

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2020] SCSC 264  
MA284/2019  
Arising in CS37/2019

In the matter between:

**ANDRE LESLIE BENOITON & ORS**  
*(rep. by Basil Hoareau)*

**Applicants**

and

**SARAH ZARQUANI RENE & ORS**  
*(rep. by Vanessa Gill/ Karine Dick)*

**Respondents**

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**Neutral Citation:** *Benoiton & Ors v Rene & Ors* (MA284/2019) [2020] SCSC 264 (24 April 2020)

**Before:** Carolus J

**Summary:** Inhibition Order – Section 76 Land Registration Act

**Delivered:** 24 April 2020

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**ORDER**

1. The registration of any dealing with parcel B1854 and any buildings thereon is inhibited until a further order of the Court.
  
2. A copy of this Order is to be served on the Land Registrar, who shall register the inhibition in the appropriate register.

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**ORDER ON MOTION**

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**CAROLUS J**

## **Background**

### *The head suit*

[1] The applicants in the present application (plaintiffs in the head suit) seek to be declared as the legitimate children of the late France Albert Rene in terms of the head suit. The respondents (first to fourth defendants in the head suit) are the wife and legitimate children of the said late France Albert Rene, respectively. The fifth defendant in the head suit, also a legitimate child of the late France Albert Rene by a previous marriage is not a party to the present application. The plaintiffs/ applicants aver in their amended plaint dated 10<sup>th</sup> July 2019, that after they are declared the children of the late Mr. Rene, they intend to institute proceedings for reduction of dispositions made by Mr. Rene of his property, in excess of the disposable portion of his succession.

### *The Application*

[2] The applicants have now filed a Notice of Motion seeking an order inhibiting all dealings with parcel B1854 and any buildings situated thereon, until further notice of the Court. The Notice of Motion is supported by an affidavit sworn to by the applicants. The relevant parts of the affidavit read as follows:

7. *During his lifetime the late France Albert Rene donated a number of this properties by gifts inter vivos.*
8. *One such properties (sic) which was donated by gift inter vivo was parcel B1854, which the late France Albert Rene transferred to Sarah Zarquani Rene for a purported price of Seychelles Rupees One Million and Seven Hundred Thousand.*
9. *The said transfer was a disguised donation ...*
10. *On the 19<sup>th</sup> May 2014 Sarah Zarquani Rene transferred parcel B1854 as a gift to Ella Setareh Rene, Louisa Carmelle Rene and Dawn Elsa Rene ...*
11. *Parcel B1854 is presently co-owned by Louisa Carmelle Rene, Ella Setareh Rene and Dawn Elsa Rene whilst Mrs. Sarah Rene holds the usufructuary interest in respect of the said parcel.*
12. *Once we have been declared the children of the late France Albert Rene we will be instituting proceedings – in accordance with Articles 913 and 920 of the Civil Code – to reduce the donation made by the late France Albert Rene both by gifts inter vivos and by Will in view that he has disposed in excess of his disposable portion and one of the properties in respect of which such a claim would be made against, is parcel B1854 as permitted by Article 930 of the Civil Code.*

13. *If an inhibition order is not made so as to inhibit all dealings with parcel B1854 and any building situated thereon, this would affect the exercise of our right to reduction – mentioned in paragraph 12 above – in that parcel B1854 may be disposed of by the (sic) Louisa Carmelle Rene, Ella Setareh Rene and Dawn Elsa Rene.*
14. *In order to prevent the disposition of Parcel B1854 by the (sic) Louisa Carmelle Rene, Ella Setareh Rene and Dawn Elsa Rene, so as to protect our right for reduction – as mentioned in paragraph 12 above – it is necessary, equitable, just and fair that an inhibition order be made as prayed for in the notice of motion.*

#### *Interim Inhibition Order*

- [3] The respondents sought and were given time to file a reply to the application and by order dated 19<sup>th</sup> September 2019, the Court granted the applicants' request for an interim order inhibiting any dealings with parcel B1854 and any buildings situated thereon pending final determination of this application or any further order of the Court.

#### *Respondents' Reply*

- [4] In their reply, the respondents opposed the application for the reasons stated in their affidavit which I have attempted to summarised below.
- [5] First, they aver that prior to the present application for an inhibition order the applicants had applied to the Registrar of Lands for a restriction order to restrict dealings with parcel B1854 which had been refused on the ground that they had no locus standi and “*were not interested persons as per section 84(1) of the Land Registration Act failed to show any merit in their Application for the prevention of any fraud or any improper dealings or for any other sufficient cause.*” It is further averred that the present application is an “*abuse of process as the Land Registrar has already made a determination of the matter regarding the disposition of parcel B1854 and ... found the Applicants have no interest and have no merit in wishing to prevent any dealings with ... parcel B1854. This further proves that the Applicants are being malicious.*”
- [6] Second, the respondents object to an inhibition being placed on parcel B1854 on the ground that the applicants have no direct or indirect interest in Parcel B1854 and therefore no locus standi to file the present application. This is because they have only

filed an *action en recherche de paternité* and “*have yet to file an application for donation déguisée or the reduction of the disposable portion under Article 913 and Articles 918 and 920 of the Civil Code*” which they have only expressed the intention of doing.

- [7] The respondents further aver that the present application for an inhibition is premature, being premised on the belief that the applicants will be found to be the biological children of the late Mr. Rene and as a result will have the requisite locus standi to file an action for reduction, but that there is no guarantee of the same.
- [8] Third, the respondents object to an inhibition on the ground that even if the applicants are found to be the biological children of Mr. Rene, parcel B1854 will not automatically form part of the succession of Mr. Rene to which they will be entitled a share as his heirs. This is because “*this parcel was subjected to a transfer for consideration for R1.7 million from Mr. France Albert Rene to Mrs. Sarah Zarquani on 12<sup>th</sup> May 2003*”, and that this transfer was done in good faith which is shown by good consideration for that time (i.e. 2003) having been paid for parcel B1854 to Mr. Rene and the fact that Mr. Rene did not retain the usufructuary interest for himself. They aver that parcel B1854 was transferred by Mrs. Sarah Rene to her three children (the second, third and fourth respondents) as a gift, eleven years after purchasing it, reserving the usufructuary interest for herself and the late Mr. Rene, by a transfer document dated 19<sup>th</sup> May 2014.
- [9] The respondents also aver that the transfer of the property to Mrs. Rene who is not a reserved heir, puts the transaction outside the ambit of the law of reserved heirship and provisions relating to actions for reduction.
- [10] In further support of their contention parcel B1854 does not form part of the succession of Mr. Rene, the respondents aver that at the time of Mr. Rene’s death the property was still in the name of his three children and he was not the owner of any immovable property.
- [11] The respondents also aver that at the time of the transfer of parcel B1854 from Mr. Rene to Mrs. Rene, the former was known to have only four children, that is the second, third and fourth respondents as well as the fifth defendant in the head suit.

- [12] The first respondent further avers that at the time of the transfer of Parcel B1854 from Mrs. Rene (first respondent) to the second, third and fourth respondents, Notary Basil Hoareau, now counsel for the applicants, who attested the deed effecting the transfer never alerted her to issues that are now being raised, namely that the transfer could be considered as a donation *deguisée* and a gift *inter vivos* in excess of the reserved portion of Mr. Rene's succession but led her to believe that her gift to her children was legitimate and legal. The respondents express the belief that counsel for the applicants is filing for an inhibition knowing full well that the first respondent had good title to parcel B1854.
- [13] The respondents aver that at the time of the transfer of the property to Mrs. Rene, she already had half of Mr. Rene's share in the bare-ownership of the property as his spouse of ten years. In addition, the property had been purchased during the time that Mr. and Mrs. Rene were married and they had developed the property together during the marriage. As such the property was for Mrs. Rene to do as she pleased. Further she did not intend by purchasing the property and gifting it to her children, to deprive the applicants, who in any event all had their own homes.
- [14] Fourth, the respondents aver that Mr. Rene, both at the time of making his last will and testament and at the time of his death, had no immovable property including parcel B1854 registered in his name. He did not bequeath parcel B1854 or any other property to his children in his will and it is not him but the first respondent who gifted parcel B1854 to them as its proprietor. The issue of him disposing in excess of the disposable portion of his estate either by gift *inter vivos* or by will, therefore does not arise. Parcel B1854 not being part of the succession of Mr. Rene, the chances of the applicants being successful in an action seeking a finding that parcel B1854 was the subject of a donation *deguisée* is remote, thereby rendering the present application frivolous, vexatious and malicious.
- [15] Fifth, the respondents aver that the imposition of an inhibition on parcel B1854 will prevent them from seeking a permission to build, mortgaging, leasing, renting or even renovating the property which will cause them great hardship and prejudice as it is their family home. They also feel that the applicants who have their own homes are seeking to control their home and deprive them from further enjoying it. The respondents aver that,

should the land have been legally owned by the late Mr Rene, the applicants would have a legitimate expectation of succeeding in a case for *donation déguisée* but that as it stands, this application for an inhibition is frivolous, vexatious and malicious in that it prevents them from dealing with their property and deprives them of their constitutional right to freely enjoy their property under Article 26 of the Constitution.

- [16] Sixth, they dispute the need for an inhibition order as they aver that the only remedy available to the applicants if they should be found to be the biological children of the late Mr. Rene, would be in monetary form and not in the form of an order allowing them to occupy parcel B1854. They aver that inhibitions are reserved for cases where financial compensation is not adequate which is not the case in this matter.
- [17] Seventh, the respondents aver that they are more likely to suffer prejudice, inconvenience and hardship if an inhibition is imposed on parcel B1854 as they would be restricted from making full use of their property, a right which is enshrined in article 26 of the Constitution. The applicants on the other hand, will not be prejudiced in any way should they succeed in their paternity claim and an eventual claim for reduction of disposition in excess of the disposable portion of the succession of the late Mr. Rene, as they will be compensated in monetary terms which, in any case will not affect parcel B1854 as it is not part of the succession of Mr. Rene.
- [18] Finally, the respondents aver that the imposition of an inhibition order on their family home on parcel B1854 would be a gross miscarriage of justice and a violation of Article 32 of the Constitution for the protection of the family and Article 26 of the Constitution. They aver that the constitutional rights to own, enjoy and dispose of property as they see fit and the violation of such right by Articles 913, 918 and 920 of the Civil Code has already been recognised by the relevant authorities and as we speak, a revision of the Civil Code to rectify this violation of such constitutional rights is under way. They aver that this revision has already been approved by the legislature and is not long before it becomes law.

### *Applicants' Submissions*

- [19] In response to the respondents' objection to the granting of an inhibition based on the refusal of the Land Registrar of the applicants' prior application for a restriction order, Counsel for the applicants argued that there is a difference in the category of persons who may apply for a restriction order and those who may apply for an inhibition order.
- [20] To make his point he explained the differences between an inhibition under section 76, a caution under section 79 and a restriction under section 84 of the Land Registration Act, stating that applications for the last two must be made to the Land Registrar. He stated that in order to have locus standi to apply for a caution under section 79 forbidding the registration of dispositions of any land, that person must be able to claim a right whether contractual or otherwise to obtain an interest in the land concerned which is capable of creation by an instrument registrable under the Land Registration Act. He stated that the category of people who may bring an application for a restriction under section 84(1) prohibiting or restricting dealings with any particular land is somewhat wider in that it provides that "*any person interested in [any particular] land*" may make an application for an order prohibiting or restricting dealings with such land for the prevention of any fraud or improper dealing or for any other sufficient cause. He drew a distinction between "a person who has an interest in the land" who is entitled to apply for a caution and "any person interested in the land" who is entitled to make an application for a restriction. He stated that whereas in the case of a caution the interest in the land to which a right is being claimed must be capable of creation by an instrument registered under the Act, in the case of a restriction the person making the application can become interested in the land not because he is claiming that he has an interest in the land but because it is proper to prevent fraud. Counsel submits that the decision of the Land Registrar was wrong in that she considered whether the applicants had an interest in the land rather than whether they were interested in the land for the purpose of preventing fraud and improper dealings. He further submitted that in any event the refusal of the Land Registrar to grant an application for a restriction does not affect the present application as such decision is not binding on this Court, the Supreme Court being created by Article 125 of the Constitution whereas the Land Registrar is at most only a statutory body.

[21] Counsel submits that out of the three categories of “Restraints on Dispositions” in Part VIII of the Land Registration Act, cautions are the most restrictive, restrictions are less so and inhibitions are the least restrictive. He states that the law does not restrict the category of people who may make an application for an inhibition order, section 76(1) merely providing that “*The Court may make an order ... inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land ...*”. Counsel submits that this provision gives a discretion to the Court which has a duty to exercise that discretion judiciously and not arbitrarily.

[22] Counsel referred to section 68 of the Land Registration Act of Kenya which contains provisions relating to inhibitions which are couched in similar terms as section 76 of the Seychelles Land Registration Act. He pointed out that section 77 of the Seychelles Act entitled “effect of inhibition” and section 78 of the same Act entitled “cancellation of inhibition” are also similar to sections 69 and 70 of the Kenyan Act respectively. He attributed the similarities in these Acts to the fact that they had been borrowed from England at a time when both Seychelles and Kenya were British colonies, and submitted that in view of these similarities Kenyan case law should, although not binding on our courts, be treated as persuasive authority. In that spirit he referred to the ruling of the Nairobi High Court (Milimani Commercial Court) in the case of **Falcon Properties Limited versus Tom Chore Odiara & Ors. Environmental & Land Case 450/2012 [2013] KLR (18 February 2013)**, at page 3 thereof, in which the Court with reference to section 68 of the Kenyan Land Registration Act of 2012, states the following:

*It is clear from those provisions that the power granted to the Court are discretionary, and is to be exercised where there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period. There is no requirement that the Plaintiff must show a prima facie case before an inhibition can issue, and the general principle that will apply is that the discretion is exercised judicially by being exercised in good faith, for a proper purpose, takes into account all relevant factors and is reasonable in the circumstances of the case.*



[23] Relying on the above passage, counsel submitted that in the present matter, the plaintiffs do not have to establish a prima facie case and that the Court only has to ensure that it exercises its discretionary power in good faith and judicially. He submitted that the matters raised in the respondents' affidavit seek to make the Court go into the merits of whether, even if the applicants are proven to be the children of Mr. Rene, they are able to prove a case for reduction which he argues the Court should not be doing at this stage. He submits that the Court should not fall into the trap of seeing whether the applicants have a case for reduction or not at this stage but should consider whether eventually the plaintiffs would be in a position to have a right to reduction, which he submits they would potentially have if they are declared as children of the late France Albert Rene. On that basis he states that if the Court were to exercise its discretion in favour of the applicants, it would be doing so in good faith because it would only be temporarily preserving the property by preventing its disposal when there is good reason to do so.

[24] Counsel submitted that such good reason for temporarily preventing the disposal of the property existed and made reference to both the affidavit in support of the application for inhibition and the amended plaint in the head suit in that respect. He referred in particular to paragraph 4 of the amended plaint which sets out the facts upon which the plaintiffs/applicants will rely in their eventual case for reduction, namely that "*as heirs of the deceased, they are entitled to a share of [Mr. Rene's] estate. During his lifetime, the deceased has alienated the majority of his properties by way of gifts inter vivo – both by direct and indirect gifts – and by way of donation deguisée.*" He then referred to paragraph 12 of the affidavit which essentially sets out the intention of the plaintiffs/applicants, once they have been declared as children of the late France Albert Rene pursuant to the head suit, to institute proceedings for reduction of the dispositions made by the said France Albert Rene both by gifts inter vivos and by will in excess of the disposable portion of his succession, such a claim to be made against parcel B1854, among other properties. Counsel further drew attention to paragraphs 13 and 14 of the affidavit which basically sets out the necessity for an inhibition order in the circumstances, namely to prevent the second, third and fourth respondents from disposing of parcel B1854 which they aver would affect their right to a reduction of the disposition.

Counsel submitted that it is on the basis of these facts that the Court ought to exercise its powers under section 76(1) judicially and judiciously to grant an inhibition order. He emphasised that the applicants are not asking for the property to be transferred to them, but having acted diligently and taken the first step to be declared as the children of the late France Albert Rene within the time limit prescribed by law, and having declared their intention of filing a case for reduction, they are only asking that in the meantime the property be preserved by an inhibition order.

[25] On the issue that the applicants have no direct or indirect interest in parcel B1854 and therefore no locus standi to bring an application for an inhibition, counsel reiterated that the applicants have taken the first step to enable them to firstly be declared as the children of the late Mr. Rene which will in turn enable them to file an action for reduction and that the application for an inhibition is merely to prevent disposition of the property which if it was allowed would affect their right to such reduction. He further submitted that while no interest in the property is required for an inhibition order to be imposed thereon, the applicants do have an indirect interest in the property in that if they are declared as the children of the late Mr. Rene, they will bring a case for reduction which will affect that property.

[26] With regards to the respondents' contention that even if the applicants were declared as the children of the late Mr. Rene, an inhibition order on parcel B1854 would not be justified because it does not form part of his succession, having first been sold to the first respondent who later transferred it to their children, counsel for the applicants reiterated that the Court should not at this stage be trying the case for reduction and going into the issue of whether or not the property was transferred to the first respondent for valuable consideration, which is an issue to be determined when the applicants bring their case for reduction. Counsel also pointed out that moreover the applicants are not alleging a simple donation in excess of the disposable portion but have alleged a *donation déguisée*, which is a donation disguised as a sale and that in that respect, evidence could be brought showing that no or insufficient consideration was paid for the property.

[27] As to the respondents' claim that at the time of the transfer of parcel B1854 from Mr. Rene to Mrs. Rene, the former was known to have only four children, that is the second, third and fourth respondents as well as the fifth defendant in the head suit, the implication being that the disposition of parcel B1854 fell within the boundaries of the law as being within the disposable portion. Counsel for the applicants submitted that the fact that Mr. Rene had recognised only four children does not mean that they were his only children. He states that this is why Article 340 of the Civil Code allows a child who has not been acknowledged by his or her father, within a period of one year after his death, to commence an *action en recherche de paternité* to be declared as the child of the alleged father. He submits that it is irrelevant whether Mr. Rene had acknowledged only four children as Article 913 of the Civil Code provides for a reserved portion for the children of the *de cuius* regardless of whether they had been acknowledged or not at the time of his death provided that they are acknowledged subsequently. Further under Article 920 of the Civil Code, the right to bring a case for reduction accrues only after opening of a succession and the Court will only then consider the number of children that the *de cuius* has, the properties that he had and the disposals that he made either by gift inter vivos or by will. It is irrelevant how many children he had at the time of the transfer in 2003.

[28] Counsel for the respondents also dealt with the averment that the transfer of parcel B1854 by Mrs Rene to her three children dated 19<sup>th</sup> May 2014 was attested to by him and that at the time he found nothing wrong with such transfer. In that regard he stated that the transfer was indeed legitimate and legal because at the time his instructions from Mrs. Rene was to transfer the property from her as a gift to her children. He therefore only had to be satisfied that the property was registered in her name and he was not concerned with the original transfer by which she came to be the proprietor of the land. He submits that the issue that has now arisen does not concern this second transfer and the gift that Mrs. Rene made to her children but with the original transfer of parcel B1854 from Mr. Rene to Mrs. Rene which the applicants are claiming is a *donation déguisée*. Because that first transfer is a donation déguisée, any subsequent transfer will as a consequence be affected by a reduction. Counsel moreover stated that no question of illegality arises when a disposition is made in excess of the disposable portion of a succession, and that the

transaction by which such disposition was effected cannot be declared null and void as if it never took place. Such a disposition only gives rise to a reduction: it gives a right to the affected party to contest the disposition so that it is reduced to the correct proportion.

[29] Counsel further submitted that the fact that Mrs. Rene was married to Mr. Rene does not automatically entitle her to an interest in his property, and it is incorrect to state on that basis that she already had a half share of his property. It is only at the stage of a divorce that a Court can pronounce on the entitlement of the spouses to matrimonial property. In support of his argument, he referred to the transfer of title No. B1854 from Mr. Rene to Mrs. Rene dated 12<sup>th</sup> May 2003, by which he transferred the whole property to her. He stated that if she had a half share in the property prior to the transfer, the document would have reflected that he had transferred his undivided half share interest of the property to her and not the whole property.

[30] On the issue of hardship to the respondents by the grant of an inhibition order, counsel submitted that according to the *Falcon Properties* case (supra), in an application for an inhibition, the Court does not have to consider the hardship caused to the affected party. He submitted that the Court is not entitled to look at the balance of convenience as in an application for an interlocutory injunction in exercise of the Court's equitable jurisdiction under section 6 of the Courts Act, and that in any case an equitable remedy cannot be granted under that provision if there is any other applicable legal provision, which in the present case is section 76(1) of the Land Registration Act. The Court therefore should not consider any hardship that may be caused to the respondents in determining whether or not to grant the inhibition but should only consider whether there is good reason to preserve the property.

[31] Counsel also referred to section 76(1) which provides for the inhibition of the registration of any *dealing* with any land etc. Section 2 of the Act defines "dealing" as including disposition and transmission. Counsel explained that disposition means transferring or compromising one's right to something so that it is incorrect for the respondents to say that prejudice will be caused to them because they will not be able to seek a permission to build, mortgage, lease, rent or renovate the property. If an inhibition is granted they will

be able to do all those things except mortgage the property and they will also be prevented from compromising the property for example by selling it.

[32] As to the respondents' argument that B1854 cannot be subject to a reduction on the basis that if at all Mr. Rene gifted that property it was to Mrs. Rene and not to his children and that the transfer to the children was later made by Mrs. Rene, counsel for the applicants submitted that Article 930 of the Civil Code permits an action for reduction against third parties holding immovable property forming part of the gifts and alienated by the donees. He argues that even if Mrs. Rene had been the donee and she had transferred the property to third parties, namely her three daughters, an action for reduction could be brought against such third parties under Article 930 in respect of the property.

[33] With respect to the respondents' contention that an inhibition order should not be granted because the remedy available to the applicants in an action for reduction would be in a monetary form and they would not have the option of occupying the property, counsel explained that in an action for reduction, the property would normally be brought back to the hotchpot of the estate and distributed. However, under Article 866 of the Civil Code, if a donation has been made to an heir who is entitled to inherit from the *de cujus*, that heir has the option of opting to pay the monetary value of the property that has been donated rather than giving it up to go into the hotchpot of the estate to be distributed. He submitted that the proper procedure is that once the applicants have filed an action for reduction, the respondents should raise that in their defence as the applicants cannot just bring an action for monetary compensation against them. The applicants therefore cannot raise this point now as a justification not to allow an inhibition order.

[34] Counsel concluded by stating that there are good reasons to preserve the property pending the determination of the head suit and an eventual case for reduction by the applicants, by making an order to inhibit any dealings on the property until further order of this Court. He stated that if the applicants are declared to be the children of Mr. Rene and they do not institute a case for reduction within a reasonable time, the Court can then, on the application of the respondents, vacate its inhibition order. He submits however that at this point in time there is a necessity to maintain the status quo.

### *Submissions of the Respondents*

- [35] In her submissions, counsel for the respondents relied mostly on the respondent's affidavit in reply in essence reiterating what was averred therein.
- [36] She added that the applicants having been unsuccessful in their application for a restriction before the Land Registrar are now making a second attempt to prevent any dealings with parcel B1854 to protect their rights under the laws relating to reduction. She states that at this juncture however, they have no right to do so as they have no "*interet personel, legitime et suffisant*" as their application is not based on a "*droit certain*", there being no certainty that they will be declared the children of the late Mr. Rene.
- [37] She challenged the likelihood that the applicants will succeed in an action for reduction, by proving that there was no or insufficient consideration for the transfer of parcel B1854 by Mr. Rene to Mrs. Rene. She submits that the applicants have not brought any evidence for example in the form of a surveyor's report to show that this is the case and that the property was worth more than the 1.7 million rupees paid for it.
- [38] She also disagreed with counsel for the applicants that the issue before this court does not concern the transfer of parcel B1854 from Mrs. Rene to her children but the first transfer from Mr. Rene to Mrs. Rene. She submitted that Mrs. Rene should have been advised by counsel for the applicants who was her counsel at the time, about the risk that the transfer of parcel B1854 first from Mr. Rene to her and subsequently by her to their children could be considered as a *donation deguisée*.
- [39] She further submitted that when Mr. Rene transferred the land to Mrs. Rene, the transfer was not subject to any restrictive covenants and that she was therefore at liberty to do as she pleased with it.
- [40] Counsel also expanded on her argument that Mrs. Rene had no intention of depriving the applicants by transferring parcel B1854 to the second, third and fourth respondents by

stating that the applicants were all older and had their own homes. She also referred to the third paragraph of clause 8 of the will of the late Mr. Rene, which reads as follows:

*I have helped all my children, be it they bear my name or not, to the best of my ability during my lifetime. They all know what they got from me ...*

[41] She further submitted that the house on B1854 is the only family home that the respondents have known, their safe haven as it were and of great sentimental value and that to impose an inhibition thereon is too restrictive as it would prevent them from fully enjoying their property thereby causing them great hardship.

[42] She also submitted that if the applicants are declared as children of Mr. Rene, in order to obtain any remedy in an action for reduction, they have to see if anything was bequeathed under his will. She states that it is clear from the will that Mr. Rene did not bequeath any immovable property thereunder, that he did not have any immovable property registered in his name at the time of his death and that he died a penniless man. She submitted therefore that no good reason exists for imposing any kind of restriction on parcel B1854 as not only does it not form part of the succession of Mr. Rene, but the applicants have no locus standi to bring a case for reduction or the present application. Further, they have no certainty of success in the head suit or an eventual case for reduction.

[43] With respect to the averments that Articles 913, 918 and 920 of the Civil Code which provide the basis for an action for reduction, violate Article 26 of the Constitution, counsel admitted that these provisions have been held by the Constitutional Court to be constitutional and that no amendments have been made to the law at this point in time.

*Reply of applicants arising from respondents' submissions*

[44] Counsel for the applicants pointed out that there is no need at this stage for the applicants to produce a surveyor's report to show that they have a case for reduction because the Court is not trying a case for reduction. This will be done at the appropriate time which is in the case for reduction itself.

- [45] He also stated that the will strengthened the applicant's case that there was a *donation déguisée* in that Mr. Rene states at the second paragraph of clause 10 of the said will, with regards to the family home, that “*I passed my family house over to my spouse in May 2003 for her 45<sup>th</sup> birthday and we subsequently agreed jointly that she transfers it to our children Ella, Louisa and Dawn as a gift ...*” Counsel submits that this passage constitutes confirmation that there was indeed a *donation déguisée*, and stated that it could be used in an action for reduction to prove the same. He states that it creates a doubt as to whether the house was a birthday gift from Mr. Rene to Mrs. Rene to do as she pleased because if Mrs. Rene was truly the owner of the property and they subsequently agreed that it should be transferred to their children, why then did Mr. Rene take part in the decision to give it to their children?
- [46] Counsel confirmed that the applicants are not seeking the eviction of the respondents from their home but that they are merely asking that they be prevented from dealing with the property by mortgaging, leasing or transferring the property. However, he reiterated that they can renovate the property. As such he states that no prejudice will be caused to the applicants by an inhibition which in any case he submits is not a consideration for the Court in an application such as the present one, the only consideration of the Court being whether there is a need to preserve the property.
- [47] Counsel also addressed the point that the applicants have no certainty of success in their action *en recherche de paternité* or an eventual case for reduction. He stated that if they were indeed declared the children of the late Mr. Rene, and were successful in a case for reduction, but by then the property has been disposed of and the proceeds thereof unable to be traced, the action for reduction would have been futile and execution will not be able to take place, hence the necessity of an inhibition order.
- [48] With regards to the constitutionality of Articles 913, 918 and 920 of the Civil Code, he clarified that the amendments to these Articles to bring them in line with Article 26 of the Constitution are being done as a revision of the Civil Code which is at this point in time still a Bill before the National Assembly. He admitted that in spite of appearing for the applicants in the head suit, he has brought a case before the Court of Appeal challenging



the constitutionality of these provisions, but in any case if the law is amended by the National Assembly, it will not affect the head suit as it concerns a right that has already been acquired by the applicants and which cannot be taken away by a law which has only prospective and not retrospective effect. A new law will only affect successions which open after it comes into effect. According to him this argument of the respondents is therefore without merit.

## **The Law**

[49] The law relating to inhibitions is provided for by sections 76, 77 and 78 of the Land Registration Act which are reproduced below:

### *Power of Court to inhibit registered dealings*

76. (1) *The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge.*

(2) *A copy of the inhibition, under the seal of the Court, with particulars of the land, lease or charge affected thereby, shall be sent to the Registrar, who shall register it in the appropriate register, and no inhibition shall bind or affect the land, lease or charge until it has been registered.*

### *Effect of inhibition*

77. *So long as an inhibition remains registered, no instrument which is inconsistent with it shall be registered.*

### *Cancellation of inhibition*

78. *The registration of an inhibition shall be cancelled in the following cases and in no others-*

*(a) on the expiration of the time limited by the inhibition; or*

*(b) on proof to the satisfaction of the Registrar of the occurrence of the event named in the inhibition; or*

*(c) on the land, lease or charge being sold by order of the court; or*

*(d) by order of the court.*

## Analysis

- [50] I will now proceed to address the various issues arising from the pleadings and submissions of the parties requiring this Court's determination.
- [51] The respondents argue that the applicants have no locus standi to apply for an inhibition order, firstly relying on the fact that the Land Registrar had previously refused their application for a restriction order on the ground that they had no locus standi to make such an application because they had no interest in parcel B1854.
- [52] In my view although restrictions and inhibitions both appear under Part VIII of the Land Registration Act entitled "RESTRAINTS ON DISPOSITIONS", different provisions deal with each one: Inhibition under sections 76, 77 and 78 and Restrictions under sections 84, 85 and 86). Further, different considerations apply when deciding whether to grant an inhibition or a restriction, the requirements for an inhibition being dealt with later in this order. Therefore, the fact that the Land Registrar found that the applicants had no locus standi to make an application for a restriction because they had no interest in parcel B1854 does not necessarily mean that a Court will find that they have no locus standi to make an application for an inhibition. Consequently, I find that the refusal of the Land Registrar to grant a restriction order in relation to parcel B1854 on those grounds has no bearing on the present application for an inhibition. For this reason, I also do not find it necessary to make a determination on whether the Land Registrar rightly or wrongly refused to grant the restriction order.
- [53] The respondents also question the locus standi of the applicants to apply for an inhibition order on the ground that they have no interest in parcel B1854 at this point in time because so far the applicants have only filed an *action en recherche de paternité* in which they have no guarantee of success. They are of the view that it is only if the applicants are successful in such action and declared the children of Mr. Rene that they will have an interest in his succession and the requisite standing to file an action for reduction of dispositions made in excess of the disposable portion thereof. It is the respondents' stance that it is only once the applicants have commenced proceedings for reduction that they will have the necessary locus standi to apply for an inhibition in respect of property

forming part of the succession of Mr. Rene and as such an application for inhibition at this point in time is premature. They further argue that as parcel B1854 does not form part of the succession of Mr. Rene the applicants lack the necessary locus standi to apply for an order inhibiting dealings with that particular property.

- [54] In response, the applicants argue that section 76(1) of the Land Registration Act does not restrict the category of people who may apply for an inhibition to those who have an interest, but gives a discretion to the Court to grant or refuse such an application, the only duty on the Court being to exercise that discretion judicially and in good faith. In addition, they contend that the applicants do have an indirect interest in parcel B1854 as plaintiffs in an *action en recherche de paternité* which if successful, will allow them to file an action for reduction which will affect parcel B1854. They further argue that the grounds on which the respondents object to the inhibition which boil down to the applicants having no prospect of success in an action for reduction based on parcel B1854 because that parcel does not form part of the succession of Mr. Rene, suggest that the applicants need to establish a prima facie case for reduction in order to justify the granting of an inhibition, but that there is no requirement for the same. In support of his arguments counsel for the applicants relies on the passage from the *Falcon Properties* (supra):

*“It is clear from those provisions that the power granted to the Court are discretionary, and is to be exercised where there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period. There is no requirement that the Plaintiff must show a prima facie case before an inhibition can issue, and the general principle that will apply is that the discretion is exercised judicially by being exercised in good faith, for a proper purpose, takes into account all relevant factors and is reasonable in the circumstances of the case.”*

- [55] The applicants emphasise that they are not required at this stage to establish a prima facie case for reduction and that the Court only must ensure that it exercises its discretionary power in good faith and judicially. They are of the view that the Court would be exercising its discretion in good faith by granting an inhibition as it would be temporarily

preserving the property by preventing its disposal when there is good reason to do so. The applicants claim that such good reason as shown in the plaint in the head suit and the affidavit in support of the present application are (1) the alienation by the deceased of his properties including by way of *donation deguisée* in breach of the applicants' rights to the reserved portion of his succession as his heirs, (2) their intention of filing an action for reduction of such dispositions in breach of their right, which will affect parcel B1854 among other properties, and (3) the necessity for an inhibition order to prevent the disposition of parcel B1854 by its current owners which would effectively affect the exercise of their right to a reduction.

[56] I note that the facts of the *Falcon Properties* case (*supra*) differ significantly from those of the present case. In summary, the plaintiff had purchased and was the registered owner of several properties which were then ordered by the Magistrate's Court to be sold by public auction pursuant to suits filed by the Nairobi City Council for alleged non-payment of rates. The plaintiff filed judicial review proceedings for an order of certiorari setting aside the judgment of the subordinate Court and it was held by the High Court that the order for sale was a nullity whereupon the vesting orders and certificates of sale declared void and of no effect. Thereafter, the first defendant filed an application pursuant to which the plaintiff claimed that the first defendant extracted a court order which he used to transfer the properties to himself and subsequently to the second defendant in which he was a 50% shareholder. The plaintiff again filed judicial review proceedings to recall and cancel the court order. He claims that the court order was recalled and cancelled by an order dated 20<sup>th</sup> July 2012. However, the defendants claimed that the effect of this order of 20<sup>th</sup> July 2012 and the court order challenged in the second judicial review proceedings was to set aside the judgment of the High Court declaring the order of the Magistrates Court for sale by public auction a nullity. The plaintiff then filed a suit seeking cancellation of certificates of lease issued to the first and second defendants and the rectification of the register to restore the suit properties to his name. Fearing that unless an inhibition order was issued to stop the registration of any further dealings with the properties, the second defendant would sell them to third parties, the plaintiff also applied for an inhibition order to preclude the defendants from dealing with properties.

The inhibition order was granted forbidding the registration of any dealings with the properties, pending the hearing and determination of the suit.

[57] In the *Falcon Properties* case the plaintiff had a much stronger claim to the properties. Originally he had been the registered proprietor of the properties. The first order of the Magistrate's Court for sale of the properties by public auction had been declared a nullity and the ensuing vesting orders and certificates of sale declared void. The second court order by means of which the plaintiff claims the first defendant transferred the properties to himself and subsequently to the second defendant is claimed by the plaintiff to have been recalled and cancelled by an order dated 20<sup>th</sup> July 2012. The defendants claim that the effect of this order of 20<sup>th</sup> July 2012 and the court order subject to the second judicial review proceedings was to set aside the judgment of the High Court declaring the order of the Magistrates Court for sale by public auction a nullity so that there was no bar to their being issued with certificates of leases in the suit properties. It is with this background and in the presence of a plaint in which the plaintiff was seeking cancellation of certificates of lease issued to the first and second defendants and the restoration of the suit properties to his name that the Court had to consider the inhibition application before it.

[58] The facts of the present case are as stated, significantly different. The applicants in the present case have only a potential interest in parcel B1854, and therefore a more tenuous claim thereto. They have to succeed in several steps before they can claim to have an actual interest in the property: It is only if, which is not certain, they are declared the children of the late France Albert Rene, that they will have an interest in his succession which will enable them to file an action for reduction of dispositions in excess of the disposable portion of that succession, which the respondents claim parcel B1854 does not form part of. The applicants have argued that there is no need for them to show a prima facie case that parcel B1854 does form part of Mr. Rene's succession to be granted an inhibition and that this will be for the Court to determine when proceedings for reduction are brought.

[59] In the *Falcon Properties* case, while the Court stated that the plaintiff does not need to show a prima facie case before issuing an inhibition, it did consider whether the plaintiff merited an order of inhibition in the circumstances of the case and stated the following in that respect:

*I will proceed to address the substantive issue whether the Plaintiff merits an order of inhibition in the circumstances of this case. I have perused the Plaintiff filed herein and note that in addition to orders of inhibition, the Plaintiff is seeking cancellation the certificates of lease issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the rectification of the register to restore the suit properties to the name of the Plaintiff. Evidence provided by the Plaintiff in this regard are copies of the certificate of lease issued to it with respect to the suit properties on 12<sup>th</sup> April 1988, and certificates of official search showing that the said properties are currently registered in the name of the 2<sup>nd</sup> Defendant which was issued a certificate of lease on 4/5/2012.*

*The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have argued that the said registration was not as a result of the orders issued on 10<sup>th</sup> December 2011 that were recalled and cancelled by Justice Githua in her ruling delivered on 20<sup>th</sup> July 2012, but pursuant to the vesting orders issued by the Magistrate's Court in Civil Suit Numbers 20,22,23,24, and 26 of 2007. They however have not produced a copy of the title issued to the 2<sup>nd</sup> Defendant or any evidence to show that indeed this was the consideration taken into account when transferring the properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. This Court cannot therefore find in their favour in this regard.*

*It is the finding of this court that there are reasonable grounds for the grant of an inhibition with respect to the suit properties, arising from the orders given in the previous applications touching on the suit property, and from the evidence produced by the Plaintiff. I accordingly hereby grant an order of inhibition forbidding the registration of any dealings with Nairobi/Block 97/376, Nairobi/Block 97/378, Nairobi/Block 97/379, Nairobi/Block 97/380 and Nairobi/Block 97/381, pending the hearing and determination of the suit herein or until further orders.*

[60] The above shows that the Court took into consideration not only the plaintiff in the head-suit seeking restoration of the suit properties to the name of the Plaintiff but also evidence provided by the plaintiff in support of his application for inhibition namely documentary evidence that the properties had been leased to him previously and that the said properties

were now registered in the name of the 2<sup>nd</sup> Defendant. It also considered the arguments of the defendants which it rejected because they had not produced evidence in support thereof. This as well as its finding that “*there are reasonable grounds for the grant of an inhibition with respect to the suit properties, arising from the orders given in the previous applications touching on the suit property, and from the evidence produced by the Plaintiff*” makes it clear that the Court had to have some material, albeit not to the prima facie standard, to satisfy itself that there were grounds for granting an inhibition.

[61] What then is the threshold for the grant of an inhibition order? Seychelles case law and the provisions of the Land Registration Act relating to inhibitions are unfortunately not clear on this issue. Unlike the provisions relating to cautions and restrictions which require certain conditions to be met by the applicant, the provisions relating to inhibitions are quite general, potentially giving courts wide discretion in determining whether an inhibition order should be granted. Similarly, local case law does not provide clear guidance on the threshold to be applied for inhibition orders. As correctly pointed out by counsel for the applicants, the Kenyan Land Registration Act contains similar provisions to our Act and their case law may serve to shed light on corresponding provisions in our Act. I find the following cases of particular relevance:

[62] In the Kenyan case of **Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation Limited (Kenyac) & 6 others Civil Suit No.566 of 2013 [2015] KLR (25 March 2015)** F. Gikonyo J, in dealing with an application for an inhibition order against the suit property under section 68 of the Kenyan Land Registration Act, stated the following:

[15] *Of great significance on the request for an order of inhibition is section 68(1) of the Land Registration Act which reads as follows;*

*The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.*

*The case of Japhet Kaimenyi M’ndatho v M’ndatho M’mbwiria [2012] eKLR dealt with the threshold for granting orders of inhibition in a pointed manner as follows:*

*“In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions;*

- a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless Preservatory orders of inhibition are issued.*
- b. That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.*
- c. That the applicant has arguable case.”*

[16] *Orders of inhibition envisaged under section 68 of the Land Registration Act are in the nature of prohibitory injunction and act to preserve the suit property just as an interlocutory injunction would do... On this I am content to refer to the decision of Okwengu, J (as she was then) in the case of Philip Mwangi Githinji v Grace Wakarima Githinji (2004) eKLR when she rendered herself inter alia;*

*“An order of inhibition issued under section 128 of the Registered Land Act is akin to an order of prohibitory injunction for it restricts the registered owner and any other person from having their transaction regarding the land in question registered against the title. Before the court can issue such an order it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition, such grounds would normally be in the form of a sustainable claim over the suit land.”*

[63] The High Court of Kenya in two recent rulings **In re Estate of Elijah Ngari (Deceased) Succession Cause No.30 of 2013 [2019] KLR (7 February 2019)**, and **In re Estate of Charles Njeru Muruatetu (Deceased) Succession Cause No.1053 of 2002 [2020] KLR (28 January 2020)**, both of which also dealt with applications for inhibition orders under section 68 of the Kenyan Land Registration Act, expressed the view that the parts of the Ruling in the Mwambeja Ranching Company Limited case reproduced at paragraph 62



above “sets out the correct position for issuance of prohibition orders where the applicant has a claim which has not been determined”.

[64] Further, in *In re Estate of Elijah Ngari (Deceased)* (supra) the Court in speaking about section 68(1) and (2) of the Kenyan Land Registration Act stated that:

6. *These provisions give court discretion to issue orders which are in the nature of an injunction restraining dealings on land pending further orders by the court. The Section is meant to preserve the property from acts that would otherwise render a court order incapable of being executed and or to give an opportunity to hear and decide the matter. It is therefore necessary to preserve the status quo pending the hearing and determination of the issue before court.*

[65] Similarly, in *In re Estate of Charles Njeru Muruatetu (Deceased)* (supra) the Court granted an order of inhibition against any transactions relating to the suit property pending the hearing and determination of the matter before it, so as to maintain the status quo and preserve the suit property, pending such hearing and determination.

[66] The Court, in the case of **Fidelity Commercial Bank v Bedan Mwaura Irari & another ELC Case No. 835 of 2015 [2016] KLR (16 September 2016)** adopted the principles enunciated in the cases of *Japhet Kaimenyi M'ndatho* and the *Philip Mwangi Githinji* relied upon in the *Mwambeja Ranching Company Limited* (supra), on the threshold for granting of inhibition orders. It further stated:

*It is also evident that the power to grant the prohibitory order is discretionary which is only granted where there is a very good reason to preserve the suit property and stay any further dealings.*

[67] The principles illustrated in these cases may be summarised as follows:

- (a) Inhibition orders are in the nature of prohibitory injunction in that they restrict the registered owner and any other persons from having their transactions regarding the land in question registered against the title; they act to maintain the status quo and preserve the suit property pending hearing and determination of disputes between the parties relating to the suit property.

(b) Before granting an inhibition order the court must be satisfied that there are good reasons to do so. The threshold for granting orders for inhibition and which an applicant must satisfy in order to succeed in such an application is:

- (i) that the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued.
- (ii) That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
- (iii) That the applicant has an arguable case. For example, the applicant should have a sustainable claim over the suit property.

[68] As to what is meant by an arguable case, as stated above, the applicant should have a sustainable claim over the suit property. The difference between prima facie standard of proof (applicable to injunctions) and arguable case (applicable to inhibitions) was also illustrated in the *Fidelity Commercial Bank case* (supra) in which the Court stated:

*“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.*

*From the above description it is evident that a prima facie case means more than an arguable case. The applicant must show that his/her right has been infringed.*

[69] Further in the *Japhet Kaimenyi M'ndatho case* (supra) the Court after reviewing the facts of that case made it clear that the chances of success of the applicant in the head suit is not a determining factor of whether an applicant has an arguable case or not. It stated:

*The applicant has therefore established that he has arguable case, whether he would succeed or not is not material at this stage, and as such orders of inhibition ought to be granted.*

[70] Having said that, it is also worth reiterating that while ‘arguable case’ is a lower standard than ‘*prima facie* case’, the applicant must have good grounds to be granted an inhibition order.

*Have the applicants met the threshold requirements?*

[71] Having set out the applicable threshold requirements for inhibitions, this Court now needs to determine whether the applicant has met these requirements for the grant of an inhibition order in relation to parcel B1854. In other words, on the facts of this case, do the applicants have a good reason for preserving the property by staying any dealings thereon, pending determination of the dispute between the parties?

[72] The reason for seeking the inhibition is to prevent the second, third and fourth respondents who are the registered owners of parcel B1854 from disposing of it, thereby ensuring that the property is able to be returned to the hotchpot of the succession of the deceased, if the applicants are successful in an eventual case for reduction.

[73] Before the applicants can file a case for reduction, they have to be declared the children of the deceased. They have filed the head suit for that purpose. It is only if they are successful in the head suit that they will have the required standing as children and heirs of the deceased to file a case for reduction of dispositions in excess of the disposable portion of his succession. Because the filing of a case for reduction depends on the applicants’ success in their *action en recherche de paternité*, for the Court to grant an inhibition order, it has to be satisfied that applicants have an arguable case both in their paternity claim and their eventual case for reduction. This has to be decided on the basis of the materials in hand in the head suit and in the application, including pleadings and any documentary evidence.

[74] In that respect, it bears mentioning that the fifth defendant in the head suit resides in the United Kingdom and was represented in these proceedings by Virginia Athanasius by virtue of a power of attorney dated 10<sup>th</sup> June 2019. Although the fifth defendant was advised by the Court to formally file either a defence or an admission to the plaint in the Registry of the Supreme Court, she has communicated with the Registrar via email and

also attached a statement to the power of attorney setting out her stance in relation to the plaint. In the absence of formal pleadings properly filed I decline to take into account the aforementioned emails and statement.

[75] I note that proceedings the head suit i.e. the *action en recherche de paternité* have been commenced within the time prescribed by Article 340(3)(b) of the Civil Code, that is within one year of the death of the alleged father. The amended plaint sets out in paragraphs 2 and 3 thereof, the facts by which the plaintiffs/ applicants intend to prove their paternal descent. These are in accordance with Article 321 and 340 of the Civil Code, namely that “*the deceased has treated each one of the Plaintiffs as his child and has provided of contributed for the education, maintenance and/or start in life for each one of the Plaintiffs, in his capacity as their father*”; that “*all the Plaintiffs have been recognised as the children of the deceased in society*” as well as “*by the family of the deceased, including by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants*”; that “*there is writings emanating from the deceased by which the deceased has unequivocally admitted to being the father of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Plaintiffs*”; and that “*the deceased and the mother of the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs – Miriam Therese Frichot – notoriously lived together as husband and wife during the conception of the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs*”.

[76] In their defence, the first, second, third and fourth defendants/ respondents in essence deny that the plaintiffs are the biological children of Mr. Rene and contest the facts by which the plaintiffs intend to prove their paternity. They claim that Mr. Rene’s actions were not that of a father but that of a man helping another person get a good foundation and to enable him to be a successful individual in future which is something which he did with many individuals. They also aver that in spite of any writings emanating from Mr. Rene neither he nor the first, second, third or fourth defendants/ respondents were ever 100% sure that the five plaintiffs/ applicants were his biological children. They explain that this is because of the existence of strong cultural tendencies in our society for certain women to claim that their child is that of a well to do man in the hope of making material, social and financial gains from that man, and further that in the absence of a scientific way of proving paternity at the time of the plaintiffs’ births, it was easy for women to

claim that their child was Mr. Rene's as he was well known for his generosity and they stood to gain power, standing and recognition in society as well as financial and economic benefits from him. It is noteworthy that the defendants/ respondents are not denying that Mr. Rene did provide assistance to the plaintiffs but are contesting the reason for his giving such assistance. They also do not deny that there are writings emanating from Mr. Rene but still contend that in spite of such writings he was never totally sure that they were his children in the absence of a conclusive DNA test.

[77] The defendants/ respondents lay great emphasis on proving paternity by means of DNA testing and aver that now that it is possible to establish paternity through such tests, it is no longer relevant or necessary to do so by conventional means. They claim that the threshold for proving paternity as set out in Article 340 of the Civil Code is far too low and contravenes Article 32 of the Constitution which provides for the protection of families, in that Article 340 is liable to abuse and makes it easy for imposters to claim paternity without DNA evidence thereby depriving the rightful heirs of their inheritance. They also aver that since the wish of the plaintiffs/ applicants to be declared as the children of Mr. Rene is solely for the purpose of claiming a share in his succession, it is imperative that they prove paternity beyond reasonable doubt which can only be done by a DNA test. Suffice it to say that the law does not currently provide for mandatory DNA testing to prove paternity which is only done where all parties concerned agree to such tests. The law only provides for the modes of proof of paternal descent in Articles 340 and 321 of the Civil Code. It is also not necessary that paternity is proved beyond reasonable doubt but on a balance of probabilities as in all civil matters. As to the constitutionality of Article 340, the defendants have filed their submissions on whether this raises an issue which ought to be referred to the Constitutional Court and the Court is awaiting the plaintiffs' submissions thereon. This issue in my view has no bearing on the arguability of the plaintiffs/ applicants' paternity claim.

[78] I also note that in his last will and testament Mr. Rene states that he is married to the first respondent and that he has the following children with her namely: Ella Setarah Rene (third respondent), Louisa Carmelle Rene (second respondent) and Dawn Elsa Rene

(fourth respondent). He also mentions that he has another legitimate daughter Pandora Rene born 17<sup>th</sup> November 1958 during his first marriage. Further on in his will he states the following: “I have helped all my children, be it they bear my name or not, to the best of my ability during my lifetime. They all know what they got from me. It was up to them to use this help to make something for themselves from what they got. I hope they were able to attain their material dreams.” Although he does not mention them by name, this suggests that that Mr. Rene did have natural children who did not bear his name.

[79] On the basis of all the above I am of the view that the plaintiffs have an arguable case in respect of their *action en recherche de paternité*. This brings us to the next question namely whether they have an arguable case for reduction.

[80] The plaintiffs/ applicants have expressed their intention of initiating proceedings for reduction in paragraphs 4, 5, and 6 of their amended plaint. It is averred in these paragraphs that the plaintiffs/ applicants as heirs of the deceased are entitled to a share of his estate, and that during his lifetime the deceased has alienated the majority of his properties by way of gifts inter vivo – both by direct and indirect gifts – and by way of *donation déguisée*. It is further averred that the plaintiffs are desirous of being declared the children of the deceased and that after being so declared they intend to institute proceedings for reduction of the disposition made by the deceased of his property by way of gift inter vivo which exceeds the disposable portion of one fourth of his properties that he owned.

[81] The defendants in their defence deny that Mr. Rene disposed of his property by gift inter vivo and *donation déguisée* and therefore that the plaintiffs will, if they are declared as children of Mr. Rene, be successful in an action for reduction on the basis that such gift or donation exceeded the disposable portion of his properties.

[82] They also raise the issue of the constitutionality of Articles 913, 915, 917, 918 and 920 of the Civil Code claiming that these provisions contravene the right to own and dispose of one’s property as one pleases enshrined in Article 26 of the Constitution. This question

was recently dealt with in the case of **Payet v Green [2019]** in which the Constitutional Court confirmed the constitutionality of these provisions.

[83] The plaintiffs/ applicants base their application for inhibition on parcel B1854 on their eventual action for reduction. The defendants/ respondents on the other hand, basically claim that an inhibition will be futile because the plaintiffs/ applicants have no chances of success in an action for reduction based on parcel B1854 as Mr. Rene never transferred that property to his children (second, third and fourth respondents) who are his reserved heirs but to his wife (first respondent) who is not a reserved heir, for good consideration and in good faith without reserving the usufructuary interest to himself, and that it was his wife who later transferred the property to their children as a gift; that parcel B1854 therefore does not form part of the succession of Mr. Rene and the question of the disposition of parcel B1854 by Mr. Rene by gift inter vivos or by will to his children, in excess of the disposable portion of his succession does not arise; and that consequently the property cannot be the subject of an action for reduction.

[84] As rightly pointed out by counsel for the applicants, the respondents fail to take into account that the applicants are not averring a simple donation of parcel B1854 by Mr. Rene to his children but a *donation déguisée*, in the guise of a purported sale of the property to their mother who subsequently transferred it to them as a gift. According to the deed of sale dated 12<sup>th</sup> May 2003, effecting the transfer of parcel B1854 from Mr. To Mrs. Rene, the transfer was in consideration of Rupees One Million Seven Hundred Thousand (Rs1.7m), which sum was stated to have been paid. This was followed by another deed of sale dated 19<sup>th</sup> May 2014 transferring bare ownership of parcel B1854 from Mrs Rene to her three children (the second, third and fourth respondents) jointly and in equal portions reserving the usufructuary interest to herself and Mr. Rene during their lifetime. To my mind, the consecutive transfers of the parcel B1854 which culminated in the ownership thereof by the second, third and fourth defendants who are reserved heirs of Mr. Rene are an indication that the transfers may have constituted a transaction amounting to a *donation déguisée*. Hence it is irrelevant that Mrs. Rene was not a reserved heir.

- [85] Further, I agree with counsel for the applicants that Mr. Rene’s reference to the “Family Home” at Barbarons B1854 in his last will and testament, and the statement that he passed it over to her spouse in May 2003 for her 45<sup>th</sup> birthday, and that they subsequently *jointly* agreed that she transfers it to their children namely the second, third and fourth respondents as a gift gives credence to the argument that the transfer from Mr. Rene to Mrs. Rene and its eventual transfer to their children constituted a *donation déguisée*. This is further reinforced by the fact that although Mr. Rene did not retain usufructuary interest in the property when he effected the first transfer, when the second transfer to the children were effected he was given such interest.
- [86] I consider it irrelevant to the question of whether or not there was a *donation déguisée*, that Mr. Rene had only acknowledged his legitimate children who were four in number at the time he transferred parcel B1854 to his wife. What is important is the number of children he had acknowledged at the time of the opening of his succession as well as the number of children that he would eventually be declared to have fathered pursuant to an action under Article 340. Subsection 4 of this Article provides that “A *child whose paternal descent has been proved under this Article is entitled to bear his father’s name (in addition to a share in his father’s succession under the title Succession.*”
- [87] I also fail to understand the respondents’ argument that Mrs. Rene as Mr. Rene’s spouse of ten years was entitled to half of his property which they had purchased and developed together, and could therefore do as she wished with it. If she had any claim to or interest in the property during his lifetime whilst it was in his name, she would only have become entitled thereto pursuant to proceedings for division of matrimonial property upon filing of divorce proceedings. In the absence of such proceedings, had the property remained registered in the name of Mr. Rene, it is only upon his death and the consequent opening of his succession that Mrs Rene would have been entitled to a share of property forming part of his succession as his surviving spouse.
- [88] Regarding the applicants’ contention that by purchasing parcel B1854 and subsequently transferring it to the second, third and fourth respondents, Mrs. Rene had no intention of depriving the applicants in any way as they had their own homes, I take note that where



the object of a sale is to deprive other heirs of their lawful share of inheritance it is a *donation déguisée* (**Contoret v Contoret (1971) SLR 257**). However, such intention will be relevant in the applicants' case for reduction in determining whether or not there was indeed a *donation déguisée* but is not relevant for determining whether the applicants have an arguable case for the purposes of this application. Further the fact that the respondents have their own homes does not mean that they are not be entitled to a share in Mr. Rene's succession if they are proved to be his heirs.

[89] As to Notary Basil Hoareau's (now counsel for the applicants) involvement in the attestation of the transfer document effecting the transfer of parcel B1854 from Mrs. Rene to her three children, and her claim that he failed to advise her at the time of the transfer that it could be subject to a reduction, there are court processes and complaint mechanisms better suited to deal with such an issue, rather than addressing it in these proceedings.

[90] In my view, all the above-mentioned factors in combination establish that the applicants have an arguable case for reduction. I hasten to add that to show an arguable case, the applicants do not have to bring strong or irrefutable evidence, in the case in hand, that there was a *donation déguisée*. This will only be necessary in proving the actual case for reduction. As stated in *Japhet Kaimenyi M'ndatho case* (supra), whether the applicants would succeed or not is not material at this stage. It is sufficient that they have an arguable case.

[91] It is however not sufficient for the applicants to show that they have an arguable case. They also need to show that they have good reason for an inhibition order in all the circumstances of the case. According to the *Mwambeja Ranching Company Limited case* (supra) the applicant also has to show that the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued and that that the refusal to grant orders of inhibition would render the applicant's suit nugatory. In that respect the applicants have averred in the affidavit in support of their application that Mr. Rene disposed of parcel B1854 by way of a *donation déguisée* to the benefit of his three children (the second,

third and fourth respondents). They also aver that the property may be disposed of by the said children if an inhibition order inhibiting all dealings with the property and the buildings thereon is not made, which would affect the exercise of their right to reduction. They aver that it is therefore necessary, equitable, just and fair that that an inhibition order be made to prevent such disposition.

[92] There is no doubt that the second, third and fourth respondents being the registered proprietors of parcel B1854 are in a position to dispose of such property. Although parcel B1854 being the family home of the respondents and the risk of them disposing of it is possibly less, it cannot be said that such risk is non-existent. I am also mindful that in the event that such disposition does occur, the applicants although they may not be left without a remedy in that Article 930 of the Civil Code permits them to follow the property in the hands of third parties, this would further complicate the process by the involvement of those third parties. Further if this does not prove possible, there is no guarantee that the proceeds of sale of the property will be capable of being traced so that the applicants can be compensated financially thus rendering the applicant's suit nugatory.

[93] The respondents have deponed that parcel B1854 being their family home, the imposition of an inhibition thereon will cause them hardship and prejudice in that they will not be able to seek a permission to build on, mortgage, lease, rent or renovate the property thereby depriving them of their Constitutional right to freely enjoy their property, whereas the applicants will not suffer any loss, hardship or prejudice by the refusal of an inhibition order that cannot be remedied by financial compensation, the only remedy available to them if they succeed in a case for reduction being in monetary form and not occupation of parcel B1854.

[94] Counsel for the applicants has submitted that neither the hardship and prejudice to the respondents affected by an inhibition order, nor the balance of convenience is a factor to be taken into account in an application for such an order. In none of the abovementioned cases did the Court give consideration to the prejudice of the respondents. In *Japhet Kaimenyi M'ndatho case* (supra), what the Court did consider was the prejudice which

would be caused to the applicant if an inhibition order was not granted and the suit property was alienated or transferred rendering the applicant's suit nugatory. It would appear therefore that the only matters to be considered in an application for inhibition are those stated at paragraph 67 above.

[95] I do not find any merit in the respondents' argument that an inhibition should not be granted because any prejudice suffered by the applicants by the refusal of an inhibition order can be remedied by monetary compensation, and that the only remedy available to them in a case for reduction would be in monetary form and not occupation of parcel B1854. As correctly stated by counsel for the applicants, in a reduction case all the property forming part of the succession has to be returned to the hotchpot of the succession for distribution to the heirs. Once a case for reduction has been filed, Article 866 of the Civil Code gives the option to a person entitled to succeed, to whom gifts have been made which exceed the disposable portion, to retain such gifts subject to the payment of monetary compensation to the co-heirs. The defendant can only avail himself of this option once the reduction case has been filed. The property subject to reduction therefore has to be preserved to prevent its disposition by the donee until commencement of proceedings for reduction.

### **Decision**

[96] For the aforementioned reasons I find that it necessary to exercise the discretion given under section 78 of the Land Registration Act to prevent any further dealings with parcel B1854 and the buildings thereon and maintain the status quo until resolution of the disputes between the parties relating to that property.

[97] Accordingly, I hereby make an order in terms of section 76(1) of the Land Registration Act, inhibiting the registration of any dealing with parcel B1854 and any buildings thereon until further order of the Court.

[98] In terms of section 76(2) of the same Act, a copy of this order is to be served on the Land Registrar, who shall register the inhibition in the appropriate register.

Signed, dated and delivered at Ile du Port on 24 April 2020

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E. Carolus J