

SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 1052
CS 26/2017

In the matter between:

EMMANUEL BIBI

LINDY BIBI

HELENE MARIE-THERESE ESPARON NEE BIBI

MARIE MADELEINE DOROTHY BIBI

JOSEPHINE JOSETTE BIBI

PAUL JEFFEREY BIBI

MARCEL GEORGES BIBI

Plaintiff

(rep. by Joel Camille)

and

THE ESTATE OF THE LATE

JOSEPH SAMUEL BIBI REP BY

THE EXECUTRIX LINDA LABROSSE

Defendant

(rep. by Nicole Gabriel)

Neutral Citation: *Bibi and Ors v The Estate of the Late Joseph Samuel Bibi* (CS 26/2017)
[2019] SCSC 1052 (27 November 2019).

Before: Pillay J

Summary: The Plaintiffs seek an order of the Court declaring that the transfer of titles J1567 and J1568 by the deceased to the first Defendant was a disguised donation or alienation.

Heard: 26th November 2018 and 15th July 2019

Delivered: 27th November 2019

ORDER

In effect as was stated by the Chief Justice “*it is not the immoveable property that is the subject of the action but the value of the immoveable property*”. In order to obtain an order that the transfer was a disguised donation subject to return the Plaintiffs needed to show that the donation exceeded the disposable portion which they haven’t.

In the circumstances the Plaint is dismissed.

JUDGMENT

PILLAY J

[1] The Plaintiffs in the case seek an order from the Court as follows:

(1) *to declare that the transfer of titles J1567 and J1568 by the deceased to the first Defendant was a disguised donation or an alienation, subject to return*

(2) *to order the reduction of the disguised donation by ordering the first Defendant to:*

a) Return titles J1567 and J1568 or the excess share to the succession of the deceased; or

b) Return or transfer the Plaintiffs’ share in titles J1567 and J1568 to the Plaintiffs.

(3) *That the first Defendant be directed to account for the fruits of titles J1567 and J1568 and to pay the or the share in excess of his title to the succession of the deceased.*

(4) *To make any order that the Court deems fit in the circumstances.*

[2] The first Defendant denies that the transfers were disguised donation and further denies that the succession of the deceased had any rights in either land parcels let alone a reserved portion.

- [3] As part of its Defence the first Defendant raised a plea in limine on the basis of prescription.
- [4] The second Defendant also raised a plea in limine on the basis of prescription as well as immunity and no cause of action being disclosed.
- [5] The pleas on the basis of prescription was dismissed but on a finding that there was no cause of action disclosed against the second Defendant the case was struck out against the second Defendant proceeding only against the first Defendant. Accordingly there being only one Defendant in the case the Court will refer to the Defendant henceforth.
- [6] Following conclusion of the evidence both sides opted to submit in writing however only Mr. Gabriel for the Defendant was forthcoming.
- [7] In summary Mr. Gabriel submitted that in order to invoke donation deguisee, bad faith on the part of the de cuius and fraudulent pretence should not only be averred but must be proved against the Defendant. It was his submission that none of the elements which constitute donation deguisee has been proved nor are they apparent in the pleadings.
- [8] It was further his submission that there is no pleadings nor any evidence as to the value of the whole property purportedly sold to the late Joseph Bibi as a donation deguisee in relation to the value of the whole property of the deceased in order to ascertain whether the purported donation deguisee was contrary to article 918 of the Civil Code of Seychelles.
- [9] Mr. Gabriel questioned the credibility of the witnesses for the Plaintiff who claimed that they only became aware of the transactions only after the death of Joseph Bibi when in fact the mother was still alive at the time and only passed away a year later.
- [10] The evidence of Lindy Bibi is that Marie Jeannette Valerienne Bibi is her mother who passed away on 20th November 2014. Along with her older brother Emmanuel Bibi she is the executor of her estate. Her mother had 10 children including Joseph Samuel Bibi who passed away on 22nd July 2013. At the time of her death her mother owned property J1568 and J1567. She was working with Joseph Bibi at the 'Zanmalak Bungalow' and

after his death she came across land documents that showed that the land was in his name. She took the documents to her brothers and sisters and they eventually sought the assistance of counsel. She was unaware of the circumstances of the transfer or any loan arrangement between her brother and her mother.

[11] Josephine Bibi testified that Joseph Samuel Bibi is her brother. Jeanette Bibi is her mother. Her mother had property at Port Glaud. She worked with her mother as carer. She testified that she was unaware of the transactions between her mother and her brother. Her mother discussed her plan that her land were for all her children. She was unaware of the transfer of J1568 and J1567 to her brother in 1995 and 1998. She was also unaware of any loan agreement.

[12] Madeleine Bibi testified that the late Jeanette Bibi is her mother and the late Joseph Samuel Bibi is her brother. She testified that she signed the transfer because her brother asked her mother for a piece of land to conduct his business and that was when her mother transferred on him¹. She was present when he asked their mother to transfer the land on him for him to conduct his business so that he could secure a loan and then he would transfer the land back to her. His brother however only transferred back the house where they all are living now but did not transfer the other parcels. Her brother did not pay the money declared on the transfer. Her mother however kept the usufruct on the property.

[13] Linda Labrosse testified that the late Joseph Bibi who passed away on 2nd June 2013 is the father of her children and she lived with him since she was 18 years old. She was aware of the transfers but did not see the documents until the death of Joseph Bibi. Nor was she aware of the sub-divisions until his passing. Parcel J1567 was sub-divided into parcel J3138 and J3139. J3138 was transferred onto the name of Jeanette Bibi. Parcel J1568 was subdivided into J3140 and J3141.

[14] The Defendant filed final written submissions relying on the authority of **Contoret and Anor v Contoret [1971] SLR 257** as well as **Therese Hoareau v Mrs. Guy Contoret**

¹ Page 16 of the proceedings of 15th July 2019 at 930am.

(rep. the estate of Guy Contoret) [1984] SLR151 and **Pragassen v Vidot [2010] SLR 163.**

- [15] The law on donation disguise is to be found in the cases cited by counsel for the Defendant.
- [16] In the case of **Clothide v Clothide (1976) SLR 245** the Supreme Court found that Article 918 of the Civil Code contains an irrebuttable presumption that a sale to an heir in the direct line avec reserve d'usufruit is a donation. Such a donation disguisee is not void but simply reducible to the quotite disponible.
- [17] In the case of **Contoret v Contoret (1971) SLR 257** the Supreme Court found that where the object of a sale is to deprive other heirs of their lawful share of inheritance it is a donation disguisee. Such a donation disguisee is not void but simply reducible to the quotite disponible.
- [18] In the case of **Pragassen v Vidot (2010) SLR 163** Judge Renaud held that a party who relies on article 913 of the Civil Code must prove the value of the gift and the estate in order to successfully rely on article 913. To invoke the notion of disguised donation, bad faith and fraudulent pretence of the deceased must be proved. To prove a disguised donation, the plaintiffs must prove that the gift infringed the basic principles of ordre public and was executed fraudulently to deprive the plaintiffs of their inheritance.
- [19] More recently however, in the case of **Reddy and Anor v Ramkalawan** the Chief Justice held that

[21] *An owner of property is not precluded by law from selling his land or giving it away. A disguised sale is also valid if the sale respects the conditions of form, the rules of contract and public policy (see Article 931, Civil Code of Seychelles). Similarly the de cuius can sell or make a gift to an heir - as long as that sale or the gift does not so diminish the estate that the reserved rights of the heirs are not satisfied. These rules are distilled from the provisions of the following articles of the Civil Code: 913, 918, 920, and 1048.*

[23]In the circumstances, the submission made by Counsel for the Defendant in respect of proof that must be met to rebut the presumption of validity of a deed in respect of a donation has no application to this case. The fact that a donation is made to an heir in excess of the disposable portion does not amount to a fraud, it only amounts to a disinheritance disguised as a donation. That is the meaning of donation déguisée in this case. Hence, the question of fraudulent donation or its proof where it concerns disinherited heirs does not arise and is completely immaterial. To that extent the case of Pragrassen v Vidot (2010) SLR 163 was wrongly decided. This is rightly so since it is not the deed itself that is being attacked but the alienated inheritance.

[20] It is in evidence that Madeleine Bibi, the fourth Plaintiff, witnessed the transfer as did one Maryse Bibi.

[21] It is also in evidence that the Plaintiffs' mother filed a case against what must have been the estate of the late Samuel Joseph Bibi². But unfortunately she passed away and the case ended for one reason or another not made known to this Court.

[22] It is in evidence that the charge on J1568 dated 16th March 1999 for SCR 150, 000.00 was in the name of Joseph and Jeanette Bibi whereas the charge on J1567 dated 12th December 1995 for the sum of SCR 80, 000.00 was in the name of Joseph Samuel Bibi. However there was no proof provided that those loans were used to help out the late Jeanette Bibi from her financial troubles as payment for the transfer of the properties. In fact the loans were taken out, as per the charge documents, after the land had been transferred. Presumably the late Jeanette Bibi also had to sign the charge for J1568 because she had the usufruct on that parcel. There was also no proof that the loans were paid by the late Joseph Bibi or the late Jeanette Bibi.

[23] Interestingly Linda Labrosse stated that she was aware of everything that was going on³ but she only saw the transfers after the death of Joseph Bibi, she had not come across any documents that the loan money went towards paying the debts of Jeanette Bibi, she was not present when the money was given to Jeanette Bibi, she did not know how he, the late

² Page 13 of the proceedings of 26th November 2018 at 9am

³ Page 49 of the proceedings of 15th July 2019

Joseph Bibi, funded his businesses and was not involved in his businesses prior to his, the late Joseph Bibi, death.

- [24] Her evidence at page 44 of the proceedings of 15th July 2019 at 930am is very insightful in my view – “I know because he said so and because I know he has done and they did not work and he did everything, he re-paid everything, every debt that was owed.” Clearly she had no knowledge of the late Joseph Bibi’s affairs first hand but only what he told her and/or what she perceived.
- [25] Further at page 50 she stated thus – “I brought the documents that I have.” Obviously if she had documents showing payments of the loan she would have brought them before the Court.
- [26] According to the evidence of Labrosse the late Joseph Bibi started his STAR business way back when he was 30 years old. If we go by the dates given the late Joseph Bibi started his truck business around the year 1994.
- [27] According to the evidence of Linda Labrosse the late Joseph Bibi started the bus transfer business in 2008 or 2009. The guest house he started in 2010 but prior to all that he had a pick-up truck.
- [28] Parcel J1567 having been transferred in 1995 ties in with the evidence of witness Madeleine Bibi that her brother asked his mother to transfer the land to him in order for him to fund his business by way of a loan secured with the property as collateral.
- [29] Although the Defendant denied paragraph 4 of the Plaintiff, the Defendant went on to state in her Defence that the usufructuary interest granted by the late Joseph Bibi to the deceased Jeanette Bibi was a genuine document executed in the presence of a Notary thereby admitting that indeed there was a usufruct granted to the deceased Jeanette Bibi by the late Joseph Bibi.
- [30] Listening to the Plaintiffs witnesses and examining their testimony, this Court found the Plaintiffs’ witnesses to be credible.

- [31] It cannot be said that the Defendant's witness was not credible. She was just as credible as the Plaintiffs' witnesses. Her evidence neither disproved the Plaintiffs' case nor proved hers but helped to fit the pieces of the puzzle together.
- [32] It is the considered view of this Court that the truth is that the late Joseph Bibi approached his mother requesting the transfer of the land parcels onto his name in order to secure a loan for his businesses and the mother accepted with the intention of doing just that and not transferring the property to him outright as the Defence suggests.
- [33] However, it is noted that there is no evidence on the value of the property or for that matter the estate. There was evidence led as to a shop on the property though it was not stated which property. The Defendant also testified that J1567 had been subdivided into parcels J3138 and J3139 whereas J1568 had been subdivided into parcels J3140 and J3141. She further testified that parcel J3138 was transferred to the late Jeanette Bibi. On examining D1, more specifically the survey documents attached to the transfer document relating to J1567, there is a note written in pen or pencil that reads 'J3138 sold to Marie-Jeannette Valerienne Bibi'. No other documents were produced to attest to such sale but for the evidence of Josephine Bibi who accepted in cross examination that J3138 had been transferred to her mother.⁴
- [34] It is further noted that J1568 covered an area of 2042 square metres and J1567 covered an area of 1523 square metres. In passing it is noted that the subdivisions on D1 do not match those on D3; D3 reflects the subdivisions of parcel J1567 as J3140 and J3141.
- [35] In the case of **Hall v Parcou & Ano. (CS 353/2009) [2017] SCSC 92 (07 February 2017)** in spite of no evidence being led as to the value of the property, the Court ordered that the value of the alienated property had to be return to the estate on the basis of the evidence that there was no other property to distribute amongst the other heirs outside of the three properties alienated.
- [36] In the current case, however, it is in evidence that there is a shop on the property, which is being rented, behind which stands the house of the late Jeannette Bibi.

⁴ Page 23 of the proceedings of 15th July 2019 at 930am

[37] With all that said the lack of evidence as to the total value of the estate and the properties in question is fatal to the case. As much as the evidence shows that about 2500 square metres of land was transferred to the late Joseph Bibi from the late Jeanette Bibi to the exclusion of his siblings this Court is unable to make a declaration as to whether or not the said transfers were over and above his lawful share in the succession without the total value of the estate inclusive of the land, house and shop.

[38] In effect as was stated by the Chief Justice “*it is not the immoveable property that is the subject of the action but the value of the immoveable property*”. In order to obtain an order that the transfer was a disguised donation subject to return the Plaintiffs needed to show that the donation exceeded the disposable portion which they haven’t.

[39] In the circumstances the Plaint is dismissed.

[40] Each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on 27th November 2019

Pillay J