

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 19-2020
CN 92/2016

CLAUDETTE AZEMIA	1 st Plaintiff
JENNIFER KILINDO	2 nd Plaintiff
SHEILA FORTIN	3 rd Plaintiff
GINETTE BOUCHARIE	4 th Plaintiff
RICHARD AZEMIA	5 th Plaintiff
PHILIP AZEMIA	6 th Plaintiff
KEVEN AZEMIA	7 th Plaintiff
MARINA AZEMIA (all rep by Lucy Pool)	8 th Plaintiff
and	

NELLIE AZEMIA (A minor represented Marie-Antoinette Savy)	1 st Defendant
DERICK AZEMIA	2 nd Defendant
MARIE-ANTOINETTE SAVY (all rep. by Tamara Chisten)	3 rd Defendant

Neutral Citation: *Claudette Bijoux & Ors v Nellie Azemia & Ors* CN 92 of 2016 delivered on 14 January 2016

Before: Vidot J

Summary: instances when case should be brought in representative capacity such as fiduciary or executor and when in one's own right, dealing with individual rights and when property held in co-ownership.

Heard: 03-09-18, 05-04-19 and 29-07-2019

Delivered: 14 January 2020

JUGDMENT

VIDOT J

- [1] This case pertains to shares in a house. It is alleged that the house belonged to Alice Azemia ("the Deceased") who passed away on 3rd April 2013. The Plaintiffs are the children and heirs of the Deceased. The Deceased had 2 other children who are also deceased. They are Guy Azemia who died on the 11th September 2014 and Antonio Azemia. The latter died without issue and the former is the father 1st Defendant Defendant, Nellie Azemia. She is a minor and represented in this suit by her mother Antoinette Savy, who is executrix of the estate of the late Guy Azemia.
- [2] The house in issue is situated on land Title V10464 a sub-division of parcel V8649. The Plaintiffs aver that the Deceased obtained permission from Marieannette Ah-Time (nee Delpêche) to build the house on that land. Title V8649 was subsequently sub-divided into parcels V10464, V10465 and V10466. It is averred that the house stood on V10464 which was transferred to Allois Reddy who in turn transferred it to Guy Azemia. The house now fell on parcel V10464. It is averred that Guy Azemia by his will wrongfully gave, devised and bequeath the house found on that land parcel to the 1st and 2nd Defendants. The Plaintiffs claim that the house belonged to their mother and therefore they have a share therein as part of their inheritance. They claim that the Defendant is not entitled to inherit the house and that their inheritance by representation is negligible and as a result they should return the house to the Plaintiffs or pay the Plaintiffs SR500,00.00 representing its value.
- [3] The Complaint was brought against 3 Defendants but following the filing of the Defence which included 2 a Pleas in Limine Litis the case was dropped against 2nd and 3rd Defendants. Therefore where in this judgment reference is made to Defendant it means the 1st Defendant.. These pleas include the following;

- (i) That the remedies sought by the Plaintiffs cannot be obtained from the 2nd and 3rd Defendants as they do not own parcel V10464 nor any shares in the located thereon. Therefore, there is no cause of action against the 2nd and 3rd Defendants.
 - (ii) The Plaintiffs are all heirs of the late Alice Azemia and must be brought an executor. The Plaintiffs are brought in the name of the wrong party and therefore must be struck off.
- [4] The Plaintiffs conceded to the first plea in limine. So, as above mentioned, the Plaintiffs are being pursued against the 1st Defendant only.
- [5] The Defence goes on deny the averments that the Plaintiffs have a share in the house standing on the land parcel. The Defendant avers that she is the registered proprietor of land parcel V10464 which has no encumbrances registered against it. Therefore, she avers that the house belongs to her and that the bequeath as per Guy Azemia's will was lawful. She also maintains that Guy Azemia purchased Title V10464 from Alois Reddy in exchange for parcel V10465 which Guy Azemia transferred to Alois Reddy as per a Court Order dated 3rd July 2001. She avers that the house was built by and belonged to the late Guy Azemia. All other allegations in the Plaintiffs are denied

Synopsis of Evidence

(a) Plaintiffs' Evidence

- [6] The 1st Plaintiff, Claudette Laporte was the only Plaintiff who testified. In fact the other Plaintiffs never appeared in Court. Witnesses were called to give evidence on her behalf. She testified that her mother Alice Azemia had 10 children, two of whom are dead. Guy Azemia is one of those who is deceased. He is the father of the Defendant. She testified that when they came to live on Marienette Ah-Time's (born Delpech) property, V8649, there was no structure thereon. Her mother built a house from "maisonite" sheets (a type of plywood) and CI sheet roofing. They lived therein for sometimes until she started to work when permission to renovate was obtained. However, there was no document produced to support the same. She rebuilt the house from bricks. They remained in the house and build the outer structure round it and gradually demolished and built the inner

structure. She paid for the construction as she was working. She repaired the roofing. She painted the house and maintained it. She alleges that she paid for the renovations.

- [7] She lived in the house till around 2008. She had gotten married in 2004. At that time Guy remained in the house together with Alice Azemia and a brother who had a disability. Alice Azemia passed away in 2013 and Guy remained in the house with the mother of the Defendant and the brother having a disability.
- [8] At some point Marienette Ah-Time sold that land parcel on which the house stood to Alois Reddy. The latter wanted them to move the house. Guy bought an adjoining parcel of land opposite the mother's house from Marie-Ange Ah-Time Gregrorety. There was an exchange of the 2 parcels between Alois and Guy. That was further to a Court judgment in case CS 158 of 2000 dated 3rd July 2001. That was partially due to the fact that V8649 was subsequently subdivided into V10464, V10465 and V10466. The first parcel was transferred to Alois Reddy and that was subsequently transferred to Guy Azemia. It is that property which the latter bequeath to the Defendant and in which the Plaintiffs claim to have a share.
- [9] Mr. Walter Pillay, electrician testified that he did work for Mrs. Laporte. That work comprised of him rewiring an entire house where the latter was staying.
- [10] Marienette Ah-Time too was called as a witness. Actually she is the cousin of the 1st Plaintiff. She acknowledged having sold V10465 to Alois Reddy. She stated that the 1st Plaintiff renovated the house that is the issue of this case but she is unaware as to who bought the construction materials. Nigel Roucou did an evaluation of the property but was not too sure of the valuation. He suggested that it could be SR900,000.00.

Defendant's Evidence

- [11] The only person to testify for the Defendant was her mother, Marie-Antoinette Savy, executrix of the estate of Guy Azemia. She said that Guy lived in the same house as his mother, Alice and she joined them in that house. She came to the house when it was already built. Guy had a pick-up truck which was used to bring materials for the house. That was at the time the house was on property belonging to Marienette Ah-Time. She is

aware that the latter sold the land to Alois Reddy because Alois sued Guy to remove the house from the land and finally the two agreed to exchange Guy adjoining plot for that on which the house stood. As some point Guy was intending to built his house on that adjoining plot of land but his mother convinced him that since the house they were residing in was old, to utilize materials he had bought to renovate that house.

Pleas in limine litis

- [12] The 2 pleas in limine litis which has been raised by the Defendant has been touched upon above. However since the Plaintiff conceded to the 1st plea in limine I shall address the second plea only.
- [13] Counsel for the Defendant submitted through written submission that the action is one that ought to be brought through an executor. She relied on Article 1028 of the Civil Code of Seychelles ('the Code'). That was the wrong Article being quoted as the correct provision is Article 1029 which provides that '*Executors shall represent the estate in all proceedings and shall act in any legal action the purpose of which is to declare the will null.....*' The Plaintiffs, it is argued, are claiming real rights in the house and as such each heir is not dealing with his or her own individual right. The right is being claimed by the estate of the late Alice Azemia and as such the action should institute by the executor of the estate.
- [14] The case of **Daniel Jean & Ors v Angelina Jean CS53 of 2015** mentioned below is being distinguished from the facts placed before Court in this present case. That is because that case relies on Article 817 and 818 of the Code which applies to property in co-ownership whilst the property in this case is not one which is subject to co-ownership. Article 817 reads thus;

- “1. *When property whether moveable or immovable is transferred to two or more persons, the right of ownership shall be converted to a like share in the proceeds of sale of any such property*
2. *Paragraph 1 of this article regulates the exercise of the right of co-ownership. It does not affect the right of co-ownership itself.”*

Article 818 provides;

“If the property subject to co-ownership is immovable, the rights of co-owners shall be held on their behalf by a fiduciary”

- [15] Counsel for the Defendant further referred to Articles 724 and 1028 which she argued was not brought to the attention of the Court. Article 724 deals with instances where the deceased leaves no immovable property, the property rights and actions of the deceased are vested in the legitimate heirs and surviving spouse and Article 1028 provides that the executor in his capacity as administrator of the succession is bound by the rules laid down in the Code relating to functions and administration of fiduciaries in so far as they may be applicable.
- [16] As regards the 2nd plea in limine Counsel the Plaintiff submitted that the Plaintiff was dealing with their respective shares thus the action being instituted in their personal names and not through an executor. She referred to the case of **Daniel Jean & Ors v Angelina Jean** (supra). It is submitted that in the case the Honourable Chief Justice Twomey cited Articles 817 and 818. These Articles have been quoted above. They argue that the executor or fiduciary is necessary in respect of actions which affect rights to the common property; see **Michel v Vidot [1977] (No. 2) SLR 214**. In the latter case the court found that co-owners could indeed bring action without representation by fiduciary if those actions related to protection of their individual rights of occupation of property and that a fiduciary was only necessary in respect of actions which affected rights of common property.
- [17] Firstly I wish to reiterate that the Plaintiffs have not all appeared to prosecute their case. The only one who appeared before this Court during the hearing of this case is the 1st

Plaintiff. They others did not show any interest in the case and the 1st Plaintiff did not establish to Court that she had any authority to represent the other Plaintiffs. Therefore, I have no option but to dismiss the 2nd to 8th Plaintiffs case. I am left to deal with the claim of the 1st Plaintiff only.

- [18] This case can definitely be distinguished from that of **Daniel Jean & Ors v Angelina Jean** (supra) and the submission of the Defendant which I find to be correct has been explained above. The case of **Michel v Vidot** (supra) and also the case of **Mathiot v Julienne [1972] SLR 135** too can be distinguished. These cases relate to actions of co-owners brought without representation by fiduciary for protection of the co-owners individual rights of occupation of property. It was held in those cases that a fiduciary is only necessary in respect of actions which affected rights of common property. However, in this case the heirs are not co-owners and they are not exercising a right to deal with their individual share. Articles 817 and 818 have no applicability. It is to be borne in mind that under Articles 724 of the Code which provides that immovable property shall not as of right vest in the heirs, but an executor. Therefore the right being claimed Plaintiff is a real right in land and not yet vested. So the heirs have no standing to claim such a right. The property in question is not one which is in co-ownership.

- [19] Therefore, the 2nd plea in limine litis succeeds and the Plaintiff is therefore dismissed.

Brief Considerations on the merit

- [20] Despite ruling in favour of the Defendant on the plea in limine, I have taken the liberty to also identify briefly a few pertinent points, on the merit whereon I feel that the case would have been unsuccessful in any case.
- [21] As per the will land of Guy Azemia (exhibit P14) parcel V10464 together with “ *house and all buildings.....*” thereon were bequeathed to the Defendant. This means that the Plaintiffs first step should have been to challenge and impugn the Will. That was not done. The assumption as per Article 552 is that the owner of land owes everything that is above and below it and that all buildings on the land is presumed to be built by the owner (in that case Guy) unless the contrary is proved. This is provided for in Article 553.1. The

1st Plaintiff tried to establish that her mother was given a right to build. This would have given her a droit de superficie over parcel V10464. This intention must be established by documentary evidence, it must be established in writing. The evidence cannot be oral. This is because it is a fait juridique; see **De Silva v Baccari [1982] SCAR 45**. It is to be noted that in this case there was vehement objection to oral evidence being adduced to establish a permission to build. So there was no document to establish that a droit de superficie allegedly given to Alice Azemia by Marienette Ah-Time.

- [22] Furthermore, on the Transfer of Land document (exhibit P16) by Marienette Ah-Time to Alois Reddy, there is no mention that the sale was subject to droit de superficie whereby Alice had been given the same; see **Mussard v Mussard [1975] SLR 170**. Even if the Court was to hold that there is a droit de superficie, which it does not, that right would have been extinguished when the house made from maisonite which had dilapidated was rebuilt to a house made of bricks. The entire structure of the house needed to be rebuilt. The 1st Plaintiff alleged that such a right was granted to her mother, Alice. Since there is no evidence of such right, that right if it existed would then have been oral and as such it could not amount to a right in perpetuity. In any case when Marienette Ah-Time sold to Alois Reddy, she basically reasserted her right of accession and there was no evidence to establish that any interested party intervened to assert any right. I can safely conclude therefore that there was no such right.
- [23] In fact Alois Reddy tried to assert his right of accession over the property when he initiated case CS 158 of 2000 against Guy Azemia (exhibit P17). It is at that time that Alice Azemia should have asserted her rights if she was indeed granted a droit de superficie. Indeed in that case, Alois sought an order that Guy Azemia removed his house from the property, thus why there was consent that Guy and Alois exchanged land parcels. This shows that Alois considered the house to belong to Guy and the Court concurred with that because it ordered that Guy exchange his land parcel for that on which the house stood.
- [24] Therefore the cause would have been dismissed anyhow on these grounds. It would not have been established on the merits.

Signed, dated and delivered at Ile du Port 13 January 2020

A handwritten signature in dark ink, appearing to be 'Vidot J', written over a horizontal line.

Vidot J