in the case of *(Clothilde v/s Clothilde [1976] SLR 245)*. This is anyhow not the case in the current circumstances of the Defendant’s transfer which was transferred free from all encumbrances and in any event, the donor has passed away and would not retain the usufruct (if any existed prior to her demise).

[57] It follows thus on the second issue upon above illustrated analysis, that the Plaintiffs have failed to prove their onus to prove that, *“the purchase price “which allegedly” was never transferred amounted to “a donation deguisee” with the intention of depriving the other heirs from benefitting from the relevant parcel of land.* In any event, proof of non-payment was never adduced before this Court in the course of the hearing. Hence the second issue is also dismissed.

[58] As to the third issue arising to be determined in this case namely that, ***whether there was “lesion” as claimed in terms of the counterclaim of the Defendant and response of the Plaintiffs thereto.***

[59] The Defendant avers in her counter claim that the price on the face of the transfers is Seychelles Rupees Ten Thousand (S.R. 10,000/-) each for the transfer of the parcels C 3385 and 3386 to the fifth and sixth Plaintiffs (*Exhibits P5 and 6*). And the Defendant further pleads *“lesion”* to the said purchase price in that it is far below the market value and the Defendant prays that the said transfers be set aside and rendered null and void in view of the lesion and the land returned to the Estate of the Deceased. And the Defendant further avers that three valuers should be appointed to value the two properties and to report to the Court accordingly.

[60] Article 1680 of the Code provides that:

“To satisfy the Court that a prima facie case exists the Plaintiff must submit a report by three experts who shall be bound to draw up a single report and to express an opinion by majority. The experts shall be appointed by the Court unless both parties have jointly agreed to appoint the three experts.”

[61] Until the Defense proves lesion, the Plaintiff cannot surrender a right to genuine authentic registered document. And to that end, the Defendant has to meet the precondition for “*lesion*” as far as the evidence goes. As per the requirement under the Code, a Report must be produced by three experts for a prima facie case to exist. However, even there, Defendant has no prima facie case as far as “*lesion*” which has been averred in the alternative.

[62] It follows on that basis alone, that the counter-claim cannot be entertained because the pre-condition has not been met. Hence the counter-claim is set aside accordingly.

[63] In conclusion, the Plaint of the Plaintiffs is hereby dismissed with costs and counterclaim (pleaded in the alternative) likewise with costs.

Signed, dated and delivered at Ile du Port on the 6th day of July 2018.

S. ANDRE

Judge of the Supreme Court