IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS. 02 of 2017

[2018] SCSC 976

MOHAMMED ISA KHUDABIN

Plaintiff

versus

WILLETTE PORICE

Defendant

Heard: 19th February and 23rd May 2018

Counsel: Mr. J. Camille for the Plaintiff
Mr. B. Georges for the Defendant

Delivered: 23rd day of October 2018

JUDGMENT

S. ANDRE J

[1] This Judgement arises out of as plaint filed before the Court by Mohammed Isa Khudabin ("Plaintiff") of the 11th January 2017 against Willette Pointe and Yvonne Porice ("1st and 2nd Defendants") (Cumulatively referred to as "Defendants"), wherein the Plaintiff requests for a Judgment that Defendants be ordered to vacate Parcel No. V5117 ("Property") with costs.

[2] Defendants filed their Statement of Defence of the 27th March 2017 wherein the plaint is partly admitted and denied and the Defendants further aver that the Defendants have been in occupation of the Property with the permission of John Lalande also known as Ibrahim Faissal Aldowais, the owner of the Property and the father of the Plaintiff ("Deceased") and had been given permission by the Deceased to occupy the Property and to build and maintain the dwelling house they occupy on the Property and that the Plaintiff owns a dwelling house at Beoliere and is in actual occupation of the same and hence, moves for dismissal of the plaint.

[3] The Defendants further raised as counterclaim averring that the Defendants having been in occupation of the Property and building on the Property with the permission of the Deceased, the Defendants have acquired a *droit de superficie* over the Property hence moving for an order that the Defendants have a *droit de superficie* over the buildings they occupy over the Property.

[4] The Plaintiff on his Part in relation to the counterclaim by way of Reply of the 28th June 2017, denied the counterclaim and puts the Defendants to strict proof thereof and denies permission by the Deceased to occupy the Property and to build and maintain a dwelling house thereon and a *droit de superficie* is specifically denied over the Property.

[5] Having highlighted succinctly the averments of the relevant pleadings, the following is the relevant factual background as per the Records.

[6] The Plaintiff, Mr Mohammed Isa Khubadin, is the owner of registered land parcel Title No V5117 being the Property, which was bequeathed upon him by his late father, Mr John Lalande, the Deceased. The Property comprises of land and a dwelling house which is part brick and part corrugated iron sheets. The Defendants, Ms Willette Pointe and her daughter, and some grandchildren all reside in the dwelling house. They have lived there since birth.

[7] According to the pleadings, the Deceased had granted the 1st Defendant's mother, Ms

Pierreline Pointe and her sister Christa Lalande, permission to stay on the Property years ago. Subsequently, the first Defendant was born on the Property and continued to live on the Property until she had her own children there, and the second Defendant also had children there. *They all stay there without the Plaintiff's permission*. They do not have any other property of their own. Over the years, the Defendants improved the dwelling home by building parts of it with bricks.

[8] Around October 2016, the Defendants began clearing works in anticipation of further constructions on the Property. *They did not request the Plaintiff's consent to do so. The Plaintiff then issued a notice for them to vacate the Property. They failed to take heed of the notice. In January 2017, the Plaintiff issued a plaint in this Court, seeking their eviction and asking for costs.*

(Emphasis is mine).

[9] At the hearing, the Plaintiff testified on his own behalf and the 1st Defendant testified as well as one Jeanne Marie Porice for the Defence.

[10] The Plaintiff briefly testified that the Deceased left him the Property by way of a Will. He testified that the Deceased had given verbal permission for his two aunts, Liline Porice and Christa Lalande to stay on the Property. He testified that both have passed away. He confirmed that the first Defendant and her family live on the Property and that it has been improved over the years. He agreed that he could pay compensation for the amounts expended on the Property if the Defendants would vacate.

[11] Under cross examination, he testified that the first Defendant had not been granted permission to stay on the Property, only her mother Liline Porice. And he was not told by Deceased that permission had been granted to the first Defendant to stay on the Property.

[12] The Plaintiff conceded however, under cross examination, that he currently lived at Beoliere, which residence he shared with his late father before he passed away. He testified that the Deceased left him several properties, including the impugned one, and

that he wanted the Property so that he could develop it and to reside on. He insisted that since nothing was written down in any Will, and he was not told anything, his late father therefore could not have given his permission for the Defendants to remain on the Property.

[13] As for the Defence, Jeanne Marie Porice testified that the Plaintiff's late father was her uncle, and that the first Defendant was her niece. She testified that she did not know the Plaintiff well, who was introduced to her by the Deceased. She testified that the Deceased used to live with her grandmother, Marianne Lalande. That he worked on the boats and would often return sick. He would then be cared for by the grandmother and by Christa Lalande. She testified that the Plaintiff's father eventually built the house at Beoliere, where the Plaintiff lived, while the grandmother remained at the Property. According to her testimony, Christa Lalande and the Deceased put together money to purchase the Property. Regarding the permission to remain on the Property, she testified that she personally witnessed the Deceased give permission to her late grandmother, her late aunt and mother to remain on the Property. She testified that the dwelling was built because of this permission. She testified that the first Defendant's mother, Pierreline Pointe was now living in France. After Pierreline left, the first Defendant continued to stay on the Property. The first Defendant improved the dwelling house while the Deceased was alive and he never intervened to stop her. She corroborated the Plaintiff's evidence that both Pierreline and Christa were allowed to remain on the Property.

[14] Under cross-examination, she testified that she grew up a few houses from the Property, and that she was a teenager when the Pierreline and Christa were given permission to reside on the Property. She further stated that Christa had been in France for about thirty years, and often returns to the Seychelles every two years. *She conceded that she did not hear the Deceased say that Pierreline and Christa's descendants could stay on the Property.*

[15] The first Defendant, Ms Willette Pointe testified that she was born on the Property and had lived there with her mother. She testified that she was granted permission by the

Deceased to remain on the Property and to improve it for her own comfort. She testified that the Deceased lived on the Property with her for some months and that he knew that she was making improvements to the house and never stopped her from doing so, and never told her to leave. She reiterated that she would not move, because she had been granted a right to remain, and said that it was not simply her mother who was granted permission, but also her. She further testified that she lived on the Property with her three children and a disabled woman.

[16] Under cross examination, she further testified that she was given oral permission to stay on the Property when she was nineteen years of age. She would not accept that she was denied permission to stay simply because permission was not reduced to writing. She conceded that there was nothing in the Will to grant her permission to stay but insisted that just because he did not reduce his intention into writing did not mean that it was not given. She testified that she took out a loan and invested some of her own monies to improve the dwelling house by building it with bricks. She said that she did not know how much she spent on it. She finally testified that she was not prepared to accept compensation, because she would have no other place to stay.

[17] Moving on to consider the legal standard to be applied and its analysis thereto, it is clear that *the evidence of both Plaintiff and the Defendants prove that there was no written permission for the Defendants to remain on the Property.* This is therefore common cause. Where they disagree is in relation to whether permission was granted orally, or whether there was acquiescence by implication. The Plaintiff's evidence in this regard is that he was not told anything by the Deceased in relation to the Defendants, he only knew about permission granted to Pierreline and Christa. The Defendants' evidence is that the Deceased orally granted permission years ago. Hence, all rest on the question of whose evidence is more credible and this is to be appreciated by the Court at this stage of the proceedings. The evidence regarding the expenditures on the dwelling by the Defendants are uncontroverted as far as the record goes albeit lack of proof as to certainty in terms of quantum. The Plaintiff has accepted that monies have been expended although the amount is unclear and this corroborated by the first Defendant's evidence (supra).

[18] Now, the Defendants have also conceded that they commenced construction on the dwelling in October 2016 to replace the remainder of the corrugated structure with bricks.

[19] Following the above illustration of the admitted evidence and the real questions in issue to be determined by this Court, the main question to be decided is, *whether a droit de superficie has been proved. A droit de superficie is a right that is created by agreement and may be for a limited period or in perpetuity depending on the intention of the parties* as decided in the matter of **(See *Veronique Servina nee Desaubin v Julita Hoareau Civil Side No. 213 of 2009, citing Albert v Stravens 1976 SLR 158.*)**

[20] For this right to be created, there must be consent, and this consent must be provided in writing as decided in the matter of ***(Coelho v Collie (1975) SLR 78.)*** In the '*Coelho case', the Court ruled on positive consent and suggested that where the consent is not in writing, it would be tacit. Sauzier J found that, where there was no transfer evidenced by a notarial act but only a simple act granting a right to build on the land, the droit de superficie created would subsist temporarily at least until the building needed rebuilding.*

This reasoning has further been confirmed in the matter of **(*Ministry of Land Use and Housing v Paula Stravens Civil Appeal SCA 24/2014).***

[21] By contrast in the matter of **(*Tailapathy v Berlouis (SLR 1978 to 1982)***, where it was decided that, *when the droit de superficie is integral, the superficie enjoys all the rights.*

[22] More recently, in the matter of the **(*Ministry of Land Use and Housing v Paula Stravens* (Civil Appeal SCA 24/2014) of the 19th April 2017)**, the Court of Appeal considered the position in Seychelles regarding whether a *droit de superficie* may be temporary or indefinite. *The Court accepted that there may be instances where it may be indefinite, but also accepted that there may be instances where it may be temporary. In the court's view, be rebuilt. The question whether there was a need to rebuild had to be determined on the evidence. And in this instance, the Court looked at the difference between the repairs and rebuilding. It looked at the extent of the repairs, and on the evidence, held that the*

repairs amounted to rebuilding.

[23] Noting the legal standards vis-à-vis the creation and subsistence of a *droit de superficie* in Seychelles, in the present matter, it is clear that the Defendants have conceded that the consent that they seek to enforce was not in writing. But that the Deceased had tacitly acquiesced, whilst still alive, that they improve the dwelling by building it with bricks. This is evidence that was not rebutted by the Plaintiff, the extent of his rebuttal was that there was no written consent. In the circumstances, this Court accepts therefore, that the Deceased tacitly provided the first Defendant with his consent to stay on the Property and allowed her to make improvements.

[24] The contentious issue however, is the extent of the improvements acquiesced to. While no evidence was led as to the extent that was intended, the Defendants have agreed in their evidence that they have began clearing works; that a loan was taken out and that they intend to replace the corrugated parts of the house with the bricks. No pictures of the Property were exhibited. From the evidence though, it seems that the improvements would amount to rebuilding *(for demolition in terms of clearing has been effected with certainty)*. In that regards then, the position is clear in that the *droit de superficie* would terminate in that instance ***(Paula Stravens Case refers)***. It would terminate when the process of rebuilding commences or when it has already happened. This has not happened in this case however. The Defendants have begun the clearing works and they have not yet built. Thus, the defendants' *droit de superficie* will terminate at the point that they start to build or when they have completed same.

[25] It follows, thus, in the circumstances, that the Plaintiff's claim should be dismissed in as far as the denial of the existence of the *droit de superficie* which as analysed has been proved to the required standard by the Defendants as per above analysis. It follows thus, that the Defendants' counterclaim is be upheld. However, should the Defendants continue to commence improvements/repairs, and if these improvements/repairs have the effect of rebuilding the dwelling house on the Property, then the *droit de superficie* would terminate and land to be repossessed by the Plaintiff.

[26] Accordingly, the Court finds that on the balance of probabilities the Plaintiff has failed to meet his Plaint hence same is dismissed accordingly and the Counterclaim as a result is granted accordingly in terms of the existence of a *droit de superficie* in favour of the Defendants over the dwelling house existing on the Property *subject to repairs and not improvements/repairs amounting to 'rebuilding'*.

[27] Costs is awarded in favor of the Defendants.

Signed, dated and delivered at Ile du Port on the 23rd of October, 2018.

S. Andre

Judge of the Supreme Court