

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 230
CS 46/2019

In the matter between:

ROY SONNY MONTHY
(rep. by B. Georges)

Plaintiff

and

PAQUERETTE MARIE-THERESE PAYET

(NEE CHIFFONE)
(rep. by W. Lucas)

Defendant

Neutral Citation: *Monthy v Payet* (CS46/2019) [2020] SCSC 230 (3 April 2020).

Before: Carolus J

Summary: Validity of instrument for transfer of land – Specific performance of agreement for transfer of land.

Delivered: 3 April 2020

ORDERS

1. The defendant shall, proceed with the subdivision of Title No. B742 to extract a portion of 1000m² therefrom, and undertake the formalities for the registration of such subdivided portion in the plaintiff's name within a period of six months from the date of this judgment, and to that end shall remove any charges burdening the said title and the subdivided portion thereof.

2. The costs of the subdivision of Title No. B742 and any costs associated thereto, as well as the costs associated with the registration of the subdivided portion of Title No. B742 in the name of the plaintiff including stamp duty and registration costs shall be borne by the plaintiff.

3. The Land Registrar is directed to register the plaintiff Roy Sonny Monthy, as the proprietor of the subdivided portion of Title No. B742 on the application of the defendant and upon payment of the necessary stamp duty and registration charges by the plaintiff.
4. Each party shall bear their own costs relating to these proceedings.
5. A copy of this judgment is to be served on the Land Registrar.

JUDGMENT

CAROLUS J

FACTS & PLEADINGS

- [1] The plaintiff seeks the specific performance of a deed of sale dated 15th November 2009, by which the defendant, in her capacity as executrix of the estate of the late Alfredine Chiffone nee Louis, purported to transfer land parcel Title No. B742, to the plaintiff, for a consideration of Rs.5000.00.
- [2] The plaintiff avers in his plaint that the late Alfredine Chiffone nee Louis (“the deceased”) passed away intestate on 16th November 2000, leaving behind as her sole heirs her two adopted children namely the defendant and one Ernest Chiffone. The defendant is also the executrix of the deceased’s estate. The plaintiff was raised by the deceased since he was three years old but never legally adopted.
- [3] The deceased was the registered owner of land titles B742 and B743 which are the result of a subdivision of title B596 on 12th April 1999. The plaintiff avers that it was the wish of the deceased that he would be given a piece of her land on which he would be able to construct his house. On 31st October 2002, the defendant acting as executrix of the deceased, gave written permission to the plaintiff to subdivide title B742 allowing him to

extract an area of 1000 square metres therefrom. On 15th November 2009 the plaintiff and the defendant signed an instrument of transfer (“Transfer of Land”) for the transfer of title B742 to the plaintiff for the sum of Rs.5000.00 which was paid. The plaintiff avers that the defendant failed to effect transfer of title B742 to the plaintiff in breach of the Transfer of Land, and that despite numerous attempts on his part to communicate with the defendant for her to honour the wishes of the deceased and to register the Transfer of Land, the defendant has failed and neglected to do so. He further avers that the defendant has charged the title numerous times.

[4] In terms of the plaint the plaintiff prays the Court to make the following orders:

- (a) To order the Defendant to proceed with the registration of the Instrument of Transfer of Title B742;*
- (b) Alternatively, to order the Defendant to subdivide Title B742 by extracting 1000 square metres from B742, and registering this extracted portion to the Plaintiff's name;*
- (c) To order the Defendant to remove all charges that could burden either B742 or the subdivided part thereof;*
- (d) To order the Defendant to pay the costs of this case.*

[5] The defendant has filed a statement of defence admitting the averments made by the plaintiff with the exception that she denies knowledge of any wish of the deceased that the plaintiff be given a piece of her land to construct his house. She admits that she signed the Transfer of Land but avers that the sum of Rs.5000.00 stated therein does not represent the consideration or purchase price for the transfer of title B742, but is the sum paid by the plaintiff to the notary who attested the transfer, hence the reason why the defendant did not conclude the transfer.

[6] The defendant prays the Court not to order her to proceed with the registration of the transfer of title B742, but states that she will accede to the alternative relief prayed for by the plaintiff, namely to subdivide Title B742 by extracting 1000 square metres therefrom, and registering this extracted portion in the plaintiff's name and, removing all charges burdening B742 or the subdivided part thereof, “*on condition that the Plaintiff pay full*

consideration and cost for subdivision, transfer, stamp duty and registration of the property". She further prays for each party to bear their own costs.

[7] Counsels for the parties agreed to proceed by filing a statement of agreed facts which would also set out the issues requiring adjudication and determination by the Court, which the Court would then proceed to rule upon. The statement of agreed facts dated 4th December 2019 and signed by both counsels to which is attached a number of supporting documents was duly filed. The relevant parts of the statement of agreed facts is reproduced verbatim below:

AGREED FACTS BY THE DEFENDANT AND ENDORSE BY THE PLAINTIFF

On the basis of the statement of Defence filed by the Defendant her position remains as follows:-

- (a) That at some point the Defendant in her capacity as Executrix gave an undertaking for the Plaintiff to extract a plot from the parent parcel B742 to the extent of 100 square metres as per a written document dated 31st of October, 2002 of which copy is attached and marked exhibit "A"*
- (b) The Defendant further went to the extent and sought permission from HFC to subdivide parcel B742 the fact that the HFC (SHDC) holds a charge on the said property and HFC was responded and granted the Defendant permission to carry out the sub-division by a letter dated 30th January, 2008 of which copy is attached and marked exhibit "B"*
- (c) Even if the Defendant claimed of the lack of knowledge of the averment under para 5 of the *Plaint*, it is assumed that the wish of the late Alfredine Chiffonne was expressed in a way to the knowledge of both the Plaintiff and the Defendant and for the same reason the Defendant started the formalities for the extraction of 1000 square metres from B742 for the benefit of the Plaintiff.*
- (d) The Defendant maintain her position that the sum of SR5000,00 expressed in the deed of transfer is not for the consideration of the property but the money was paid as Notarial fees to Mr. John Renaud.
Whereas the Plaintiff's position is that the payment was consideration for the transfer of the plot to the extent of 1000 square metres.*
- (e) Even if the Defendant endorsed the deed of transfer before Notary Public Mr. John Renaud dated 15th November, 2009, the said deed of transfer is in contradiction of Exhibit "A" which expressly stated for the extraction of 1000 sqm for parcel B742 whereas the deed of transfer expressly provided for the*

transfer of the whole parcel B742 with an area of 4081 sqm into the name of the Plaintiff which renders the deed of transfer invalid and unenforceable.

(f) The Defendant avers that all deed in order to be a valid document it has to be registered by virtue of section 54 of the Mortgage Registration Act. [sic].

ADJUDICATION AND DETERMINATION BY THE COURT

Parties to the above suit hereby request this Honourable Court to adjudicate and give a determination on the following issues:-

(a) Is the verbal wish expressed by the late Alfredine Chiffone is capable to the interpretation of an equitable privilege of Estoppel or a legal obligation.

(b) Is the refusal of the Defendant to finalize the extraction of the 1000sqm for the benefit of the Plaintiff is a breach that can be subject for specific performance.

(c) Is the deed of transfer executed before Notary Public dated 15th November, 2009 which remain unregistered can be considered as a valid document for the purpose of its enforcement. [sic].

[8] I note that this statement of agreed facts is somewhat one-sided in that it mainly sets out the position of, and the case for, the defendant and only at paragraph (d) thereof refers to the plaintiff's position on one issue. As such, in this judgement I will have to sometimes make findings as to what facts stated in the agreed statement of facts are or are not proved.

ANALYSIS

[9] It appears from the statement of agreed facts that the main issues for determination by this Court are whether the Transfer of Land dated 15th November 2009, being an unregistered document, is a valid agreement between the parties and therefore enforceable and can be subject to an order of this Court for its specific performance.

[10] The Court will also be required to determine whether the intention of the parties was to transfer the whole of title no. B742 or only part thereof to the plaintiff, and whether the sum of Rs5000.00 stated in the Transfer of Land to be the consideration for the transfer of title no. B742, represents consideration for the transfer of part of title no. B742 of the

extent of 1000 square metres as contended by the plaintiff, or is the fee paid by the plaintiff to the notary who attested the transfer as the defendant contends.

Validity of the Transfer of Land

[11] In order to pronounce on the validity of the Transfer of Land, this Court has to first examine the events that led to the execution of such transfer. This will serve to enlighten the Court on what led them to conclude such transfer, and on the terms and conditions that they did and to some extent inform the Court as to the intention of the parties.

[12] In paragraph (c) of the statement of agreed facts it is stated that even if the defendant claimed lack of knowledge of the deceased's wish that the plaintiff be given a piece of her land to construct his house, it is assumed that the wish of the late Alfredine Chiffonne was expressed in a way to the knowledge of both the Plaintiff and the Defendant and for the same reason the Defendant started the formalities for the extraction of 1000 square metres from B742 for the benefit of the Plaintiff. There is however no evidence of such wish of the deceased and the Court is not prepared to make any assumption as referred to above. The Court therefore cannot find that there is any obligation on the defendant to fulfil the alleged wish of the deceased as requested in the statement of agreed facts.

[13] According to paragraph (a) of the statement of agreed facts there was an undertaking between the parties for the extraction of a plot from title B742 to the extent 1000 square metres as per a written document dated 31st of October, 2002. This document (exhibit "A") is signed by the defendant and grants permission to the plaintiff to sub-divide parcel B742 to extract therefrom a portion of land of approximately 1000 m² delimited by reference to certain beacons. The document is reproduced below:

TO WHOM IT MAY CONCERN

Re: Permission to Sub-Divide Parcel B742

I Paquerette Payet of Belonie, Mahe, Seychelles acting as executor for the said property B742 at Belonie, Mahe, Seychelles, hereby give permission to Mr. Roy, Sonny Monthy the right to sub-divide the above mentioned property to extract a portion of land delimited by beacons QT37, NE71, NF17, N... [the rest of the

numbers are illegible] *and point between beacons QT37 and QT58 to form an area of approximately 1000m2.*”

- [14] There is also a letter dated 16th November 2007 (exhibit “B”), from the defendant addressed to Mr. Charles Bastienne, the Managing Director of the Housing Finance Company requesting the temporary removal of a restriction which had been placed on parcel B 742 by the SHDC to allow her to proceed with subdivision of the said parcel. A further letter 30th January 2008 (also exhibit “B”) from the Housing Finance Company Limited addressed to the defendant grants her permission to subdivide parcel B742, and advises her to furnish them with details of the subdivision on completion of the same.
- [15] I am convinced on the strength of these documents, in particular the permission to subdivide dated 31st October 2002, that there was an understanding between the parties to transfer to the plaintiff the subdivided part of parcel B742 of an extent of 1000m², and delimited by the beacons stated in the permission to subdivide dated 31.10.2002.
- [16] In my view it is irrelevant whether such understanding was founded on the wish of the deceased that part of her property be transferred to the plaintiff or not. What is important is that such an understanding existed between the parties. This understanding was given effect to by the execution of the impugned Transfer of Land dated 15th November 2009, the relevant part of which is reproduced below:

THE LAND REGISTRATION ACT
TRANSFER OF LAND

Title No. B742

I Paquerette Marie-Therese Payet nee CHIFFONE of Beolier, Mahe, Seychelles, acting as Executrix of the estate of the late Alfredine CHIFFONE nee LOUIS, in consideration of the price of Rupees Five Thousand (R5000.00) which sum has been paid hereby transfer to Roy Sonny MONTHY of Saint Louis, Mahe Seychelles, the land comprised in the abovementioned title.

- [17] The Transfer of Land is signed by the defendant and the plaintiff as the transferor and transferee respectively and was executed before John Renaud, Attorney-at-Law who attested to its execution. This instrument remains unregistered. Paragraph (f) of the

statement of agreed facts states that by virtue of section 54 of the Mortgage and Registration Act, all deeds have to be registered in order to be valid. Subsection (1) of this provision reads as follows:

54. Documents to be registered

(1) All deeds, judgments or writings made or drawn up either in or out of Seychelles, and which are not specially exempted from the formality of registration, shall be registered.

[18] I note that transfer deeds are not exempted from registration under section 69 of that Act which provides for documents exempted from registration. I further note that the Mortgage and Registration Act is silent about the effect of non-registration on the validity of deeds for transfer of immovable property, unlike leases of immovable property which under section 58 of that Act, unless registered are void against purchasers of the property or any interest therein.

[19] I also take into account section 46 of the Land Registration Act which provides as follows:

46. Transfer

(1) A proprietor may transfer his land ... with or without consideration by an instrument in the prescribed form ...

(2) The transfer shall be completed by registration of the transferee as proprietor of the land ... and filing the instrument.

[20] The Appeal case of ***Charlemagne Grandcourt & Ors v Christopher Gill (SCA07/2011) [2012] SCCA 31 (07 December 2012)*** also concerned an unregistered deed for the sale of a plot of land and a charge over that land. The defendant before the Supreme Court/ appellant in the appeal proceedings had sold the plaintiff before the Supreme Court/ respondent in the appeal proceedings parcel T 696 for the sum of Rs 500,000.00 and executed a deed of sale to that effect. The parties had also agreed that the purchase price would be paid by installments, the full payment of which would be secured by a charge over the land in favour of the defendant/ appellant which was executed immediately after the execution of the deed of sale. The respondent failed to pay the installments within the required period which included an extension of time granted to him by the appellant to

effect such payment, whereupon the appellant refused to accept further payment and subdivided the land into two parcels namely titles T1393 and T1394 and registered the subdivisions thereby preventing registration of the deed of sale by the respondent. The respondent's position was that the appellant was bound in law to give effect to the deed of sale and by way of relief, prayed for, inter alia, an order of specific performance compelling the appellants to discharge their obligations under the deed of sale and to execute the transfer of titles T 1393 and T 1394 in his favour. One of the defences of the Appellant before the Supreme Court was that neither the deed of sale nor the charge were registered and therefore the Respondent never obtained any real rights to the property in law. The Supreme Court gave judgment for the plaintiff/ respondent ordering the Land Registrar to register him as sole owner of land parcels titled T1393 and T1394. The appellants appealed against the judgment of the Supreme Court and the Court of Appeal ordered the respondent to pay the outstanding sum remaining unpaid with interest and authorized the Land Registrar to register the respondent as the proprietor of parcels T1393 and T1394.

[21] On the issue of the legal status and validity of the unregistered deed of sale and charge, the Court of Appeal stated:

6. *As the notarial documents were never registered they must be treated purely as a contract of sale between the parties. Although Mr. Rouillon raised the issue of section 46 of the Land Registration Act 1967 nullifying the contract, we are of the view that the provisions have no such application. All the provisions do are to prescribe the form used for the transfer of land and to provide that the transfer of land shall be completed by registration and filing of the instrument.*

[...]

8. *However, as pointed out since the document was never registered it had no effect as far as third parties were concerned. But it has full application and binding effect as far as the two parties to it are concerned. Registration would only have perfected the transfer. In the case of Hoareau v Gilleaux SCAR 1978-1982 158, Lavoipierre JA quoted with approval Sauzier J's finding in the lower court that the parcel of land in question*

“being property subject to registration, the acceptance by the plaintiff of the promise of the defendant to sell her [the land] for R100,00 was, by virtue of Article 1589 of the Civil Code of Seychelles, equivalent to the sale of [the land], effective only as between the plaintiff and the defendant.”

9. *We therefore have to view the documents produced purely as a contract of sale ...*

[22] On the basis of the above authority, I find that that the Transfer of Land dated 15th November 2009 and executed by the parties, although it is not registered, is a valid contract of sale which has full application and binding effect insofar as it concerns the parties although it has no effect as far as third parties are concerned.

[23] I am confirmed in my view by Article 1134 of the Civil Code which provides generally for the effects of obligations as follows:

Article 1134

Agreements lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorizes

They shall be performed in good faith.

Terms of the Transfer of Land – Intention of the Parties

[24] In the *Grandcourt* case (supra) the Court of Appeal also found, on the basis of the evidence before it that the deed of sale was not accurate as it stated that money had been paid when it had not. It stated the following:

7. *Given the circumstances of this case, under the Act the notarial deed was clearly not accurate as it stated that the money had been paid when indeed it had not. Both parties knew this and were secure in the knowledge that on the one hand the transfer would be effected and on the other hand the charge would restrict further dealings with the land until the money had indeed been paid.*

[...]

9. *Article 1156 of the Civil Code of Seychelles stipulates that in the interpretation of contracts the common intention of the parties should be sought. It is clear both from the written documents and the evidence of both parties that there was an agreement for the transfer of Parcel T696 from Mr. Charlemagne Grandcourt (the deceased) to the Respondent for the sum of R500, 000....*

[25] Similarly, it is also evident especially from the “permission to subdivide parcel B742” dated 31st October 2002 in the present case, that the intention of the parties was to transfer only a subdivided portion of 1000 m² of title No. B742 the plaintiff and not to transfer the whole parcel to him.

[26] I note in that respect, that the defendant in his defence has accepted to subdivide Title B742 by extracting 1000 square metres therefrom, and registering this extracted portion in the plaintiff’s name and, removing all charges burdening B742 or the subdivided part thereof provided that the Plaintiff pays full consideration for the land and bears the costs of subdivision and transfer thereof as well as stamp duty and registration for such transfer.

[27] However, whereas it is stated in the deed of sale that the consideration for the transfer of title no. B742 is “Rupees Five Thousand (R5000.00) which has been paid” there is no evidence to show that this sum does not reflect the true intention of the parties as to the sum to be paid in consideration of the transfer of such subdivided part or that such sum was not paid.

[28] It is clear from Article 1134 of the Civil Code referred to above that in the circumstances, the terms of the contract must be given effect to. I am confirmed in this view by the Court’s statement in the case of ***Linda Katz v Michelle Ward & Anor CS11/2015 & CS12/2015 Consolidated [2017] SCSC 790 (4th September 2017)*** in which the Court in reference to Article 1134 stated:

35. Hence, of paramount importance in the law of contract is the recognition that of the principle that as between the parties their wills are autonomous and the obligatory force of their agreement must be given effect. The Court is therefore bound to interpret the terms of the contract as concluded by the parties. In the

event of a conflict between the parties as to their intention as expressed, it is the contract that prevails (Ladouceur v Bibi (175) SLR 278).

[29] Further I find Articles 1317 to Articles 1320 relevant to this issue. They provide as follows:

Article 1317

An authentic document is a document received by a public official entitled to draw up the same in the place in which the document is drafted and in accordance with the prescribed forms.

Article 1318

A document which is not authentic owing to the lack of powers or capacity of the official or owing to a defect of form shall have effect as a private document if signed by the parties.

Article 1319

An authentic document shall be accepted as proof of the agreement which it contains between the contracting parties and their heirs or assignees.

Nevertheless, such document shall only have the effect of raising a legal presumption of proof which may be rebutted by evidence to the contrary. Evidence in rebuttal, whether incidental to legal proceedings or not, shall entitle the court to suspend provisionally the execution of the document and to make such order in respect of it as it considers appropriate.

Article 1320

A document, whether authentic or under private signature, shall be accepted as proof between the parties, even if expressed in terms of statements, provided that the statement is directly related to the transaction...

- [30] It is clear from these provisions that if the deed of sale is considered as an authentic document to which Article 1319 finds its application, “*it shall be accepted as proof of the agreement which it contains between the contracting parties*” which raises a legal presumption of proof which may be rebutted by evidence to the contrary. This imposes a burden on the party who claims that the document is false or does not reflect the intention of the parties, in this case the defendant, to bring evidence of the same. This, the defendant has not done thereby failing to rebut the presumption.
- [31] Further whether the deed of sale is considered as an authentic document or a document under private signature owing to a defect of form because it was not registered, Article 1320 shall apply to such deed of sale which “*shall be accepted as proof between the parties, even if expressed in terms of statements, provided that the statement is directly related to the transaction.*” There is no doubt that the statement that the consideration for the transfer of title no. B742 is “Rupees Five Thousand (R5000.00) which has been paid”, being expressed in the deed of sale itself, cannot be otherwise than be directly related to the transaction.
- [32] I find that that the Transfer of Land dated 15th November 2009 and executed by the parties, although it is not registered, is a valid contract of sale which has full application and binding effect insofar as it concerns the parties although it has no effect as far as third parties are concerned.
- [33] For these reasons, I find that the intention of the Parties was to transfer to the plaintiff part of title No.B742 of the extent of 1000m² as delimited in the “Permission to sub-divide parcel B742” dated 31st October 2002, for a consideration of Rupees Five Thousand (Rs.5000.00) which I further find has been paid by the plaintiff to the defendant.

DECISION

- [34] Having found that the Transfer of Land dated 15th November 2009, is a valid and binding agreement as between the parties for the transfer of part of title No.B742 of the extent of 1000m² as delimited in the “Permission to sub-divide parcel B742” dated 31st October

2002, to the plaintiff, for a consideration of Rupees Five Thousand (Rs.5000.00) which has been paid by the plaintiff to the defendant, I make the following orders:

1. The defendant shall, proceed with the subdivision of Title No. B742 to extract a portion of 1000m² therefrom and undertake the formalities for the registration of such subdivided portion in the plaintiff's name within a period of six months from the date of this judgment, and to that end shall remove any charges burdening the said title and the subdivided portion thereof.
2. The costs of the subdivision of Title No. B742 and any costs associated thereto, as well as the costs associated with the registration of the subdivided portion of Title No. B742 in the name of the plaintiff including stamp duty and registration costs shall be borne by the plaintiff.
3. The Land Registrar is directed to register the plaintiff Roy Sonny Monthy, as the proprietor of the subdivided portion of Title No. B742 in terms of section 75 of the Land Registration Act, on the application of the defendant and upon payment of the necessary stamp duty and registration charges by the plaintiff.

[35] Each party shall bear their own costs relating to these proceedings.

[36] A copy of this judgment is to be served on the Land Registrar.

Signed, dated and delivered at Ile du Port on this 3rd April, 2020.

Carolus J