IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 554
CS 159/2019

HERCULE BARBE — **Plaintiff**
(rep. by Edith Wong)

And

GINETTE ESPARON — **Defendant**
(rep. by Frank Elizabeth)

Neutral Citation:	*Hercule Barbe v Ginette Esparon* CS 159 of 2019 [2020] SCSC…….. delivered on 31st July 2020
Before:	Vidot J
Summary:	Pleas in limine; prescription, res judicata and suit is frivolous and vexatious
Heard:	via submissions
Delivered:	31st July 2020

RULING

VIDOT J

[1] The Plaintiff and the Defendant are cousins. They both occupy the same immovable property ("the property") which the Plaintiff purchased from his father on the 13th March 1984, as per deed of Transcription, Volume 71, Number 113. In 1998 when the property was registered on the new land register, the only encumbrance registered against it was a charge in favour of the Seychelles Housing Development Company. The Plaintiff alleges that the Defendant, at a time unknown to him built a house on the property. It is alleged that the house was built without permission. On 19th November 1991, it is averred that the Defendant through means unknown to the Plaintiff obtained a document alleging that the Plaintiff's father granted the Defendant permission to build the house on the property in April 1974. That document was registered against the title of the property. The

Plaintiff has always asked the Defendant to vacate the property. The Plaintiff has also through other legal means attempted to have the Defendant removed from the property.

[2] In answer to the Plaintiff's plaint, the Defendant has filed a statement of defence in which she refutes most of the averments made in the plaint. She alleges that she had permission of 'the owner" to build the house as per the document mentioned above and that she has been living on the property without interruption ever since. She avers that she has acquired title to the property in law by way of prescription. She therefore claims a *'droit de superficie"* by virtue of having constructed her house there with permission.

[3] As a result thereof, as part of her defence she has pleaded 3 points in limine litis. These are;

i. The action is prescribed in law and liable to be dismissed;

ii. The plaint is frivolous and vexatious and does not disclose a reasonable cause of action against the Defendant; and

iii. The matter is res judicata as the Rent Board has already dismissed an application for eviction filed by the Plaintiff

Prescription

[4] As above stated, the Defendant avers that she built her house with permission and has been residing at that residence since 1974 and that the the Plaintiff purchased the property on the 13th April 1984. The Defendant relies on Articles 2219, 2262, 2265 and 2271 of the Civil Code of Seychelles "the Code"). The Plaintiff relies on articles 2262 as well, together with articles 2229 and 2232. Article 2262 of the Code bars real actions of rights of ownership of land after 20 years. So, the Defendant alleges that since she has lived on the property for 46 years and therefore claims that the action is prescribed. We are dealing here with acquisitive prescription which shall be addressed further below. The Defendant in her defence argues that she has acquired a droit de superficie over the property. Such right nonetheless may be brought to an end provided certain conditions of law are followed. When a person is granted a droit de superficie he cannot based on that

lay claim to the property by way of prescription. However, article 2229 provides that in order to acquire prescription, possession must be continuous, uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of the owner.

[5] Article 2219 provides that;

"1. Prescription involves the loss of rights the failure to act within the limits established by law.

It is a means whereby, after certain lapse of time, rights may be acquired or lost, subject to conditions established by law"

Counsel for the Plaintiff also argues that under article 2271 of the Code provides that *'All rights of action shall be subject to prescription after a period of 5 years except as provided in article 2262 and 2265 of this Code"* Article 2262 deals with actions in respect of rights of ownership in land or other interests therein which is barred by prescription of 20 years , whether the person claiming benefit of such prescription can produce a title or not and whether or not the party is in good or bad faith. On the other hand article 2265 makes provision that if a person claims benefit of such prescription and produces title which has been acquired for value and in good faith, then the period of prescription under article 2262 is reduced to 10 years.

[6] The Defendant's argument is that irrespective whether the Court decides that the Defendant started to occupy the property in 1974, the right of action would have rested with the plaintiff's father who gave permission to occupy before the Plaintiff acquired title or from the time that acquisition of title came into effect in March 1974. The Plaintiff's action would be prescribed. He therefore moved the Court to dismiss the suit under article 2271, that provides for prescription after 5 years, except in a case of a judgment debt which prescriptive period is 10 years, claiming that in terms with article 2219, the Plaintiff has failed to act within the prescribed time which translates into that right having been lost subject to conditions established by law. Both the Plaintiff and Defendant articulated that it is important that one takes heed to the legal position in France in view of the fact that the Seychelles Civil Law is derived from the French Civil

law. The Plaintiff relied on the case of **Lizanne Reddy & Anor v Wavel Ramkalawan CS93 of 2013**, wherein the Learned Twomey CJ referred to prescriptive period in cases of succession where she noted Article 9 of the Loi n. 2006-728 of the 23 juin 2006. As a general rule our law makes full provision as to how the rules of prescription are to be applied though where necessary French law may be referred to. However, as noted the above referred law dealt with rules of succession, dealing particularly as from which point the rules in respect of prescription starts to run in such matters.

[7] Book III of the Code deals with various ways in which acquisition of ownership of property may be obtained. Apart from article 711 that provides that property may be acquired and transferred by succession, by gift inter vivos or by will and by effect of obligations, article 712 provides that *"ownership may also be acquired by accession or incorporation and by prescription."* Generally when a person claims prescriptive prescription, that person must show corpus and animus. Counsel for the Plaintiff refers to **Chetty v Estate of Regis Albert & Ors CS131/2018,** wherein Twomey CJ explained acquisitive prescription in relation to French and Quebecois laws;

'Acquisitive prescription in French and Quebec civil law is a means of acquiring property that is based on possession, which includes a material aspect and an intentional aspect: the possessor must demonstrate corpus and animus in order to acquire title by prescription. Corpus refers to physical control and "the exercise of real right." As for as animus, it refers to animus domini, in other words the intention to become the owner, or more broadly, the "desire of the possessor to present himself to others as the holder of a real right.

Quoting Cody J, the Chief Justice went on to add that in relation to the Louisiana law of acquisitive prescription, the absence of animus operates as a bar to the finding of acquisitive prescription which states as follows;

"The absence of animus or the admittance of proof that possession began on someone else's behalf implicates the concept of precarious possession, which is insufficient for acquisitive prescription. The Civil Code defines precarious possession as "[t] the exercise of possession over a thing with the permission of or on behalf of the owner or

possessor." The precarious possessor in turn suffers from a legal presumption that he or she is presumed "to possess for another although he may intend to possess for himself." This presumption is an important part of defeating acquisitive prescription and can be fatal to both a supposed possessor and a quasi-possessor." (Cody J Miller, Boudreaux v Cummings: Time to interrupt an Erroneous Approach to Acquisitive Prescription, 77 La. L. Rev. 1143 (2007)

[8] Article 2229 of the Code provides that *"In order to acquire by prescription possession must be continuous and interrupted, peaceful, public, unequivocal and by a person acting in capacity of an owner."* The Defendant seemed to have been in continuous occupation but such occupation in my view was not uninterrupted. The Plaintiff had been trying particularly through various means to challenge that occupation. However, the Defendant states that she had occupied the premises since 1974 uninterrupted and the Plaintiff only acquired ownership of the property in March 1984. That is for a period of about 10 years and the Defendant claims prescription has already run its course thereby making her the owner. One has to bear in mind that in order to claim acquisitive prescription, the possessor must demonstrate corpus and animus. The Plaintiff, quoting **Chetty v The Estate of Regis Albert & Others** (supra) argues that the Defendant did not show the existence animus, the mental element, for an equivocal possession in order to claim for prescriptive possession to succeed. Article 2232 clearly states that *"Purely optional acts or acts which are merely permitted shall not give rise to possession or prescription."*

[9] In this case the Defendant has pleaded that she had a permission to build which she said gave her a droit de superficie. She even produced a document to that effect. She is therefore claiming that she has permissive occupation and is incompatible with prescriptive acquisition. A droit de superficie has a lifespan. It comes to an end upon the happening of certain event and may also be terminated prior to the end of that lifespan. Therefore, if permission was granted it will operate as a bar to prescriptive acquisition. The Defendant is therefore a precarious possessor. So, if the occupation was permissive, then the Defendant needs to establish when it ended and at which point prescription started to run in order to support a claim of acquisitive prescription; see **SDC v Morel Civil Appeal 8/2002 (18th December 2002)** in which was stated that *"on the facts of this*

case, the respondent must establish when his permissive occupation terminated and when his possession as owner commenced. Time begins to run after he commences to possess the parcel as owner."

[10] This plea in limine fails

Frivolous and vexatious

[11] The second plea in limine is that the Plaint is frivolous and vexatious that it does not disclose a reasonable cause of action and should therefore be struck out. Section 92 of the Code of Civil Procedure ("CCP") makes provision for striking out of pleadings if it does not disclose a reasonable cause of action or is frivolous and vexatious. Of relevance are sections 90 and 91 of the CCP, which give a party to a suit to raise by pleadings any point of law, and any point so raised shall be disposed at the trial, provided that by consent parties, or by order of court, on application of either party agree to dispose of it at the trial and that if in the opinion of the court, the decision of such point of law disposes of the whole cause of action, dismiss the action. Both Counsels brought to Court attention that section 92 of the CCP is couched in same wording as Rule 3.4 of the Civil Code Procedure Rules of England (White Book). Rule 3,4(2) provides that the Court;

"..... may strike out a statement of a case if it appears to court-

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process"

In the comment of the rule the authors of the White Book make the following observation:

"Grounds (a) and (b) cover statements of cases which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill founded and other cases which do not amount to a legally recognisable claim or defence"

[12] The Defendant relies on the fact that the plaint avers that the Plaintiff only became owner of the property when it was acquired from his father in March 1984 and therefore the action is prescribed. It is alleged that the Defendant by then was already in occupation of the property, at which point the Plaintiff had knowledge thereof. Counsel for the Defendant argues that, that in itself is sufficient for the Court to dismiss the Plaint. Counsel also quoted **Frank Elizabeth v The President of the Court of Appeal** (supra) to provide a definition of frivolous and vexatious. The case held that frivolous and vexatious and the facts that the plaint does not disclose a cause of action are two different concepts. That is explained well in section 92 of the CCP. If the plaint discloses no cause of action, that pleading may be declared frivolous and vexatious; the action may be stayed or dismissed. However, I have already found that the pleadings discloses a cause of action and the Court finds that the issue of occupation was permissive and permissive occupation is a bar to prescriptive acquisition. That is an issue that is arguable and has to be addressed at a hearing proper. I am of the opinion that at this stage the Court should not resort to the summary process of dismissing the case.

[13] In fact the Plaintiff is alleging that the Defendant is a tier de mauvaise fois or in the alternative a tiers de bonne fois. These are actions in land and therefore subject to 20 years prescription and reasonable cause for such action. The Plaintiff alleges that the plaint discloses that the Defendant is occupying the property without the Plaintiff's permission. The Defendant has claimed that she was granted permission, hence the action is that she is either a trespasser de bonne fois, or tier de bonne fois. These are actions with legal basis. So, therefore, the second plea in limine fails.

Res judicata

[14] The Defendant claims res judicata as the parties had already been before the Rent Board for an order of eviction and before the Supreme Court on an application for a writ of habare facias possensionem, both of which was decided in favour of the Defendant. Both cases was in relation to the property

[15] In **Hoareau v Hemrick [1973] SLR** 272, Sir Georges Souyave CJ, gave a clear definition of what is res judicata as follows;

"For the plea of res judicata to succeed to be applicable, there must be between the first case and the second case the threefold identity of "object", "cause" and "personnes".

[16] As was held in **Nourrice v Assary [1991] SLR 80** and **Attorney General v Marzorcchi SCA 8/1996, LC 312,** a plea of res judicata will succeed if four pre-requisites are satisfied

(a) The object matter should be the same;

(b) The cause of action should be the same;

(c) The parties should be the same;

(d) The previous judgment should be a final judgment of a court of competent jurisdiction

The doctrine of res judicata is based on the rationale that there is public interest in the finality of decisions (interest republicae ut finis litium sit) and that individual should not be troubled twice on the same subject matter; see **Attorney General v Marzocchi** (supra).

[17] I find that this case is similar to the previous Rent Board and Supreme Court case to the extent that the object and the parties are the same. As far as the Rent Board case is concerned another pre-requisite is satisfied in that the judgment was final but that do not apply to the Supreme Court case. The Rent Board case was to establish whether or not the Defendant was a lessee of the property. An action for a writ habare facia possensionem is sought when there are no other remedies available regarding occupation of land which is illegally occupied by another.. In the Ruling of that case, Egonda Ntende CJ (as he then was) noted that the Defendant had claimed that she had a droit de superficie. It was not possible through affidavits to establish that such an interest did not exist and decided in favour of the Defendant. The Plaintiff had an option of bringing an action to disprove that the Defendant held such droit de superficie. Therefore that follows that the actions are not the same. That means that one of the pre-requisites is not satisfied.

[18] Therefore, I dismiss the pleas and limine litis and order that the case is heard on the merits.

[19] I will finally wish to commend both Counsels for having produced well researched submissions. That effort is much appreciated.

Signed, dated and delivered at Ile du Port on 31st July 2020

M. Vidot J