

MAGISTRATES / SUPREME / CONSTITUTIONAL COURT OF SEYCHELLES

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**Reportable**

[2019] SCSC 49

CS 47/2017

In the matter between

**JEANNE D'ARC JUPITER**

*(rep. by Bernard Georges)*

**Plaintiff**

and

**WILL FOSTEL**

*(rep. by Karen Domingue)*

**1<sup>st</sup> Defendant**

**MAGDA DUGASSE**

*(rep. by France Bonte)*

**2<sup>nd</sup> Defendant**

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**Neutral Citation:** Jupiter v Fostel and Anor CS 47/2017 [2019] SCSC 49

(30 January 2019).

**Before:** Pillay J

**Summary:** Promise of Sale - Enforcement

**Heard:** By way of submissions

**Delivered:** 30 January 2019

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**ORDER**

Case dismissed. Plea in limine allowed the land having been co-owned at the time the promise of sale was signed by the first defendant.

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**RULING**

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**PILLAY J**

- [1] The Plaintiff in the case seeks an order from the Court to enforce the promise of sale by ordering the Defendants to transfer Parcel V17385 to the estate of the late Mr. Abbas Ally.
- [2] The Plaintiff avers that she is the executrix of the estate of the late Abbas Ali Coeur de Lion, also known as Abbas Ally, who died in Seychelles on 15<sup>th</sup> June 2015.
- [3] On 20<sup>th</sup> December 1995, Abbas Ally and the First Defendant entered into a Promise of sale for approximately 450 square metre of land that would be extracted from Parcel V8428. The First Defendant signed the promise of sale in his name and not as fiduciary.
- [4] The sum of SCR 18, 000.00 was paid by Abbas Ally to the First Defendant as per the Promise of Sale but after the sub-division of parcel V8428 was completed, the sub-division was registered as Parcel V17385 in the names of the Defendants and not to the said Abbas Ally.
- [5] The First Defendant defended the claim stating in effect that Parcel V8428 was co-owned and are the sub-divisions he could not and cannot on his own transfer the property to the Plaintiff.
- [6] In effect the Second Defendant adopted the same position as the First Defendant in her Defence.
- [7] The Defendants raised a plea in limine on the basis that the land was co-owned and as a result of the said co-ownership the Promise of Sale was null and void in that it was not entered into by the co-owners.
- [8] The Defendants raised a further plea that the Plaintiff's action was time barred.
- [9] The Plaintiff submitted that at the time the Promise of Sale was entered into the First Plaintiff was the sole owner of Title V8428.
- [10] Plaintiff's counsel submitted that the Promise of Sale was signed on 20<sup>th</sup> December 1995. The late Abbas Ally passed away on 15<sup>th</sup> June 2015. The Plaintiff was appointed as

executrix to the deceased estate on 6<sup>th</sup> November 2015. The present case was filed 2<sup>nd</sup> May 2017.

- [11] In support of their plea counsels for the Defendants filed joint submissions to the effect that Parcel V8428 was co-owned even before the sub-division as per Article 818 of the Civil Code as well as settled law, rights of co-owners shall be held by a fiduciary through whom they shall act.
- [12] As for the second limb of their plea in limine the Defendants' argument is weak at best, merely saying that the deceased had 15 years to file a case which he didn't and that must be indicative of him knowing that he didn't have any chances of success in an action.
- [13] The Plaintiff's argument is not any stronger. The Plaintiff's argument is that the deceased had mistakenly believed that the transfer had been effected and when she learned that it was not so she instructed counsel as per her duties as executrix.
- [14] Neither argument is grounded in law. By virtue of being a plea in limine the objection should be grounded in law which it clearly isn't. For that reason I will not take time to consider that part of the plea and reject it outright.
- [15] As regards the first limb of the plea in limine the Defendants produced the certificate of official search for parcel V8428. The area is 5378 square metres and the proprietors are listed are Will Clifford Fostel ½ and Magda Germaine Dugasse ½. The fiduciaries are also Will Clifford Fostel and Magda Germaine Fostel.
- [16] I note the cases referred to by counsel for the Defendants. In my view Sauzier JA sets out the position clearly in the case of **Legras and Ors v Legras CA 6/86** finding t that 'Article 818 of the Civil Code only affects the exercise of the right of co-ownership in so far as it relates to or involves the immovable property itself, individual co-owners remain vested with their real right of co-ownership in the property..., such real right of co-ownership, representing the share of the co-owner in the immovable property, may be transferred or transmitted to a co-owner or to a third party without the intervention of the fiduciary.'

[17] According to the case of Emmanuel v Gill SSC 128/1995, 11<sup>th</sup> July 1996 the court found that ‘a right of co-ownership may be transferred or transmitted to a co-owner or to a third party without the intervention of the fiduciary. Hence, the co-owner has the right to sell, the right to protect the right of the co-ownership and to take appropriate steps to recover any loss of rights without the intervention of an executor or fiduciary.’

[18] With regards to the case at hand, in entering into the promise of sale and agreeing to extract a portion of land from the co-owned parcel, V8428, the first defendant was not dealing with his right of co-ownership but with the property itself. He was not seeking to transfer his right of co-ownership to the Plaintiff but was seeking to extract a portion of the property to sell to the Plaintiff which could only be done by the fiduciary.

[19] In the circumstances I find in favour of the Defendants, the plea in limine is allowed. The Plaintiff having no cause of action against the Defendants, matter is dismissed.

[20] Each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on this 30<sup>th</sup> day of January 2019

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Pillay J