

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 29
CS112/2013

In the matter between
Vincent Padayachy
(rep. by *Guy Ferley*)

Plaintiff

and

Nelson Jean
Sandra Stephany Jean
(rep. by *Basil Hoareau*)

1st Defendant

2nd Defendant

Neutral Citation: *Padayachy v Jean & Anor* (case number CS 112/2013) [2019] SCSC
(judgment date 24 January 2019).

Before: Twomey CJ

Summary: Droit de superficie – how created – gifts - revocability

Heard: [28 September 2018 – 7 November 2018]

Delivered: [24 January 2019]

ORDER

The plaintiff is dismissed with costs.

JUDGMENT

TWOMEY CJ

Background

- [1] The plaintiff, by amended plaintiff dated 20 August 2014, prayed for a declaration from the court of a *droit de superficie* in his favour in Parcel H8631 owned by the first and second defendants (his son in law and his daughter respectively). He averred in his plaintiff that the said parcel of land had belonged to the first defendant's mother who had

given the defendants permission to build thereon. Subsequently, she had divided the land and transferred Parcel H8631 to the defendants. It is the Plaintiff's averment that he had invested substantially in the construction of a house on the land and after its completion had lived therein with his then wife, together with two other of their children and the defendants. After his divorce to his wife, the defendants had forced him out of the house.

- [2] The plaintiff's claim is based on the premise that he had built the defendants' home with his own funds and with the knowledge and intention of all concerned that the house would be used as his family home and having lived there, was entitled to a *droit de superficie* therein.
- [3] The defendants aver that the first defendant's mother granted them permission to build on her land. They further aver that the plaintiff offered to assist financially in the construction of their home on that land as a gift to the second defendant, his eldest daughter, as was the transfer of the land a gift from the first defendant's mother to the first defendant, her son.
- [4] The defendants further aver that in recognition of the plaintiff's gift they offered to accommodate him, his wife and family in the newly constructed home until he was able to build his own home as he was at that time living in rented accommodation. He moved in with the rest of his family but after his divorce, of his own volition, moved out of the defendants' home. They reject the plaintiff's claim for a *droit de superficie* and pray for a dismissal of the suit.

The Evidence

The Plaintiff's evidence

- [5] The plaintiff testified and also called two other witnesses to support his claim. He stated that the defendants married in 2012 and that the house they were residing in was built in the years 2008- 2009. He had come to know the first defendant when he helped him move furniture out of a hotel he owned in 2006. The plaintiff subsequently rented a family home in Fairview, La Misère. The first and second defendants developed a relationship and the first defendant would sometimes stay over at his

house. It was his testimony that the first defendant offered to accommodate the plaintiff's family on his mother's land at La Batie in a house he intended to build.

- [6] He met the first defendant's mother, the owner of the land on which the house was to be constructed. He then helped redesign the intended three bedroomed house into a five bedroomed house with the potential to build an extra storey with two apartments which the plaintiff could rent.
- [7] He stated that he helped clear the land and was involved with the construction of the house at all times. He paid the contractor and the workers who assisted with the construction of the house. He purchased all the materials. The second defendant only drove a pick-up to deliver the materials. They all moved into the house even if it was not fully completed.
- [8] In 2012 after the marriage of the first and second defendants, it was agreed that a separate entrance to the home would be constructed and the first floor of the house would be given to the defendants for their exclusive use. It was also agreed that the house and land would be transferred to the plaintiff. The documents were drawn up but the defendants refused to sign them. The plaintiff produced receipts showing the total sum of SR900, 000 spent on the construction of the house. In all, he claimed he spent about 4 million constructing the house. He accepted in cross examination that the first defendant's mother had given the second defendant permission to build on the land and not to him.
- [9] In 2013, whilst going through a divorce initiated by his wife, he received a Family Tribunal order to only occupy one bedroom of the house but the room was blocked and he could not have access to it.
- [10] He did not accept that he was allowed to live in the defendants' house as an act of gratitude for the help he had given them to build the house. He did not accept that he had threatened his wife and the defendants with violence and that was why he had been prevented from re-entering the house after he had left of his own volition. He also denied that the first defendant had borrowed money to construct the house. He

also admitted that in an application to the Land Registrar to restrict dealings with Parcel H 8631 in 2014, he had deponed that he had received permission from the defendants to build thereon and not from the first defendant's mother who owned the land.

[11] Mr. Allain Savy, a site excavator, testified that he had been commissioned by the plaintiff to excavate rocks from a site somewhere in Glacis in 2007/ 2008. He was paid in the region of SR 18,000 by the plaintiff for the work. Similarly, Mr. Guy Boniface, a mason, testified that he had been paid by the plaintiff to construct a house in La Batie. He laid down the foundations and constructed the house up to the first floor level but could not complete it as he fell ill. In cross examination, he accepted that the first defendant transported materials to the site and sometimes helped him around the site. Allain Maillet, a labourer, also testified that he worked on the construction of the house and was paid by the plaintiff. In cross examination, he accepted that it was the plaintiff who drilled rocks which he had carted away.

[12] Ms. Karen Domingue, attorney-at-law, testified that the plaintiff had been a previous client as was the first defendant. She did some debt collecting work for the plaintiff in respect of his car hire business. She also effected a transfer of land from the first defendant's mother to the defendants. She advised the plaintiff that she would prepare documents to protect his investment in the house being constructed on the defendants' land but the defendants had refused to sign the document which would have ensured that plaintiff obtained a *droit de superficie* in the house. She also represented Mr. Padayachy in the Family Tribunal matter with his wife. Mr. Padayachy decided to vacate the house voluntarily. She confirmed that the application to the Tribunal had been brought on the basis of family violence by the plaintiff against his wife.

The defendants' evidence

[13] The first defendant testified that he had obtained permission to build on his mother's, Solange Jean's land (Parcel H4082) in April 2008. Parcel H4082 was later subdivided and one of the subdivisions, Parcel H8631, was transferred to him and the second defendant jointly. He obtained planning permission to construct a three-bedroomed

house. He started clearing the site. He was employed at that time by the plaintiff who approached him and said he was prepared to assist him financially in the construction of the house as a gift to his daughter, the second defendant. As work progressed on the site the plaintiff advised him to build a bigger home so that they would not have to extend the house to suit their needs at a later stage. On 12 April 2011, he married the second defendant. It was only after the house was completed that the second defendant approached him and asked if she could bring her family to reside in the house. Her family including the plaintiff moved in but subsequently in late 2013 the plaintiff moved out of his own accord. There had been domestic violence and he had tried on occasions to intervene to bring peace between his in-laws.

- [14] During the divorce proceedings, the plaintiff asked him to sign documents to show that he had contributed financially to the construction of the house. When he read the documents, he realised that he was being asked to sign something different, the grant of a *droit de superficie* to the plaintiff, which he did not accept and therefore refused to sign. The other reason why he did not sign the document was because it also mentioned that he had granted the plaintiff a right to construct on the land and this was factually incorrect.
- [15] He accepted in cross examination that the plaintiff had partly financed the construction of the house. He stated that he had also obtained two loans from the bank in the sums of SR250,000 and SR74,000, and further loans from the second defendant's aunt and mother amounting to about SR300, 000.
- [16] The second defendant corroborated the evidence of the first defendant. She stated that when she and the first defendant decided to build their home they had gone to the bank to obtain a loan but had been advised that they would have to show their salaries to support their application. They had approached the plaintiff for whom they were both working and asked him to transfer their salaries into the bank. He had instead proposed to help them financially. The original plan had been to build a three-bedroomed house but the plaintiff had extended the foundation to construct a five-bedroomed house. When the house was habitable she initially moved in with her

husband. She then invited her family to move in with them out of gratitude for the fact that her father had assisted her financially to construct the house.

[17] Her father would come home drunk and threaten the family. He was not thrown out of the house but walked out. This was two or three years after he had moved into the house. Subsequently, she received a phone call from Ms. Domingue, attorney-a-law, to come into her office to sign some documents. When the contents of the document were read out she decided not to sign them as they did not reflect the gift her father had given her. She accepted that the plaintiff had been the major contributor financially to the house. They had also received financial help from her aunt, but could not remember the sums of money they had given. She and the first defendant had also taken out loans. In cross examination she maintained that the land was a gift from her mother-in-law and the financial help from the plaintiff was a gift from father to daughter and not an investment for a family home for all of them.

[18] Mrs. Solange Jean also testified. She was the first defendant's mother and confirmed that in April 2008 she had given her son a written permission to build on her land, Parcel H4082. She later subdivided her land and on 10 August 2012 transferred one of the subdivisions, Parcel H8631, to her son, the first defendant and his wife, the second defendant. She also gave the defendants over SR200, 000 in instalments towards the construction of their house.

[19] In cross examination she disagreed that she had intended that the plaintiff occupy the defendants' house when she had given her son permission to build on her land, nor had the plaintiff ever told her that he intended to occupy the house he was helping to build.

Submissions

[20] No closing submissions have been received by Counsel for the plaintiff. Counsel for the defendants has submitted in writing that the financial contribution by the plaintiff towards the construction of their house was never a gift but rather an investment in the construction in return for which he would obtain a *droit de superficie*.

[21] Counsel has submitted that pursuant to Article 894 of the Civil Code a gift in this respect would have meant the plaintiff irrevocably divesting himself of the ownership of the house which in his evidence was not supported as the only intention he had was to build the house so as to make it his home.

[22] In regard to a *droit de superficie*, Counsel has relied on Article 555 of the Civil Code and the cases of *Coelho v Collie* (1975) SLR 79, *Lesperance v Barra* (2014) SLR 87, *De Silva v Baccarie* (1982) SCAR 5 and *Durup v Radegonde* (1998) for the supposition that the grant of permission to build on a third party's land need not be express but must be positive in the sense of knowledge of and acquiescence to it. In the present case, it is his submission that the defendants never objected to and positively acquiesced to the construction of the house.

The law relating to the creation of a *droit de superficie*

[23] Counsel for the plaintiff has erroneously relied on Article 555 of the Civil Code for the creation of a *droit de superficie*. It must be stated at the outset that a *droit de superficie* is a creature of jurisprudence and not statute. The *droit de superficie* is not a right of ownership but a right of retention. Its existence is implied from Article 553 which provides in relevant part that:

All buildings, plantations and works on land or under the ground shall be presumed to have been made by the owner at his own cost and to belong to him unless there is evidence to the contrary...

Impliedly, therefore when there is evidence to the contrary, a retention right to the property or part of the property can be accorded.

Discussion

[24] The *droit de superficie* however must be created by an agreement between the owner of the land and the third party claiming the right of retention. In Seychelles, it is normally created by a registered agreement outlining the right to build on someone's land. Such an agreement is exemplified by Exhibit P2 in which the first defendant's mother gave the first defendant a right to build on her land. Such agreements infer that the third party building

on the owner's land will have the right to remain in the building once constructed. It is also possible to have an oral agreement to this effect.

[25] In the present matter, it is not disputed by the parties that the first defendant had an agreement with his mother to build on her land, which land after subdivision was then transferred to him and his wife. Had he not acquired ownership of the land it is certainly also undisputed that he would have acquired a *droit de superficie* therein.

[26] There is also *jurisprudence constante* that a *droit de superficie* is personal to the third party to which it was granted. It is a *servitude personnelle*. and although children succeed to the right, it cannot be sold. Generally, once the building which is subject to a *droit de superficie* has deteriorated, it may not be repaired because that is not part of the right. However, in certain circumstances, such as those alluded to by Lalouette JA in *Tailapathy v Berlouis* (1978-1982) SCAR 335 the *droit de superficie* can be integral and confer the same rights to the superficiary owner as the landowner even in terms of constructing and rebuilding. Sauzier J in *Albest v Stravens* (1976) (No. 2) SLR 254 observed that whether the right was perpetual or for a term would depend on the circumstances of the case and the evidence adduced. This view was followed by the Court of Appeal in the case of *Ministry of Land Use and Housing v Paula Stravens Civil Appeal SCA 24/2014* [2017] SCCA 13 (21 April 2017).

[27] Whether a *droit de superficie* has been created or what its duration is will certainly depend on the evidence in each case. As I have stated there is documentary evidence that such a right was created between the first defendant and his mother but having considered the evidence in the present suit, I cannot find any evidence that the defendants or their predecessor in title ever granted such a right to the plaintiff. I cannot therefore grant such a right to the plaintiff.

[28] The issue remains as to the nature of the investment in the defendants' house. In this regard, the defendants have averred that the plaintiff's financial contribution was a gift.

The law relating to gifts

[29] Article 894 of the Civil Code provides that:

A gift inter vivos is an act whereby the donor irrevocably divests himself of the ownership of the thing in favour of a donee who accepts it.

Whilst gifts may be created by documents in writing in the forms of contracts, Article 931 stipulates that:

...

(2) A gift may also be made by delivery, in which case no document need be drawn up. Proof of the intention to make a gift which has already been delivered shall be subject to the general law of evidence.

[30] It is clear from the above provision that a gift is an act of generosity which is both serious and final once it is accepted as the donator transfers to the donee his/her right of ownership. There may of course be conditions to the gift but the provisions of the Code do not prevent parents making generous gifts to their children. Where there are no conditions or clauses to the donation, the gift is irrevocable.

[31] Article 953 *et seq* provide the strict rules applying to the revocability of gifts. Gifts may only be revoked by reason of failure to fulfil the conditions subject to which it is made or by reason of ingratitude or the subsequent birth of children.

[32] Further, when the gift is made as in the circumstances of this case without a notarial document, the intention of the donor to make the gift is inferred from the evidence. In *Searles v Pothin* (Civil Appeal SCA 07/2014) [2017] SCCA 14 (21 April 2017) Msoffe JA stated:

It has to be noted that a person asserting the delivery of a gift was made on some condition has the burden of establishing such condition as a requirement of recovery...Whether or not a gift is conditional or absolute is a question of the donor's intent, to be determined from any express declaration by the donor at the time of the making of the gift or from the circumstances of the case.

Discussion

- [33] The evidence of the defendants and their witnesses is credible. They had intimated to the plaintiff that they wished for him to pay their salaries in a bank account so that they would have evidence of their income to obtain a housing loan to construct their house. He had instead offered to help them finance the cost of their house. I believe them. It is not unlikely that the plaintiff feels hard done by his family who seem to have sheltered his ex-wife and his children whilst he has been ousted from a home which he helped build.
- [34] Even if I were to disbelieve the defendants' evidence the plaintiff has only claimed a *droit de superficie* in the house for which as I have pointed out there is no evidence for its support. He might have been able to bring a case for unjust enrichment if he met the conditions for the same but this court cannot venture into considering this possibility as it has not been raised.

Decision

- [35] In the circumstances, I have no option but to dismiss the plaint with costs.

Signed, dated and delivered at Ile du Port on 22 January 2019.

Twomey CJ