

SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 269
MA 274/2018
(Arising in CS 71/2018)

In the matter between

VIRGINIA LAU-TEE
(rep. by Joel Camille)

Applicant

and

SEYCHELLES CIVIL AVIATION AUTHORITY
(rep. by Serge Rouillon)

Respondent

Neutral Citation: *Lau-Tee v Seychelles Civil Aviation Authority* (MA274/2018) [2020] SCSC 269 (8 May 2020).

Before: Carolus J

Summary: Joinder of Defendant – sections 109, 110, 111, 112, 114 and 115 Seychelles Code of Civil Procedure

Delivered: 8 May 2020

ORDER

1. The application for joinder of Mr. Samuel Lautee as second defendant to CS71/2018 is dismissed.

2. The Registrar of the Supreme Court is directed to fix a date for preliminary hearing of CS71/2018.

RULING

CAROLUS J

Background

- [1] Virginia Lau-tee is the Defendant in CS71/2018 (the “Principal Suit”) which has been brought against her by the Seychelles Civil Aviation Authority as Plaintiff. She has filed this application (MA274/2018) for an Order joining her husband Samuel Lau Tee as 2nd defendant in the Principal Suit.
- [2] In terms of the Principal Suit, the Plaintiff/Respondent avers that Defendant/Applicant is the owner of land Parcel Title No. S5256 which was encumbered with a number of restrictions including a loan with Housing Finance Company. It avers that it entered into a promise of sale with the Defendant/Applicant for the purchase of the said land Parcel Title No. S5256, for the sum of SCR7,000,000, pursuant to which it paid a deposit of SCR660,000 for the Defendant/Applicant to clear the loan with Housing Finance Company. The Plaintiff/Respondent further avers that it effected the balance of the payment to the Defendant/Applicant by cheque and the transfer deed relating to the transaction was executed on 29th March 2018 but that the transfer deed cannot be registered because there is an inhibition order against the property due to a court case between the Defendant/Applicant and her former husband. The Plaintiff/Respondent is therefore seeking:
- (a) the refund of the sum of SCR7,000,000 paid by it to the Defendant/Applicant; or alternatively
 - (b) an Order for the Defendant/Applicant to cause the inhibition order to be removed against Title No. S5256, and to effect the registration of the transfer of the said land parcel to the Plaintiff/Respondent, and to bear any validating duty for the same;
 - (c) with costs.
- [3] The Defendant/Applicant has filed a Statement of Defence in response to the Plaint. In essence she admits that she was the owner of land Parcel Title No. S5256 in respect of which she entered into a promise of sale with the Defendant/Applicant for the sum of SCR7,000,000. She avers that she transferred the property to the Plaintiff/Respondent by deed of transfer executed on 29th March 2018. However, she denies that the property was

encumbered by a loan from the Housing Finance Company and claims that the sum of SCR660,000 was paid into the Barclays Bank account of her husband Samuel Lau Tee to clear a loan that he had taken from the bank and in respect of which the property had been charged to secure repayment of the said loan. The Defendant/Applicant admits that the Land Registrar did not register the deed of transfer because her husband had applied for a restriction against land Parcel Title No. S5256, but avers that the application was dismissed on 2nd July 2018. She admits however that there is an interim inhibition order granted by the court against the property in a case filed against her by her husband Samuel Lau Tee.

The Application

[4] The Applicant has made the present Application to join her husband Samuel Lau Tee as a 2nd Defendant to the Principal Suit, by way of Notice of Motion supported by an Affidavit sworn by herself. In her Affidavit she depones *inter alia* that -

3. *I state that in my statement of Defence, I have averred that except that it is admitted that the Plaintiff/Respondent has paid Rs 660,000, it is denied that the said sum was paid to me, the Applicant. I have further aver (sic) that the said sum was paid into the Barclays Bank Account of my husband, namely Samuel Lau Tee to clear a loan that Samuel Lau Tee had taken from the bank and of which the Defendant has charged the property in favour of the bank to secure repayment of Samuel Lau Tee's loan.*
4. *Again at paragraph 12 of my statement of defence, I have averred that there is an interim inhibition order granted by the Court against the property and of which the case will be heard on the 8 November, 2018, filed by my husband Samuel Lau Tee.*
5. *On the basis of all the above and in view of the averments contained in my statement of Defence, the joinder of the said Samuel Lau Tee would enable this Honorable Court to effectively and completely adjudicate upon and settle all questions and issues involved in the cause rather than having multiplicity of action.*

Respondent's Position

- [5] The Applicant did not file any written submissions despite having been given time to do so.
- [6] The Respondent (Plaintiff in the head suit) did not object to the Application for joinder, its Counsel stating that the Respondent would abide with the Court's decision.

Mr. Samuel Lautee's Response

- [7] Mr. Samuel Lautee, filed an Affidavit in Reply to the Application dated 5th December 2018. In his Affidavit he raises the point that no documents have been filed in support of the present Application. He states that since the Application is to join him as a party to the Principal Application, the Applicant's failure to exhibit any documents renders the present Application defective as he cannot refer to the Plaint filed in the Principal Application or verify the matters stated in the Plaint, the Defence or the Affidavit. He therefore prayed for the Application to be struck out on this basis. He further submits that since he was not provided with any documents in respect of the allegations and averments in the Application it has not been satisfied that he is liable for any alleged violation of the Plaintiff's right, and therefore no cause of action has been disclosed against him.
- [8] After being served with the relevant documents in the Principal Suit, Counsel for Samuel Lau Tee filed a response to the Application for his joinder in the Principal Application by way of legal submissions, due to the unavailability of Mr Lau Tee to swear to an affidavit in reply. With his response he produced a number of documents in support thereof which will be referred to below at the appropriate time. I note that most of the factual matters averred in the response are contained in Mr. Lautee's first Affidavit with the exception of matters relating to the Order of the Court dated 17th January 2019, the proceedings pursuant to which such order was made being still ongoing at the time that the first Affidavit was sworn. In any case I take judicial notice of such Order.
- [9] In the Response it is averred that Mr Lau Tee has filed a divorce Petition in DV134/2018 against his wife the Applicant, in which he has made a claim for determination of the Parties' respective shares in their matrimonial property which is mainly an interest in land title No. S5256 and the house thereon. This is supported by the Divorce Petition and

supporting affidavit exhibited as “A”. It is averred that although the matrimonial property is registered in the name of the Defendant/ Applicant since being purchased by her in October 2007, it has been substantially developed and enhanced to its present value of SCR7,000,00 during the marriage almost solely by the Respondent. It is also pointed out that he has claimed in the matrimonial property proceedings that he is entitled to a greater share of the matrimonial property than the Applicant which if proved he will be awarded.

[10] The following is also set out in the response: On the application of Mr. Lautee, the Court granted an interim Inhibition Order in MA 198/2018 in respect of land title S5256 in the proceedings relating to the matrimonial property. This was followed by another Order dated 17th January 2019, after the Court had heard the parties, in terms of which the Court denied the application for the Inhibition Order but stated that the Applicant having found a buyer to purchase the property for SCR7,000,000 and signed a promise of sale to that effect, an injunction against the property could cause her to lose that opportunity. The Court found that it would be unfair to allow the Applicant to lose the possibility of going through with the sale and ordered the removal of the injunction previously imposed on the property to allow the sale to go through after the Applicant had paid half of the proceeds of the sale less SCR 660,000 already paid to the Petitioner’s bank account by SCCA in escrow in the client’s account of the attorney or notary in charge of the sale. The Court further stated that when it determines the share of each party in the matrimonial property, the proportion of the sum in escrow representing the share to which Mr. Lautee is entitled will be paid to him and the remainder if any will be paid to the Applicant. It is averred in the response that if the conditions set out in the Court Order of 17th January 2019, are complied with, the inhibition will be automatically released. The following documents were exhibited in support of the above:

- (a) The applicant Virginia Lautee’s affidavit in reply dated 12th September 2018, to the application for the Inhibition Order - exhibited as “B”.
- (b) A supplementary affidavit dated 2nd October 2018, sworn by Samuel Lautee in support of his application for the Inhibition Order – exhibited as “C”.

(c) The Court Order dated 17th January 2019 referred to at paragraph 9 hereof, and a further Order dated 23rd January 2019 clarifying that the inhibition would not be removed until the Applicant had complied with the conditions set out in its previous Order – exhibited as “D”.

[11] In terms of Mr. Lautee’s response it is claimed that the Applicant has tried to deprive him of his rights to a proper share of the matrimonial property by signing a document for the sale of the said property to the Respondent for the sum of SCR7,000,000; that neither the sale nor the deed of sale included or concern him in any shape or form; and that the Applicant has to bear the consequences of her actions which were reckless and premature. He avers that he had nothing to do with this process and is not a party to the head suit although he intends to protect his rights in the matrimonial property and his clear overriding interest and *droit de superficie* in the proceedings relating to the division of matrimonial property.

[12] A point of law was also raised. Reference was made to section 109 SCCP which provides for joinder of defendants and the case of **Otar v Hoareau & Ors (CS58/14) [2016] SCSC 395** was relied upon in support of the proposition that according to that section, for a person to be made a defendant in a suit, the right to some relief must be alleged to exist against that person. It was further averred that section 109 SCCP must be read together with section 71 (d) and (e) SCCP which provides that among the particulars which a plaintiff must contain are:

(d) a plain and concise statement of the circumstances constituting the cause of action, where and when it arose and of the material facts which are necessary to sustain the action;

(e) a demand of the relief which the plaintiff claims;

[13] Reference was also made to the case of **Get High (Pty) Ltd & Ors v Steve Gerrad & Ors CC No.8 of 2012** in which the Court considered the meaning of “cause of action” as defined by the Court of Appeal of East Africa in **Auto Garage v Motokov [1971] EA 514** which is as follows:

If a plaintiff shows that the Plaintiff enjoyed a right that has been violated and that the Defendant is liable, then ... a cause of action has been disclosed.

[14] It is Mr. Lautee's contention that no basis had been shown in this application to support the applicant's claim that "a joinder would enable this Court to effectively and completely adjudicate upon and settle all questions and issues involved in the cause rather than have a multiplicity of actions" and that in view of the ongoing matrimonial proceedings regarding the property in question there will continue to be multiplicity of actions even if there is a joinder. Further, a joinder can lead to more confusion when there are ongoing matrimonial property issues yet to be decided between the Applicant and Mr. Lautee: two different courts may be faced with conflicting issues and it is best for matters to remain separate. He opines that a joinder would not assist the proceedings in the head suit as the suit property is already subject to an inhibition order with conditions set out by the Court in MA198/2018 for removal of such inhibition.

[15] In conclusion he states that the Applicant has a choice between (a) complying with the conditions set by the Court in MA198/2018 by depositing half of the proceeds of the sale less SCR 660,000 already paid to the Petitioner's bank account by SCCA, in escrow in the client's account of the attorney or notary in charge of the sale, pending determination of the matrimonial property claim before the Court; or (b) returning the total purchase price paid by the plaintiff until a future date when the applicant and the plaintiff are ready to conclude the transaction.

Submissions

[16] Both Counsels were given time to file written submissions which neither of them did.

Applicable Law

[17] The relevant law as to joinder of parties to a suit is found in sections 109, 110, 111, 112, 114 and 115. These provisions are reproduced below –

109. *All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. And judgment may be given against such one or more of the defendants*

as may be found to be liable, according to their respective liabilities, without any amendment.

110. *The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.*
111. *Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court to defend in such cause or matter, on behalf of or for the benefit of all persons so interested, subject to such notice to the persons interested as the court may direct.*
112. *No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any persons improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

113. *Where a defendant is added or substituted, the plaint shall, unless the court direct otherwise, be amended in such manner as may be necessary, and a summons with a copy of the amended plaint attached shall be served on the new defendant and the proceedings as against such party shall be deemed to have begun only on the service of such summons. The court may order a copy of the amended plaint to be served on or supplied to the original defendant.*
114. *Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by motion, or at the trial of the action in a summary manner.*

Analysis

- [18] An examination of the Pleadings in both the Principal Suit and this Application, the affidavit evidence of the parties as well as documentary evidence produced in support of their respective cases reveal the following: Parcel S5256 is registered in the name of the Applicant who entered into a promise of sale with the Respondent in respect of the said parcel for the sum of SCR 7,000,000. The Respondent transferred the sum of SCR660,000 to the Applicant's husband Mr. Samuel Lautee's bank account for the purpose of settling a loan taken by Mr. Lautee for which the parcel had been charged to secure repayment of said loan. This payment was necessary for discharging the charge so that the sale could be effected and it appears that the charge was so discharged. The balance of the SCR7,000,000 was paid to the Applicant and the deed for transfer of the property was executed by the parties on 29th March 2018.
- [19] However the deed could not be registered due to an inhibition imposed on the property by the Court in proceedings commenced by Mr. Lautee for determination of the Parties' respective shares in their matrimonial property. Mr. Samuel Lautee claims that the property is the matrimonial property of the parties on the basis that he was almost solely responsible for its development and enhancement to its present value of SCR7,000,00, during the marriage. In fact he claims that he is entitled to a greater share of the matrimonial property than the Applicant. The Court has now ordered the removal of the inhibition on condition that the Applicant pays half of the sale price paid to her by the Respondent to be held in escrow pending determination of the matrimonial property proceedings, so as to allow the deed of sale to be registered.
- [20] The reliefs claimed by the Plaintiff/ Respondent in terms of the head suit is the refund of the SCR 7,000,000 it has paid to the Applicant, or alternatively for the Applicant to cause the removal of the inhibition order against parcel S5256 so that registration of the transfer of the said parcel can be effected, the payment of any validating duty and costs.
- [21] In terms of section 109 SCCP "*[a]ll persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative*". The court is also empowered under section 112 SCCP to order that "*the*

names of any parties ... who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

[22] This Court therefore has to determine firstly, whether on the face of the plaint a right to any relief is alleged to exist against Mr. Lautee, and secondly on the facts of this case whether his presence before this court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.

[23] I note that the only reference to Mr. Lautee in the plaint is the following at paragraph 2(k) thereof:

k. That the Plaintiff aver (sic) that by an order of the court there is an inhibition order against the property due to a court case between the Defendant and her former husband, which is preventing the registration of the title deed, and causing great difficulty to the Plaintiff.

[24] Mr. Lautee has relied on the case of *Otar v Hoareau & Ors* (supra) to support his argument that there is no right to any relief alleged against him in the plaint as required by section 109 SCCP and therefore no cause of action disclosed against or relief claimed from him him in the plaint as required by section 71(d) and (e) and section 92 SCCP, and that therefore there is no basis for joining him as a defendant.

[25] However, the case of *Otar v Hoareau & Ors* (supra) differs from the present one in that it involved a suit filed against three defendants, the first and second of whom had raised pleas in *limine litis* pursuant to section 92 SCCP for the plaint to be struck out against them as it disclosed no cause of action against them. The Court was therefore entitled to find as it did, namely that “no “*faute is alleged and or averred*” and or “*right of relief is alleged to exist*” as against the 1st and 2nd Defendants” in the plaint”, and consequently “*that there is no reasonable cause of action as against the said Defendants at this stage of the proceedings ex facie the pleadings*” and accordingly dismiss the plaint against both the 1st and the 2nd Defendants.

[26] On the other hand, the head suit in which it is sought by the present application to join Mr. Lautee as a defendant was filed by the Plaintiff/ Respondent only against the Applicant as the Defendant. It is understandable in the circumstances for the plaintiff not to allege the existence of the right to any relief against Mr. Lautee, as the Plaintiff/ Respondent filed the plaint against the Applicant in whose name the property was registered and with whom the Plaintiff/ Respondent had entered into the promise of sale and subsequently the deed of sale. It is the Applicant who is now, after the head suit was filed against her as sole Defendant, seeking to join Mr. Lautee as second defendant in the head suit on the basis that *“the joinder of the said Samuel Lautee would enable this Honorable Court to effectively and completely adjudicate upon and settle all the questions and issues involved in the cause rather than having multiplicity of action”*.

[27] The question that arises is whether a person may be joined as defendant in a plaint even where no right of any relief is alleged to exist against him as required under section 109 SCCP and where the plaint discloses no reasonable cause of action or answer against him as required under section 92 SCCP. It would appear so. It was held in **Seigneur v Therein (1976) SLR 204** and **Prestige Car Hire v Bibi (1991) LSC 29 [60]** that:

Even where no relief is claimed against a second defendant, a plaintiff can join that person as a defendant under section 109 of the Code of Civil Procedure as a party whose presence before the Court is necessary to adjudicate effectually and completely on and settle all the questions involved in the cause or matter.

[28] The Court therefore has to determine whether the presence of Mr. Lautee is necessary for the Court to adjudicate effectually and completely upon, and settle all the questions involved in the head suit.

[29] In the present case, parcel S5256 is registered solely in the Applicant’s name. However Mr. Lautee claims that the property constitutes matrimonial property in which he is entitled to a share and has commenced proceedings for the determination of the parties’ shares in the property. His share in the property, if any, will only be conclusively determined at the conclusion of those proceedings and at this point in time, all he has is a potential interest therein. I further note the following words of Vidot J, at paragraph 5 of

his Ruling of 17th January 2019: “*Nonetheless, the Petitioner will only, if at all, be entitled to a share of the proceeds of sale of the Property*”.

[30] Further, although the reason that the deed of sale between the Plaintiff/ Respondent and the Defendant/ Applicant cannot be registered is because of the inhibition order prohibiting such registration, which was ordered on the application of Mr. Lautee pending resolution of matrimonial property proceedings between himself and the Plaintiff/ Applicant, the Court has ordered the removal of such inhibition on condition that the Applicant deposits half the proceeds of sale of the property less the sum paid in Mr. Lautee’s bank account, to be kept in escrow until determination of the matrimonial property proceedings. Upon doing so the inhibition will be removed and the deed of sale registered, and the cause of action between the Plaintiff/ Respondent and Defendant/ Applicant cease to exist. I note in that respect that there is no claim for damages in the head suit and that the only further claims against the Applicant are for validating duty arising from late registration of the transfer deed and costs. As I see it, the ball is in the Applicant’s court. If she pays the sum to be kept in escrow, which is only a proportion of what she has been paid by the Plaintiff/ Respondent, the inhibition will be removed and the sale allowed to go through. I note further, that the reason for Vidot J removing the interim inhibition albeit on certain conditions was to allow the Applicant to go through with the sale.

[31] I cannot, in the circumstances understand how the presence of Mr. Lautee would assist the Court in adjudicating effectually and completely upon, and settle all the questions involved in the head suit. Had the interim inhibition order been maintained, I might have found differently but am unable to do so in the present circumstances.

[32] I therefore dismiss the application for joinder of Mr. Lautee as second defendant to the head suit.

[33] Since the Applicant/ Defendant has already filed her statement of Defence in the Head Suit, the Registrar is directed to fix a date for preliminary hearing of the Head Suit.

Signed, dated and delivered at Ile du Port on May 2020

Carolus J