

IN THE SUPREME COURT OF SEYCHELLES

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Reportable  
[2020] SCSC 557  
CS 92/2017

**JEMMA MARIE PAYET**  
(rep by Kieran Shah)  
and

**Plaintiff**

**ALWYN TALMA**  
(rep. by Frank Elizabeth)

**1<sup>st</sup> Defendant**

**THONY CLEMENT ADELINE**  
(rep. by Lucy Pool)

**2<sup>nd</sup> Defendant**

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**Neutral Citation:** *Jemma Marie Payet v Alwyn Talma & Another* CS 92 of 2017 delivered on 01 March 2019

**Before:** **Vidot J**

**Summary:** Rescission of sale of land; retrossession

**Heard:** Counsels filed written submissions

**Delivered:** 05 August 2020

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**ORDER**

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**JUDGMENT**

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**VIDOT J**

- [1] The Plaintiff has filed a Complaint seeking the rescission of a sale of land. This concerns land parcel PR955. It is averred that by a deed dated the 08<sup>th</sup> July 2014, which deed is transcribed in Vol. No. 240, the 1<sup>st</sup> Defendant purchased the rights of the 2<sup>nd</sup> Defendant in a portion of land at Cherimont, Praslin for the consideration of SR500,000/-. It is averred that the sale

consideration was never paid. Since the 2<sup>nd</sup> Defendant co-owned the property with the Plaintiff, the latter now who seeks to exercise her right of retrocession.

[2] Whilst the 2<sup>nd</sup> Defendant filed a Defence on the merits only, the 1<sup>st</sup> Defendant apart from addressing the merits in his defence raised 3 pleas in limine litis. They are;

- (i) The Plaintiff has no locus standi to institute and pursue the suit;
- (ii) The Plaintiff does not disclose a cause of action against the 1<sup>st</sup> Defendant; and
- (iii) The Plaintiff's case is bad and unsustainable in law and should be struck out.

[3] After Plaintiff had closed her case, the 1<sup>st</sup> Defendant made a submission of no case to answer and raised a constitutional issue as well asking that the matter be referred to the Constitutional Court in terms with Article 130(6) of the Constitution. The Plaintiff and the 2<sup>nd</sup> Defendant objected to that arguing that there was agreement between the parties that the pleas in limine would only be canvassed after the all parties had closed their cases. Though I note that there was such an undertaking, I remain conscious that the 1<sup>st</sup> Defendant would not in the circumstances otherwise have been able to raise his submission of no case to answer and since there was a request for referral to the Constitutional Court it was pertinent that such matter was raised as early as possible. The Constitutional issue is whether Article 814 of the Civil Code contradicts Article 26 of the Constitution. It is this Constitutional issue that I shall deal with first. However, I believe that Counsel for the 1<sup>st</sup> Defendant made a mistake in referring to Article 814 of the Civil Code. The correct article dealing with retrocession is indeed Article 824.

[4] Article 26 of the Constitution provides for a right to property which includes a right to acquire, own, peacefully enjoyed and disposed of property either individually or in association with others. The Article also has some derogation limiting the exercise of such right. The Court has to decide if any of these derogations are applicable to this present case.

[5] Article 834 of the Civil Code reads ;

*"In the case of sale of a share by a co-owner to a third party, the other co-owners or any of them shall be entitled, within a period of 10 years, to buy that share back by offering to*

*such third party the value of the share at the time of such offer and the payment of all costs and dues and transfer.”*

- [6] Article 130(6) of the Constitution makes provision that where in the course of proceedings a question arises as to whether there has been or likely to be a contravention of the Constitution, other than Chapter III, the Court shall, if it is satisfied that the question is not frivolous or vexatious or has not already been subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination to the Constitutional Court. As correctly submitted by Counsel for the 1<sup>st</sup> Defendant, before ordering a referral, the Court is required to judiciously screen that question for referral. He referred to **Lizanne Reddy & Anor v Wavel Ramkalawan CS 97 of 2013 [2014] SCSC 41(30 January 2019** , wherein the Twomey CJ stated the following;

*“With respect, Article 46(7) clearly prescribes an additional element that the Supreme Court must determine. This additional element is whether a constitutional issue has arisen in the course of the proceedings. A referral is thus not a mere rubber stamping exercise*

*The question of constitutionality of a legal provision could arise at any stage in the case; the pleadings, the evidence or the submission. Whilst this would ordinarily be a very perfunctory question to determine, it finds relevance in this case.”*

- [7] The 1<sup>st</sup> Defendant’s submission is that the right of retrocession contravenes Article 26 of the Constitution. Counsel argues that the right to retrocession limits the right of a person to dispose of property as he wishes.
- [8] Counsel for the 1<sup>st</sup> Defendant submitted that the matter has merit and is neither frivolous nor vexatious. The Court needs to consider if the constitutional issue which has been raised has never has not been addressed by the Constitutional Court in former judgments or rulings. The Plaintiff maintains that the issue were addressed in **Durup & Ors v Brassel & Anor CP 5 of 2012 [2013] SCSC 6 (28 May 2014)**.
- [9] Counsel for the 1<sup>st</sup> Defendant in explaining what is meant by “frivolous and vexatious” cited section 92 of Seychelles Code of Civil Procedure and submitted that they are

intertwined with the reasonable cause of action principle. By virtue of Rule 2(2) of the Constitutional Court (Application, Enforcement or Interpretation of the Constitution) Rules, the aforementioned section 92 has applicability here. He referred to several cases in support of his submission. One of such cases is **Frank Elizabeth v The President of the Court of Appeal** wherein the court remarked;

*“The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case, or in the case of action or defence being shown by the pleading to be frivolous and vexatious, the court may order the action to be stayed or dismissed, or maybe give judgment, on such term as may be*

*Turning to the question of whether a matter is ‘frivolous and vexatious’ we note that the 2 words are not defined in the Seychelles Code of Civil Procedure. In fact, we have not been able to come across a legislative interpretation of the words though the words are used in legislation in many jurisdictions. We shall start by looking at the dictionary definition. According to the Oxford Dictionary and Thesaurus ..... frivolous is defined as ‘adj. 1. Paltry, trifling, trumpery. 2 lacking seriousness; given to trifling, silly.’ We can take it that this word in relation to a claim or petition has no reasonable chances of success”*

- [10] Whilst the 2<sup>nd</sup> Defendant does not address that issue in its written submission, the Plaintiff responded by objecting to the application and asking Court to refuse referring the case to the Constitutional Court. Counsel for the Plaintiff argues that the alleged constitutional question being canvassed by the 1<sup>st</sup> Defendant is frivolous and vexatious. Counsel argues that the law of retrocession in Article 834 of the Civil Code, is merely a limitation to the exercise of a Third Party having purchased the share of a co-owner in the property to enjoy the rights if another co-owner seeks retrocession from the Third Party within 10 years. Counsel submitted that viewed in that context it is an extension of the rights of sibling stemming from the family unit to enjoy their family property.
- [11] Counsel for the Plaintiff too cited **Durup & Ors v Brassel & Anor (supra)**. That case concerns a Plaintiff who sought to reduce the testamentary disposition of the testator of the disposable portion to be shared equally amongst the testators’ heirs. The matter was heard by the Constitutional Court whereby it was held that the limitations of the law of reserved

rights in Article 915 of the Civil Code is not unconstitutional and it falls under the limitations necessary in a democratic society, guaranteeing the family, which is the fundamental group unit of society; economic social protection. As I see it, the Constitutional Court was upholding and promoting the protection of the family right as guaranteed under Article 32 of the Constitution.

- [12] Counsel for the Plaintiff also submitted that retrocession preserves the right of heirs to retain possession of property. It is a right that must take precedence over right of a third party having purchased from another co-owner and subject to limitations prescribed by law in a democratic society. The right it seeks to preserve to be found in Articles 26(2)(a) and (f) as provided for in the **Durup** case. He noted that the 2<sup>nd</sup> Defendant was aware that where co-owned land is concerned, co-owners have restricted rights and rights of co-owners cannot be ignored. In the present the right of the heirs to retain ownership of property was being preserved. Counsel submitted that the right of a third party to purchase is prescribed by law as to what is reasonable in a democratic society. Under Article 26(2) generally and in particular Article 26(2)(a) in public interest and (f) in consequence of a law in regard to limitations of action or acquisitive prescription. Counsel sought to explain how the term 'as may be prescribed by law' as to include any law and that the Civil Code is such a law.
- [13] It is argued by the Plaintiff that outsiders who purchase undivided co-owned land are aware that the co-owners may buy back the land from them within a period of 10 years of date of purchase as per Article 834 of the Civil Code. Furthermore, the Court also notes that the 1<sup>st</sup> Defendant only purchased the bare ownership of the land and the 2<sup>nd</sup> Defendant's share remained in usufructuary interest for his lifetime. Therefore the 1<sup>st</sup> Defendant enjoyment of the bare ownership of the property is restricted by that usufructuary interest.
- [14] I have considered the Ruling in the **Durup** case on which the Counsel for the Plaintiff relies upon, in concluding that there isn't any constitutional question that requires this case to be referred to the Constitutional Court. The **Durup** case considered Article 913 of the Civil Code contravenes Article 26 of the Constitution by inhibiting the testator from freely disposing of property and a done from receiving and enjoying such bequest. Article 26(1) of the Constitution provides;

*"Every person has a right to property and for the purpose of this article this right includes the right to acquire, own peacefully, enjoy and dispose of property either individually or in association with others."*

It was decided in that case that Article 913 of the Civil Code does not contravene Article 26 of the Constitution.

[15] At the heart of this application for referral of this case to the Constitutional Court is the right of an owner of property to own and dispose of property. It is the Defence contention that Article 834 restricts the free disposal of property. I hold the opinion that Article 834 of the Civil Code deals with a completely different situation in limiting rights of owners of land to dispose of property. Therefore, I feel that it will be unwise for this Court sitting with a single judge as the Supreme Court, should alone make a declaration as to whether Article 834 of the Civil Code contravenes Article 26 of the Constitution. In the circumstance I shall invoke Article 130(6) of the Constitution and refer the matter to the Constitutional Court.

[16] The question to be considered by the Constitutional Court to consider is whether article 834 of the Civil Code contravenes article 26 or any other provisions of the Constitution.

[17] I shall reserve my ruling on the preliminary objection, particularly in regards to the submission of no case to answer after the determination of the Constitutional Court Ruling regarding the above.

Signed, dated and delivered at Ile du Port 06 August 2020

  
Vidot J