

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: NO 20 of 2016

[2018] SCSC 947

MICHELLE COOK

Plaintiff

Versus

LESLIE BARBE AND OR

Defendants

Heard: 16th May, 2nd August, 6th November 2017; 9th February, 26th February, 20th
March, 16th May and 30th May 2018.

Counsel: Mr. S. Rouillon for the Plaintiff
Mr. Rajasundaram for the Defendant

Delivered: 19th October 2018.

JUDGMENT

ANDRE J

- [1] This Judgment arises out of Plaintiff filed before the Supreme Court by Michelle Cook (born Boniface) (“Plaintiff”) of the 18th March 2016 against Leslie and Claudette Barbe (“First and Second Defendants”) and (“cumulatively referred to as “Defendants”), wherein the Plaintiff seeks for the sale of property No. V 5825 onto the names of the Defendants (“Property”), to be declared null and void in view of lesion and in view of a fraudulent sale on ground of fraud for gross omission of the Plaintiff as co-owner; that the Land Registrar be directed to include the name of the Plaintiff in the records of the Property as the co-owner and direct that the Defendants are jointly and severally liable to pay the Plaintiff the costs of this suit and for any further reliefs that this Court deems fit according to the circumstances of this case.
- [2] The Defendants filed their statement of Defence on the 17th May 2016 raising a two-fold pleas in limine litis, in that the plaint is incompetent, frivolous and vexatious and time barred and cannot stand; and that the Plaintiff has no locus standi to bring this action since she has no interest in the Property.
- [3] In their Defence on the merits, the Defendants deny the averments of the plaint and further aver that the Will as alleged by the Plaintiff shows no proof of any property or title to the Property and the Defendants purchased the Property for value and in good faith and the pre-condition for lesion has not been met in the absence of a joint valuers’ report supplied and or produced by the Plaintiff to prove that the lesion amount stated on the Plaint as valued is less than the price paid by the Defendants through several registered deeds.
- [4] The Defendants further raised a counterclaim to the effect in a gist, that the Defendants are both pensioners and that the interim injunction was misconceived wrong in law and an infringement of their right to enjoyment of Property based on speculations of the Plaintiff as per the plaint namely no real interest in the Property and alleged lesion,

hence moving for damages in the sum of Seychelles Rupees Eighty Thousand (S.R. 80,000/-) for inconvenience and damages caused as a result.

- [5] The Plaintiff on her part in answer to the counterclaim, avers that it lacks merits in the absence of an appeal against the interim injunction Order of the Court of the 26th April 2016, that the inconvenience and allegations of frivolity and vexatious nature of the Plaintiff are to be part of costs awarded by the Court hence the counterclaim being irrational and exaggerated and against the law and inadmissible.
- [6] The matter was heard on the afore-mentioned dates and the both parties filed written submissions and due consideration has been given thereto.
- [7] Briefly, the relevant factual background as per the records for the purpose of this Judgment reveal as follows.
- [8] The Plaintiff being a Seychellois/British national alleges that her parents, Lorenza Boniface and Jean Baptise Boniface are both deceased. That her late father, Mr. Boniface died in 1994 in Seychelles, and her late mother Mrs Boniface died in 1995 in England. Before he passed away, her father owned one fifth of immovable property at Bel Air Mahe, which is registered as title V 5825 being the Property. The rest of the Property was divided according to her amongst his siblings, as it was a family home. That her father lived on the Property. In 1985, he sold the Property to Mrs Lina Williams for the sum of Seychelles Rupees Eight Thousand (S.R. 8000/-).
- [9] She further avers that the Defendants, Mr Leslie Barbe and Claudette Barbe are the present owners of the Property. They purchased various shares in the Property from Lina and Annielle Williams and James Williams over a period of six years, starting in 2002. They paid in the region of Seychelles Rupees One Hundred and Sixty Thousand (S.R. 160,000/-) over three transactions.

[10] That in 2014, and again in 2016, the Plaintiff filed a plaint in this Court contesting this ownership. The merits of the 2014 case were never heard, due to a legal technicality and case dismissed. The Plaintiff thus filed the present proceedings in March 2016.

[11] The Plaintiff thus claims that her mother owned the Property and that she gained title of the Property through succession as a co-owner of the Property and that the other legal heirs of the estate have sold their shares of the Property without her knowledge and did not pay her part of the share as claimed. That she only found out about this in January 2013. She also claims that the amounts at which the Property were sold were much lower than the valuated amounts, and that the sale constituted lesion. She further alleges fraud on the part of the co-owners because they had excluded her from the sale. In the circumstances, she wanted the Court to make the Orders as per paragraph [1] above.

[12] The Defendants oppose the Plaint and counterclaim as per paragraph [2] (supra), and also the two pleas in limine litis as above-referred and as part of the defence denying that the Property was owned by the Plaintiff's parents and that it had been left to the Plaintiff through testate succession. In their view, the Property was purchased in good faith. They claimed that the Plaintiff's share in the Property was sold by his father on 11th March 1985, and that the Plaintiff's mother had no share to inherit in the property. As to the lesion claim is argued that it is less than the lesion amount paid for the Property, hence damages for the inconvenience suffered as a result.

[13] The Plaintiff as highlighted above, opposes the counter claim, stating that its basis is legally unsound as it relates to ordinary costs in proceedings, and misplaced as the claim of the Plaintiff was not a money one, but an assertion of her rights.

[14] During these proceedings, the two interlocutory applications filed by the Defendants for security for costs and recusal were disposed of and do not require much details. An injunction was however granted by the Court following Motion of the Plaintiff of the

26th April 2016 wherein the Court ruled that, “*that at this stage of the proceedings, on the face of the pleadings, I am satisfied that the Plaintiff appears to have a bona fide claim as against the Defendants in the main suit; and I am further being satisfied that unless the Court grants the ad in litem injunction in terms of section 304 of the Seychelles Code of Civil Procedure (Cap 213) as read with the equitable powers of the Court by virtue of the provisions of sections 5 and 6 of the Courts Act (CAP 52), as sought by the Petitioner, the Plaintiff will suffer irreparable loss, hardship, inconvenience and distress in the event Judgement is given in her favour. Hence granting the motion for an ad interim injunction to the effect that the Defendants restrained from constructing anything on the property and or develop the said land until the final disposal of the main suit as against them*’.

- [15] Now, the evidence as adduced with respect to the *historical ownership of the property* provides very unclear picture as to the ownership of the Property by the Plaintiff’s father. The Defendants produced (*Exhibit D1*), which is a transfer deed of the Property dated 11th March 1985 in the name of Lina Williams from the Plaintiff’s father of his 1/5th share in the Property hence it is clear that in terms of (*Exhibit D1*), the Plaintiff’s father, Mr Jean Boniface sold his one fifth of the Property to Lina Williams for the sum of Seychelles Rupees Eight Thousand (S.R. 8000/-). The deed described that Mr Boniface had acquired his one fifth of the Property as an inheritance from his parents. The Defendants further adduced a set of documents regarding the registration of the Property namely, the notice of registration dated 4th October 1991, (*Exhibit D3(1)*), being indicative that the Heirs Mrs Williamine William (born Boniface), Miss Lina William, Mr Ephantase Boniface and Mr William George Morel had the Property registered under their names, but with a qualified title subject to two encumbrances namely, a legal charge of Seychelles Rupees One Thousand (S.R.1000/-) in the name of the Government of Seychelles and a usufruct for the lifetime of Jean Boniface. At this stage it is unclear as to how usufructuary interest in the name of Mr. Boniface was registered as an encumbrance in the absence of the said condition on the transfer deed and Mr. Fred Hoareau Deputy Land Registrar could not give any plausible explanation

to the Court to justify its existence.

- [16] In terms of (*Exhibit D3(7)*), a certificate of death entered by the Defendants, the Plaintiff's father died on 8 December 1994.
- [17] The Plaintiff on her part produced a Will that her late mother left (*Exhibit P1*) dated 17th July 1995, wherein the Plaintiff was bequeathed with all her property, movable and immovable.
- [18] The Defendants further produced (*Exhibit D2*), being a transfer deed dated 4th October 2002 in respect of the Property wherein Lina Williams transferred her rights, being an undivided one fifth share to the Defendants for Seychelles Rupees Sixty Thousand (S.R. 60,000/-). The Defendants further produced an Affidavit of transmission by death of the 17th January 2003 by James Victor Williams and wherein it was averred that of Mrs Marie Williams (born Boniface) died intestate on 5th January 1986 and had left six children, namely himself, Lina Williams, Annielle Williams, and three other relatives who were deceased. The Affidavit went on to state that Marie Williams was the registered owner of an undivided interest in the property. It further stated that he and his siblings, as well as those who were deceased and represented, were the heirs through direct inheritance. It also averred that to the best of his knowledge, no one else had rights to the inheritance.
- [19] Further, Defendants produced (*Exhibit D3(4)*), which is another transfer deed of the 24th February 2003, done jointly by Lina Williams and Annielle Williams, in terms of which they transferred their rights to the Property, being an undivided half share, to the Defendants for the sum of Seychelles Rupees Fifty Thousand (S.R.50,000/-). Subsequently, on 28th February 2008, James Victor Williams also transferred his undivided share in the Property to the Defendants for an amount of Seychelles Rupees Fifty Thousand (S.R.50, 000/-) (*Exhibit D3(5)*).

[20] For sake of completeness, there is another entry at the Land Registry records with regards to the transfer dated the 9th February 2004 filed by William George Morel and Ephantase Boniface rectifying an erroneous entry of them as owning one fifth of the Property (*Exhibit D4*). Subsequently, there were updated documents that emanated from the Land Registry dated the 18th August 2016 being a Certificate of official search which entries show that the Defendants are the owners of the Property, and there are no encumbrances. (*Exhibit P2*) and also records of the Land Registry of the 16th May 2017, showing that the Property of the Plaintiff's father was sold to Lina Williams for (S.R. 8000/-) on 11th March 1985 and the record entry of the 17th July 1995 showing the entry of a Will in favour of the Plaintiff.

[21] Other Exhibits produced by the Plaintiff relates to valuation reports relevant to the lesion claim in the form of the first valuation report dated 27th December 2012, and marked (*Exhibit P4*) prepared by Quantity Surveyor, Ms Bastille. She valued the then current market value of the property (2012) at over (S.R.9.5 million). Another valuation report, (*Exhibit P5*) dated 21st January 2013 prepared by Quantity surveyor Mr. Nigel Roucou. This report assessed the value of the Property in 1985. In terms of the report, the value of the Property was valued at around (S.R.655,000/-). A fourth report was prepared by Mr Jacques G Renaud on 13th May 2013. This report, marked (*Exhibit P6*), was commissioned to get the value of the Property as at 1985 and 2013 respectively. He valued the Property at (S.R. 135,000/-), in 1985, and around (S.R. 6.6 million) in 2013. The last report, marked (*Exhibit P7*), was 'allegedly' prepared jointly by the three Quantity Surveyors. This report assessed the value of the Property as at 2003. In terms of the report, the value was at (S.R. 5.3 million).

[22] Now, the Plaintiff testified that the Property was sold but claimed that she had a right of ownership in the Property by virtue of her mother's Will (*supra*). She testified that she had been born and raised on the Property together with her twelve siblings. She also testified that a few years ago, she had gone onto the Property and was threatened off the land by the first Defendant. After this, she testified, she conducted research at the Land

Registry and found that she was the owner of the Property by virtue of her mother's will. She was asked where she was when the Property was sold. She responded that she was in England. And that she only became aware of the sale in 2013. She rejected the transfer deed, stating that she did not know the alleged transferors. In her view, the documents seemed fraudulent. According to her recollection, her father owned the entire property and lived on it without any other sibling. Her father was illiterate and disabled. She confirmed that she appointed valuers to value the Property. Under cross examination, she was asked about the earlier proceedings that she had brought against the Defendants. She conceded that she had no proof of title of her parents' ownership of the Property. She did not dispute the 1986 Board proceedings, which implicated her mother, but testified that she did not know about them because her mother never mentioned them to her the proceedings of the Rent Board is to be noted was simply itemised in this case by the Defendants.

[23] The Plaintiff further testified as to alleged fraud that the original sale by her father was fraudulent because her father was sickly and illiterate and would never have sold the Property rendering them homeless. In her view, the fraud was committed by the owners who sold the property to the Defendants. But, she also believed that the Defendants were not bona fide purchasers because they 'played cat and mouse.' Later on, she testified that she had been told by her lawyer that her father had signed over the Property on his death bed. When this was explored further, she changed and said that this was what she presumed. Later she changed her evidence again to the effect that if her father had sold the Property it must be because he had been threatened. In this regard, she said that she had seen many instances like this in her work as a nurse, where family would force sick people to sign and threaten that they would not look after them if they refused. According to her, he was a frightened man. She also testified that she had spoken with her father, both telephonically and verbally when she visited although it is unclear when this was. And that her father said that 'soon all our land will be back' and that they would be able to 'come back and live like [they lived] before'.

- [24] The second Defendant, Ms Claudette Barbe gave sworn testimony that her and the first Defendant, her husband, bought the property from Mrs Lina Williams and Annielle Williams and she also confirmed that they had lodged a counter claim against the Plaintiff for the inconvenience of opposing the Plaintiff.
- [25] Mrs Selma Williams testified that she was related to the Plaintiff. Her father was the Plaintiff's uncle. She knew the Plaintiff, and also knew that the Plaintiff had other siblings.
- [26] Mr. Jacques Renaud qualified Quantity Surveyor called by the Plaintiff produced (*Exhibit P7*) (*common valuation of the property*) of himself, Ms. Cecile Bastille and Nigel Roucou latter also qualified Quantity Surveyors evaluating the Property as at the year 2003 at (S.R. 5,300,000/-).
- [27] However, it is to be noted with particular interest in this case that Ms. Bastille testified that she physically went to see the Property a few years back, and then did her valuation report (*Exhibit P4*), and was not involved in the joint report (*supra*).
- [28] Mr Fred Hoareau, the Deputy Registry General of the Land Registry testified about the various documents produced as exhibits in relation to the Property. With regards to the Will that the Plaintiff's mother left after her death in favour of the Plaintiff, he testified that it had legal effect because it had been registered. He also confirmed the contents of the registered deeds of transfer and the notice of transfer, as well as the revocation documents(*supra*). He further testified that as per the Land Registration Act and Adjudication of Title Decree, the procedure is that all parcels are surveyed with a specific cadastral plan. In his view, it would not have been possible for Mrs Williams to transfer the Property to the Defendants if it was not surveyed. He confirmed that the Plaintiff's father had a usufruct over Mrs Lina William's one fifth share of the Property.

[29] He was questioned by the Court about why the usufruct was not mentioned in the original 1985 transfer deed. His response was that he needed to look at the records. He also testified that there was nothing on the records to indicate that the Plaintiff's father owned more than a fifth of the Property. He also testified that the Property was not surveyed in 1985. In relation to the usufruct, he confirmed that it did not appear in the certificate of official search, only in the notice of first registration. He had no explanation for this. In his experience, this was uncommon as all transfers would normally retain the usufruct, which would normally appear on the title deed. There was no such retention in this case. He also testified that although the Plaintiff's name was not registered in any of the documents, her name appeared in the Repertoire. He testified that when a new transfer happened from the old land register, all information pertaining to ownership of that parcel that was on an old land register would be put on the new land register. He also testified that according to the documents, the Defendants owned three fifths of the Property. He maintained that what was transferred by Mrs Williams was bare ownership, meaning that the property was transferred subject to the usufruct.

[30] I shall now move to consider the legal standard to be applied and its analysis thereto.

[31] First and foremost, I will address the preliminary issues as raised by the Defendants in this case for the plaint stands or falls dependent on the Ruling of the court on any of those two points of law as raised as per paragraph [2](supra).

[32] It is trite law by virtue of Sections 90 as read with 92 of the Seychelles Code of Civil Procedure (Cap 213) ("Civil Procedure Code"), that any party may raise preliminary objections at any stage of the pleadings and those legal points may be disposed of at the trial and if the court considers that the decision of such point of law substantially disposes of the whole cause of action, ground of defence, set off or counterclaim, the court may thereupon dismiss the action, or make such other order therein as may be just.

- [33] I thus find it apposite to treat the first plea in limine litis namely, in that the Plaintiff has no locus standi to bring this action since she has no interest in the Property.
- [34] As illustrated, it is averred and testified that the Plaintiff has no interest in the Property and therefore lacks standing to file the plaint. The allegation could not be determined by the Court ex-facie the pleadings hence hearing of the merits to ascertain proof of ownership.
- [35] Without having to unduly repeat and or analyze the evidence pertaining to ownership of the Property, the Court reiterates the evidence as per paragraphs [15] to [29] (supra) which is illustrative of the history of the Property and its ownerships.
- [36] Article 516 of the Civil Code (“Code”) under the heading of *Different kinds of property* provides that, all property shall be distinguished into movable or immovable. Article 517 further provides that, property is immovable either by its nature or by its destination or by reason of the purpose which it serves.
- [37] Further, Article 543 of the Code provides that, property shall be subject to rights of ownership or to a simple right of enjoyment or to a claim to the benefit of easements thereon. Article 544 further provides that ownership is the widest right to enjoy and dispose freely of things to the exclusion of the other, provided that no use is made of them which is contrary to any laws or regulations. In the same line Article 545 further provides inter alia, that no one may be forced to part with his property except for a public purpose and in return for fair compensation.
- [38] Now, the Plaintiff claims right of ownership through succession by virtue of Article 711 of the Code in that her ownership of the Property was acquired and transferred by succession by way of the Will (supra).

- [39] Needless to go further, to determine this crucial issue of locus standi for the Court after carefully analyzing the evidence as per paragraphs [15] to [29] (supra) namely, those of Defendants, the Plaintiff herself, and Mr Fred Hoareau Deputy Registrar of the Land Registry, it is abundantly clear through Exhibits D1, D2, D3 and P2 that the Plaintiff's late father's 1/5th share in the Property was sold prior to his death in 1994, and as per (*Exhibit D1*) on the 11th day of March 20185 to one Lina Williams and this is clearly transpired on (*Exhibit P2*) being the Official Transcription record of the Land Registry's Office. Hence, it is clear that since the his share of the Property had already been sold it could not have been subject matter of the succession to which Plaintiff is entitled to enjoy by virtue of the Will (*Exhibit P1*) whereby the late mother of the plaintiff bequeathed, "*all the property which I shall leave at my death, movable or immovable, money wherever satiate, to my daughter Michelle Cook.*"
- [40] It is to be noted by this Court coming to that conclusion the explanation given by Mr. Fred Hoareau as per above-sated status as to the reason for the entry of the Will in the records of the Property in the year 1995, and this according to him was, "*when a new transfer happened from the old register, all information pertaining to ownership of that parcel that was on an old land register would be put on the new land register.*"
- [41] It is thus clear to my mind upon scrutiny of all the Land Registration documents as mentioned and illustrated that the Plaintiff holds no rights of ownership and or interests in the Property in issue for it was already sold by his late father in the year 1985 (supra) and thus could not have been subject of the Will which should be noted is very wide in terms of property left behind for the benefit of the Plaintiff.
- [42] It follows thus, that the plea in limine litis on ground of lack of locus standi succeeds and upheld by this Court and the Plaint is dismissed as against both Defendants.
- [43] The other points of law as raised remain on file for it will be simply an academic discussion to treat it in this Judgment based on dismissal of the Plaint on a point of law as determined above.

- [44] Turning to the Defendants' counter claim. As mentioned, they have sought a counter claim, primarily raising the inconvenience of being brought to Court on two separate occasions in the same matter. Accordingly, the claimed moral damages averred for the inconvenience and embarrassment of being brought to Court to answer a case that they submit was a non-starter, because of the documentary evidence concerning the property. They have asserted that as pensioners, they should not have been put through this process, and to have been made to have suffer harm because of it. The Plaintiff has opposed the counter claim as per paragraph [15] (supra).
- [45] These kinds of damages are recognised as a separate kind in the Civil Code. Art 1149 (2) provides that damages shall also be recoverable for any injury to or loss of right or personality. These rights, the Article holds cannot be measured in money. These rights are neither material nor corporal; it is something intangible. And unlike other kinds of damages, these do not have a statutory yardstick. Each case is to be decided on its own merits, and evidence must be led to enable the court to determine an appropriate award and this as clearly ruled in the matter of **(See: Denis v Ryland (CS 135/2012) [2016] SCSC 10 (15th January 2016).**
- [46] In the present case, the Defendants have stated that they were caused harm in opposing the claim on two separate occasions and had to contend with the discomfort that comes with Court proceedings, in a situation where the Plaintiff knew that they held legal title of the property. And where they are both retired pensioners. Although the oral evidence that was led by the second Defendant in this regard went no further than to confirm that they have had to defend the proceedings, the embarrassment of defending a legal title to property that they had bought is evident based on the determination based on the plea in *limine litis* as to *locus standi* (supra).
- [47] However, this Court finds that based on precedence *inter alia*, with regards to the inconvenience and moral damages, it is noted at this juncture that assessment of same and similar damages in tort cases are to be compensatory and not punitive as clearly ruled in

the matter of (*Jacques v Property Management Corporation (2011) SLR 7*). Further, it is trite that moral damages are intangible and neither material nor corporal.

[48] I find in that regards, thus based on the evidence of the Defendants proving inconvenience as illustrated at paragraph [40], that the award as claimed in the sum of (S.R. 80,000/-) as it is grossly exaggerated in this instance especially noting insufficiency of evidence to that effect. In the circumstances, this Court will award a sum of (S.R. R20,000/-) in favour of the Defendants.

[49] Finally, as earlier determined [paragraph 38], the Plaint is dismissed on the basis of lack of locus standi and the Counterclaim is allowed on the above stated compensation being paid to the Defendants with costs of proceedings.

[50] As obiter dictum, the Court further wishes to state that this Court in the special circumstances of this case, that we are sympathetic to the Plaintiff's plight as a pensioner who spent some time away from the Seychelles and is sensitive to the importance of a family home, but unfortunately, the Court cannot create expectations where these cannot be legally justified.

Dated this 19th day of October 2018.

S. Andre

Judge of the Supreme Court