IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS131/2012

[2018] SCSC 823

ESTEPHANETTE RADEGONDE
Plaintiff

versus

NORMA ALBERT
First Defendant

RENALD ALBERT

Second Defendant

KANNAIYAN BALASUBRAMANIAN
Third Defendant

Heard: 04-02-14, 05-12-17 and 07-05-18

Counsel: Ms. K.Domingue for plaintiff

Mr. J.Camille for 1st and 2nd for defendant
Mr. F. Bonte for the 3rd Defendant.

Delivered: 14 September 2018

JUDGMENT

Vidot J

[1] The Plaintiff, Estephanette Radegonde, resides at La Misere, in a house situated on land Title B447 (hereafter "the Property").The Property is registered in the name of the

3rdDefendant, who purchased it from the 1st and 2nd Defendants on 04th June 2010 (Exhibit D8). The 1st and 2nd Defendants are wife and husband and respectively, daughter and son-in-law of the Plaintiff. The 1st and 2nd Defendants purchased the same from Tony Radegonde (hereafter "Tony") on 09th of October 2006 (Exhibit D2). Tony is the brother of the 1st Defendant. He now lives in Canada and in fact has been living in Canada shortly after the Plaintiff moved onto the Property.

[2] The 3rd Defendant has not been able to have access to the Property which he bought for his son, who at the time of purchase was moving from Praslin to Mahe for studies. This is because the Plaintiff is still occupying the Property. The Plaintiff came to establish herself on the Property at the invitation of Tony in the 1990s, since at that time she was experiencing conflicts with her husband. However, at some point, the husband too moved into the house.

[3] After moving into the house, she made improvements to the house, mainly by constructing some extensions thereto. She claims to have used her own money to carry out construction and that Tony had given her permission to build. Therefore she invested substantially in the property. She had sold her Property at La Louise and that money was also used to fund the construction. Further to an agreement between Tony and the 1st and 2nd Defendants, it was agreed that that the Plaintiff would enjoy the property throughout her and her husband's lifetime.

[4] The Plaintiff further alleges that Tony had a house loan with the Seychelles Housing Development Company (SHDC) which she repaid. That was out of goodness of her heart. There was no request from Tony for her to pay off the loan.

[5] Following the sale of the Property, the 3rd Defendant had caused a letter to be written to her asking that she vacates therefrom. The Plaintiff is now claiming that she has a "droit de superficie" over the property and therefore a right to remain thereon. She further prays for compensation from the Defendants, in the event that she has to vacate the Property, alleging that they were aware that she had invested in the house and that they are jointly and severally liable to her. She claims the following;

(a)	Repayment of house loan	SR100,00/-
(b)	Survey of the Property	SR 17,000/-
(c)	Completion of 4 bedroom house	SR 586,675/-
(d)	Construction of retaining wall	SR220,000/-

In total, this amounts to SR923,675/-.

[6] The Plaintiff prays to Court for the following reliefs;

(i) An order declaring that the Plaintiff has a "droit de superficie" on parcel B447 and that the 3rd Defendant is bound to respect the Plaintiff's right and therefore cannot evict her from parcel B447; or in the alternative

(b) An order that the 1st, 2nd and 3rd Defendants are all bound jointly and severally to reimburse the Plaintiff the sum of SR923,675/-;

(c) Any other orders that this Honourable Court deems fit and proper in the circumstances of this case.

The Defence

[7] In a nutshell, the Defence of all Defendants, is to deny the Plaint and aver that there was no agreement between Tony and the Plaintiff for her to make any addition or improve the property whatsoever. They all refute allegations that the Plaintiff has a "droit de superficie" over the property. They further contend that they were bona fide purchasers for value and pray the Court to dismiss the Plaint.

Plaintiff's Evidence

[8] The Plaintiff testified on her own behalf and called on several other witnesses to depone. She was asked by Tony to live on the Property for her to have peace of mind from her husband because he was an alcoholic. Christopher Radegonde (Christopher) the Plaintiff's son, corroborates that in that he testified that *"Tony entrusted the property to*

my mother since my father was an alcoholic. They were fighting every day, so Mum moved to La Misere." When she moved there, the house only had a small varandah and a dining room. Christopher confirmed that. The Plaintiff testified that Tony had told her reside there for her lifetime and do anything she wanted. Therefore she built the kitchen, 4 bedrooms and a store. She also averred that she constructed retaining walls. She had sold her house at La Louise to Kenneth, another son. She testified that she spent in excess of SR 70,000/- on improvements. She further paid off a loan of around SR75,000/- that Tony had secured with SHDC, something that was not done at Tony's request, but out of the goodness of her heart. She was not informed that Tony had sold the Property to the 1st and 2nd Defendants. In fact, Michelle Anne, her daughter testified that she had informed the Plaintiff of the sale by Tony to the 1st and 2nd Defendants. Despite asserting that she has a right to be on the Property, she concluded that the money invested in the Property should be refunded to her.

[9] Michelle Anne, testified that her brother Tony gave her Power of Attorney over the Property and instructed her to sign for the transfer to the 1st and 2nd Defendants. Tony had also instructed that should the 1st Defendant want to subsequently sell the Property, the siblings should have the right of first refusal. However, a clause to that effect was not included in the deed of transfer. Asked if Tony ever told her that he had told the Plaintiff to pay the loan and build the house, her answer was in the negative. She confirms that the Plaintiff paid off the loan and made additions to the house.

[10] Gustave Reginald, a mason recounted doing some work on the Property on behalf of the Plaintiff. Yet she states that all arrangement was done with the Plaintiff's husband and it was the latter who paid him for work and there is still payment that is still due and owing. That included construction of a kitchen and bedroom. He did some work for Tony that included wall and steps and was paid for by him.

[11] Christian Denis also performed construction works on the Property which included a living room, kitchen, varandah and a bedroom. He claims that the Plaintiff paid her for those works and that amounted to approximately SR50,000/-.

[12] Christopher Radegonde confirmed that Tony had a loan with SHDC which initially he was paying but then Kenneth, his brother bought the Plaintiff' house a La Louise and he continued paying off the loan and refunded him what he had already paid. That loan is confirmed by exhibits P1 & P2 and witness Elvis Barreau.

The Defence Evidence

[13] Renald Albert deponed on his own behalf and that of the 1st Defendant. He testified that after Tony had come back from Canada, he wanted to sell the Property to 1st Defendant. In 2004 they had made an application with Government to purchase property but was not successful in being allocated a plot. When they purchased the Property, they had to raise a loan with Nuvobanq. Tony did not inform them that the Plaintiff had permission to occupy the house. He acknowledges nonetheless that he was aware that the Plaintiff was occupying the Property, but not the terms of her occupation. He acknowledged that for 10 years they were not on good terms with the Plaintiff.

[14] The 3rd Defendant, similarly like the other 2 Defendants argue that he was a bonafide purchaser for value. He states that the only thing that was told to him was that the occupants of the Property would be vacating within 4 to 5 months. He had conducted the necessary search and was satisfied that all was fine for the purchase. He had decided to purchase the Property because his child was coming to school on Mahe.

The Law; Droit de Sperficie

[15] As was held in **Lesperance v Barra [2014] SLR 87**; *"A droit de superficie is a real right separate from right of ownership of land conferred on a party other than the owner of the land, to enjoy and dispose of the things arising above the surface of the land, such as constructions, plantations and work"*; see **De Silva v Baccarie [1982] SCAR 45**. It further adds that *"a droit de superficie can be created through the consent of the owner or by a party building on a property in good faith."* The consent of the owner, as per **Coelho v Collie [1975] SLR 79**, creates the droit de superficie in favour of the builder.

[16] In the event that this Court rules that the Plaintiff has a droit de superficie, Articles 555 of the Civil Code of Seychelles (CCS) is very pertinent to this case. It provides;

1. *When plants are planted, structures erected, and works carried out by a third party with materials belonging to such party, the owner of land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them.*

2. *If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of land.*

3. *If the owner elects to preserve the structures, plants and works, he must reimburse the third party in a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of such reimbursement, after taking into account the present conditions of such structures, plants and works.*

4. *If plants were planted, structures erected and works carried out by a third party who has been evicted but not condemned, owing to his good faith, to the return of the produce, the owner may not demand the removal of such works, structures and plants, but he shall have the option to reimburse the third party by payment of either of the sums provided for by the previous paragraphs.*

5. *Where an owner, who is subject to a condition subsequent, has caused plants to be planted, structures erected and works carried out, he shall be presumed to have acted in good faith, unless he actually knew when such acts were performed that the events, which was the subject of the condition, had already occurred. This*

rule shall not apply to a usufructuary or a tenant unless specific permission to plant, erect or construct had been given by the owner.

[17] Article 553 is also relevant to a claim of "droit de superficie". It provides as follows;

"All buildings, plantations and works done on land or under the ground shall be presumed to have made by the owner at his own cost and to belong to him unless there is evidence to the contrary; this rule shall not affect the rights of ownership that a third party may have acquired or may acquire by prescription, whether of a basement under a building in the of another or of any part of the building"

Analysis of Law and fact

(i) Does the Plaintiff have a droit de superficie over title B447?

[18] The burden of proving the droit de superficie rests on the claimant. The claimant must show that the circumstances were such that they are entitled to compensation. It is not enough to claim that the land was built on in good faith; vide **Geers v Belmont SSC 102/2002** (15th July 2002). The claimant must also show that the owner is not the owner of the buildings or works on the land. It is clear from the evidence adduced that the Plaintiff made some constructions on the land, though I have reservations as to the extent of the construction, especially when one considers the evidence of Gustave Reginald and Christian Denis. It was clear that Gustave Reginald performed some works for Tony that included construction of walls. Furthermore, Gustave Reginald testified that works he performed was paid for by the Plaintiff's husband and not her and that in fact there is outstanding payment that cannot be recovered because the husband has passed away.

[19] In **Youpa v Marie [1992] SLR 249** it has held that where there is a droit de superficie over property and a purchaser purchases the land with the knowledge of the structures on it, the land passes with the droit de superficie" Therefore, the Plaintiff further bears the burden, on the balance of probabilities, to establish that the defendants had knowledge of the structures thereon.

[20] As already mentioned, it is established that the Plaintiff made some construction to the property. Unfortunately the extent of the expenses is not supported with documentary evidence. I note that Article 1341 of the CCS that any matter, the value of which exceeds SR5000/- requires documentary proof. There is no written agreement between the Plaintiff and Tony and neither are there receipts of expenses as would be required under Articles 1343 and 1345. In absence of documentary evidence, oral evidence is inadmissible. However, there are exceptions to this general rule found under Article 1348. Counsel for the Plaintiff has argued that since this case is one where document would be one of moral impossibility, I disagree. I believe that in such circumstances if Tony would have given his consent to the Plaintiff to construct on the Property, it would not have been impossible, despite familial relationship for necessary documents to be drawn up, especially considering that Tony had decided to emigrate Canada. Be that as it may, I find that the Defendants did not raise issue with that, so the applicability of Articles 1341 shall not come into play in this case.

(ii) The Consent

[21] Before making a finding as to whether there was consent or not and whether the parties acted in bona fide, I have to record my observation that most key witnesses were not being truthful, save for the 3rd Defendant. Most of them had interests to protect. I find that the transaction between the Plaintiff, Tony and the 1st and 2nd Defendants was a family matter and that most of the witnesses who were called to testify were economical with the truth and rather than bringing clarity to the case, created more obscurity. That makes it more difficult to make a finding. Counsel for the Plaintiff relied on **Coelho v Collie [1975] SLR 79** to argue that there was consent. In that case, it was said that *"tacit consent is not sufficient to produce the legal effects of consent, which must be positive, although not necessarily express. Such consent produces legal effects. Any act of the owner amounting to consent which is sought to be proved is a "fait juridique" to which the rules regarding proof in writing applies"*

[22] If the Court is to find the Plaintiff has a "droit de superficie" Article 555 shall apply and in the present circumstances, the Plaintiff shall be entitled to compensation for her

investment. It will be a difficult task to assess the value of the compensation. I note that there are no receipts, there is no evaluation (professional or otherwise) of the value of the property, prior to and after the Plaintiff undertook construction. The compensation being claimed for the works by the Plaintiff is nearly twice the value the 3rd Defendant paid for the Property. Counsel for the Plaintiff has in her submission argued that the 3rd Defendant knew that the Plaintiff had a droit de superficie because he gave the Plaintiff 6 months to vacate therefrom. I believe that this is not the sole interpretation that can be given to that position, as the reverse could overwhelmingly be possible. He testified that he before he bought the property he conducted his searches and he was informed that the Plaintiff was vacating in a 4 to 5 months. That purchase by him was for future use by his children.

[23] The Plaintiff has produced no evidence of any written document signifying the consent of Tony for her to construct on the land. She states that when Tony asked her to move to the Property because of hardship she was enduring because her husband was an alcoholic, he had said to her that she could do anything she wants. There is no testimony to satisfy Court what Tony meant by that. Was it the same thing that what appeared to have been understood by the Plaintiff? On his part, Christopher states that Tony and his mother had an agreement; *"he said she could stay until her death"*. This suggests possibility of a usufruct, not a permission to build. If that was so, it begs the question why Tony did not have a grant of usufructuary document prepared to safeguard the Plaintiff's interest? Michelle-Anne testified that she was not aware of any agreement.

[24] Tony was not called as a witness. Relying on **Coelho v Collie (supra)**, Counsel for the Plaintiff pressed upon Court, not to draw adverse inference for the non-calling of Tony to give evidence. I shall not. I note nonetheless that that in **Coelho v Collie (supra)** though one of the persons who was alleged to have given consent was not called, there were proxies who were alleged to have given consent and were available. I don't agree that it would have been immorally impossible to have Tony available to testify. This could have been done via video conferencing, provided such request satisfied the requirements of the Evidence Act.

[25] In my assessment as to whether there was consent, I question whether if in telling the Plaintiff she could do anything on the Property, Tony had in mind extension of a permanent nature to the Property. If that was so, would Tony have sold the Property without keeping a safeguard for her? I ask this particularly because as per Plaintiff's case, the 1st and 2nd Defendants had not been good terms for a long time and especially well before that sale. It has been suggested that there was a business deal to raise capital between Tony and the 1st and 2nd Defendants and that the Property was to be transferred back to Tony, yet there is absolutely no indication that Tony tried to regain back the Property. I also note that as per Michelle-Anne's testimony, Tony had come back to Seychelles and said he was going to transfer the Property to the Plaintiff but did not do that. It is difficult to appreciate what Tony's intention was and can be interpreted that he did not necessarily envisaged the Plaintiff constructing any permanent structures on the Property.

[26] The Power of Attorney dated 26th September 2006 whereby Tony appointed Michelle Anne as his attorney is also not indicative of any tacit or positive consent by the former. It granted his attorney power, inter alia to sell. Had he in fact granted permission to build, he would not have done so. This is more reason why evidence from Tony would have been most necessary to clear all the blur in this matter.

[27] I am equally question the reason why the Plaintiff, if as she claims she has a droit de superficie over the Property did not move to enforce such right once she discovered about the sale between Tony and the 1st and 2nd Defendants. That sale was effected on 9th October 2006. When asked as to whether the Plaintiff was aware of that sale Michelle-Anne answered; *"yes, I told her and asked her if she knew about it and if Tony talked about it and she said no."* However, admittedly in her evidence she contradicts Michelle-Anne and says she was not aware of the sale but I am sure that faced with the situation whereby the 1st and 2nd Defendants were not on good terms with her, Michelle-Anne would have informed her of the sale. The sale to the 3rd Defendant was effected on 04th June 2010. I also take into consideration that as per Exhibit P4, the Plaintiff disputes that she was informed of that sale by the 1st Defendant as claimed in letter from her Attorney

(Exhibit P3). I have no reason to disbelieve Michelle-Anne. She is a witness for the Plaintiff.

[28] I conclude that from the evidence as identified above it is not clear whether Tony granted a permission to build on the property. On the balance of probabilities it is totally unclear whether there was such conduct and his conduct contradicts any suggestion of a consent having been granted.

(iii) **Good faith**

[29] The Plaint, pleads the existence of a droit de superficie through consent. It does not plead good faith. It is further pleaded that the consent was for completion of construction of the house and for the Plaintiff and her husband to occupy throughout their lifetime and /or until the house of the Plaintiff require reconstruction. I note that the evidence adduced before Court by the Plaintiff and Christopher is that the Plaintiff would move into the Property to be away from her husband who was alcoholic and they were encountering problems. Then why would the permission to reside on the property extend to the husband. I further note that despite the alleged condition as per Plaint states that the Plaintiff would remain on the Property until her house needed reconstruction, the Plaintiff sold her house. I already held such consent has not been established.

[30] Nonetheless, I shall consider whether in good faith, the Plaintiff understood what Tony told her about "doing anything" she wanted to the Property to have included included building thereon. It was held in **De Silva v Baccarie** (supra), that *"a droit de superficie can be created through the consent of the owner or by a party building on a property in good faith."* Unfortunately the Plaintiff has not adduced evidence to sufficient enough to support that. In **Geers v Belmont** (supra) it was held that is not enough to claim that the land was built on in good faith. There needs to be something more. I find the Plaintiff's behaviour after Michelle-Anne had informed her that Tony had sold the Property to the 1st and 2nd Defendants, not with that of someone who had an interest to be protected. There is no evidence adduced that she approached or discussed that sale with Tony. In my mind, this behaviour is inconsistent with that of someone who would have understood that she was granted permission to construct on the Property. Could it be that as per

Michelle-Anne's evidence which contradicts that of the Plaintiff, she moved into the Property because some people were interested in it and Tony was defaulting on his loan repayment. Tony was moving to Canada and therefore having someone on the Property will make the process of repossession more difficult. The Plaintiff has not satisfied this Court that she understood from Tony that she could construct on the property.

[31] The Plaintiff has prayed that in the alternative that the Defendants should be made liable because they were aware of her investment. There is no indication from evidence before Court that the 3rd Defendant was aware of the transaction between Tony and the Plaintiff or that the Plaintiff has invested therein. As far as the 1st and 2nd Defendants are concerned the position of the Plaintiff is that they had not been on speaking terms. That state of affairs was began before the sale. The 2nd Defendant's testimony is that he bought the house as he saw it. He had visited it before and when he bought it was the same. The onus remains on the Plaintiff to establish awareness by the Defendant. That she did not establish.

[32] Therefore, I dismiss this case, find that the Property belongs to the 3rd Defendant and that each party shall to bear his/her own cost.

Signed, dated and delivered at Ile du Port on 14 September 2018

M. Vidot
Judge of the Supreme Court