

SUPREM COURT OF SEYCHELLES

Reportable
[2019] SCSC 697
CS 44/2019

In the matter between

Rania Lucienne Dorothy Morel
(Represented by B Hoareau)

Plaintiff

and

Marie Myna Flavia Morel

1st Defendant

Francois Barnsley Allisop
(Represented by G Ferley)

2nd Defendant

Neutral Citation: *Morel v Morel & Anor* (CS 44 of 2016) [2020] SCSC 697 (28 September 2020).

Before: Govinden J

Summary: **Immovable property; Article 1583 of the Civil Code and section 46 (1) Land Registration Act**

Heard: 16th and 17th January 2020

Delivered: Date 28th September 2020

ORDER

For the reasons given in this judgment the Land Registrar shall in terms of section 75 of the Act and on the application of the Plaintiff and payment of the necessary Stamp duty and Registration fees, cancel the registration of Marie Myrna Flavia Morel and Francois Barnsley Allisop as co-owners of parcel V1487 and to instead register Rania Lucienne Dorothy Morel as the sole owner of the said parcel.

JUDGMENT

GOVINDEN J

Background

- [1] The 1st and 2nd Defendants are siblings and the sole heirs to the estate of one Alix Michel Jimmy Allisop, hereinafter referred to as “the deceased” and in those capacities they are registered as co-owners in equal portion of parcel V1487, hereinafter referred to as “the parcel”. The deceased passed away intestate on the 27th of September 2017. By an Instrument of Transfer dated the 24th of May 2016, the deceased purported to transfer the bare ownership of the parcel and the building situated thereon to the Plaintiff for the consideration of One Hundred and Fifty Thousand Rupees by a transfer document dated the 6th of May 2018. The transfer document was, however, not registered by the Registrar of Lands under the Lands Registration Act (CAP 107), herein after referred to as “the Act”, as at the time of its presentation there was a restriction and a Charge in favour of the Property Management Corporation and it was returned to the Notary who prepared it.
- [2] By a Court order, dated the 20th of March, 2018, the 1st Defendant was appointed as the executor of the estate of the deceased. Subsequently, by an Affidavit on Transmission by Death, dated the 27th of March 2018 and sworn by the 1st Defendant, the parcel was registered jointly and in equal portions in the names of the 1st and 2nd Defendant, in their capacities as the sole heirs of the deceased.
- [3] On this basis the Plaintiff claims that she is the real owner of the parcel and the building situated thereon and that the 1st and 2nd Defendant have been illegally registered as the co-owners of the said parcel. This is denied by the Defendants who claim that they are the legal owners of the parcel as their title have been lawfully registered under the Act and that the Plaintiff has no title for want of registration.

Matter for court determination

- [4] Given the state of the pleadings, the first issue to be decided by the court would be one of fact, which is whether it is proven that the deceased did purport to transfer the said parcel to the Plaintiff as averred in her Plaint. The second would be one of law, that is, who between the two parties is the legal owner of parcel V1487 and should be registered as such. The legal effect of the unregistered but executed Instrument of Transfer as

compared to the registered title of the Defendants are in issue here and so is the action of the Registrar of Lands.

Plaintiffs' Evidence

[5] The Plaintiff called the Senior Compliance Officer at the Land Registration Office, Mr Suleman Athanasius. According to the witness, documents that are tendered for registration under the Act but which are not registered are returned to lawyers. A copy is kept for their internal purposes and their originals are returned to their makers. The reasons for their return are indicated on the file. Mr Suleman testified that a transfer document was received in respect of a transfer of land for title V1487, from Alix Jimmy Alissop of Foret Noire, for the consideration of SCR 150,000, to Rania Lucienne Dorothy Morel of Foret Noire, dated the 24th of May 2016. It was prepared and attested by Notary Public Lydia Mubarak. This document was not registered in terms of the provisions of the Act because there was a charge that had been submitted and registered prior to it being presented for registration, together with a restriction and accordingly, it was returned to the Notary. According to the witness when a charge is registered with a restriction, as it was in this case, then one cannot proceed with any sale transaction against the registered parcel. The witness confirmed that there is registered an Affidavit of Transmission by Death that transferred the parcel to the two defendants. The Affidavit of Transmission by death was admitted as exhibit D1. The Charge in favour of the Housing Corporation for the sum of SCR 358,000, together with its restriction was admitted as exhibit P1. The unregistered Instrument of Transfer of V1487, was through this witness admitted as Item P1.

[6] The Plaintiff testified that the deceased was more or less a family member who grew up with her, along with the two Defendants and they grew up like brothers and sisters and that he passed away intestate on the 27th of September 2017. She identified Item P1 and says that it's a document that represents a transfer of land from the deceased to her. She identified all the signatures on the document, which are that of the Notary; the deceased, as transferor and her signature as transferee. According to her testimony, even though the

deceased was going to transfer the parcel to her, he was going to keep the usufructuary interest and that at the time of the execution of this document the consideration of SCR 150,000 had been fully paid. She confirmed that the document was returned to the Notary when the deceased was still alive and according to her, the deceased did not rush to address the issue of registration of the instrument as he was having his usufructuary right in the land anyway. She however took action to bring the case to court when she received, contrary to her expectation, a letter telling her that the two Defendants have been registered as owners. The letter which was issued by counsel for the Defendants was admitted as exhibit D2.

- [7] Mrs Lydia Mubarak was the 2nd witness for the Plaintiff. She has been a Public Notary since 2004. She identified the transfer of land instrument, item P1, as made by her and signed by herself and the respective parties, in her presence, in her office. At the material time she claimed that she only knew the transferor. She did not recall when the document was returned to her from the registration office and cannot say who in that office made the hand written entries on the returned document. She claims further that the instrument was not drafted by her but by another PublicNotary, who asked her to attest the document as the Transferee was her sister. According to her, it was that other Notary who did the due diligence regarding the parcel. The witness, being the maker of the document, tendered the item P1 in evidence as exhibit P2.

Defendant's Evidence

- [8] The 1st Defendant testimony is that the deceased is her brother and the Plaintiff is the daughter of her cousin. She testified further that the 2nd Defendant, and herself inherited the parcel as a result of the death of the deceased, who passed away intestate without living any issues. She does not accept that the Plaintiff is the owner of the parcel and said that this need to be proven and she contests the validity of exhibit P2. She contest the signature of the deceased. It is her evidence that the parcel has been solely occupied by the Plaintiff and that she has refused to move out despite repeated requests since the deceased passed away.

[9] The 2nd Defendant on the other hand claimed that after the death of the deceased, being his younger brother, the property V1487 was transmitted to him and his sister. He disputed the signature on transfer document and claimed that it was not that of the deceased.

Submissions

[10] Learned Counsel for the Defendants in his written submissions made reference to Article 1650 of the Civil Code regarding the contractual obligation of the buyer to pay the price on the day and at the place agreed upon by the sale and submitted that no evidence has been adduced in support of the purchase price. As such he surmised that the sale is void. At any rate, learned counsel submitted that in terms of section 46(1) of the Act, the sale is not complete due to lack of registration of exhibit P1. Counsel further submitted that section 3 of the Act which gives it precedence in case of conflicts with other laws, should be given full effect. According to him there is conflict and inconsistency between section 46(1) of the Act and the provisions of Article 1583 of the Civil Code in this case. In so doing counsel submitted that the line of previous decisions culminating with the case of *Zena Entertainment (PTY) Ltd v Philip Lucas and Ors, SCA 4/13*, were wrongly decided. Counsel for the Plaintiff had not filed his written submissions at the time of the writing of this judgment.

The law

[11] The law on the sale of land pertinent and relevant to this case is found in the following legal provisions of the Civil Code and the Land Registration Act.

The Civil Code

Article 1583

1. A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid.

Article 1602

The seller shall be bound to explain clearly what he undertakes.

An obscure or ambiguous terms shall be interpreted against the seller.

In regard to the obligations of the seller the provisions of article 1625 shall have particular application.

Article 1603

There shall be two principal obligations, the obligation to deliver and the obligation of warranty of the thing sold.

Article 1604

Delivery is the transfer of the thing sold to the control and possession of the buyer.

Article 1605

The obligation to deliver immovable property on the part of the seller shall be performed when he hands over the keys, if it is a building, or when he passes the documents of title of the property to the other party.

[12] The applicable provisions from the Land Registration Act are the following:

Land Registration Act

Interest conferred by registration

20. Subject to the provisions of this Act-

(a) the registration of a person as the proprietor of land with an absolute title shall vest in him the absolute ownership of that land, together with all rights, privileges and appurtenances belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of land with a qualified title only shall not affect or prejudice the enforcement of any right or interest adverse to or in derogation of the title of the proprietor and subsisting or capable of arising at the time of registration of that proprietor; but save as aforesaid shall have the same effect as registration of a person with an absolute title;

Transfer

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

Provided that where a charge is transferred the instrument shall also be executed by the charger to signify that he agrees to the transfer.

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

Transfer to take effect immediately

Reconciliation with other laws

3. Except as otherwise expressly provided in this Act, no other written law relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act; but save as aforesaid any written law relating to land, unless otherwise expressly or by necessary implication provided by this or any other Act, shall apply to land registered under this Act whether expressed so to apply or not:

Provided that nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the sanction or approval of any authority to any dealing.

Analysis and determination

- [13] In this case there is a contract of sale purportedly entered between the deceased and the Plaintiff for the transfer of the parcel to the Plaintiff. It was not registered given a restriction entered against the said parcel as a result of a mortgage given by the deceased to Property Management Corporation as security for a loan. Due to the unforeseen and unfortunate death of the deceased the said registration did not take place and was instead preceded by the transmission of the property to his surviving heirs. I assumed that this transmission of the property to the Defendants happened because of the removal of the restriction. However, how this restriction came to be removed is not in evidence. Was it after the full settlement of the loan by any of the parties to this case or the deceased or by the unilateral waiver of the Mortgagee or the decision of the Land Registrar? This is not known. Evidence has not been led from the representative of the Registrar of Lands or the respective parties as to how this happened.
- [14] However, the fact remains that they are now proprietors of the land. Given the circumstances in this case, the question remains as to who between the two parties is the legal owner of parcel V1487 and should be registered as such.
- [15] The Defendants have denied the sale of the bare ownership of the parcel. In their Statement of Defence the Defendants deny that, through the Instrument of Transfer exhibited in this case, the deceased transferred the bare ownership of the parcel and the building thereon to the Plaintiff for consideration and that the Instrument was executed before the Notary Public Lydia Mubarak Ali. They had put the deceased to proof thereof. The Plaintiff thus has to convince this court on a balance of probabilities that this was the case. The first Defendant in her testimony insisted that the Plaintiff proves the execution of this contract of sale. She was especially insistent on the fact that to her there was no proof adduced before the court that the Plaintiff had paid the consideration of SCR 150,000.
- [16] I have thoroughly considered the facts led before this court in the light of the law and the submissions of counsel. I have done this whilst considering the veracity of the evidence of both sides as tested by cross examinations. Having done so, I find that a contract of sale and transfer of property was concluded between the deceased and the Plaintiff on the

24th of May 2016. This contract was attested by and executed before Notary Public Lydia Mubarak Ali in her office at the Capital City Building. Though the document was drafted by another Notary, I am satisfied that Mrs Mubarak complied with the requirements of the Notaries Act (CAP 149) in its due execution. The parties were present before her and the execution was done in her presence. She only failed to do a due diligence search at the Land Registration Office in order to ensure that the registration of the sale would not be hindered by any restrictions. She instead relied upon the Notary who drafted the document to do this search. I am of the view that, however, though advisable, this is not a sine qua non legal requirement in law and it cannot affect the validity of the contract of sale as it is not an essential element for the existence of the contract.

[17] The only issue that could have raise a concern here, however, appears to be the payment of the consideration of SCR 150.000. The only proof of such payment comes from the Plaintiff who says that it was paid by three instalments and that at the time of execution of the document that sum had already been paid. No written proof of payment was adduced. On the other hand, the court finds that the Seller has unfortunately passed away and cannot vouch for this. This as it may, the court is bound by the provisions of the law and the pleadings. A sale is complete between the parties and the ownership passes as of right from the seller to the Buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid. The evidence led proves that the object of the sale and its consideration, as set out in the transfer agreement was agreed upon by the seller and the buyer.

[18] The Defendants on the other hand have not put a case forward, neither in their defence nor through a counterclaim, for the rescission of the contract of sale based on the non-payment of valid consideration. They only put the Plaintiff to proof as to whether the execution of the Instrument of Transfer took place as averred by the Plaintiff and in extensor whether the requirements of Article 1583 of the Civil Code were satisfied. On this issue, the court is satisfied, based on the evidence of the Plaintiff and that of Mrs Mubarak that the Plaintiff has proven the existence of the sale agreement. However, as this notarial document was not registered it has to be treated as an unregistered contract of sale of immovable between the parties. The nature of such document was aptly

expressed in the case of *Hoaeau v Gillaux SCAR 1978-1982*, in which the Court of Appeal held that

“...being property subject to registration, the acceptance by the plaintiff of the promise of the defendant to sell her [the land] for R100,00 was, by virtue of Article 1589 of the Civil Code of Seychelles, equivalent to the sale of [the land], effective only as between the plaintiff and the defendant. .I therefore have to view the documents produced purely as a contract of sale effective between the deceased and the Plaintiff.”

[19] The alternative defence of the Defendants are that the failure of the Plaintiff to complete the registration of this sale under the Act is fatal to her title, especially given that their titles as owners are registered prior to that of the Plaintiff and based on their legal entitlements. Learned counsel for the Defendants asked the court to disregard the long list of authorities culminating with the case of *Zena Entertainment (Pty) Ltd v Philip Lucas and others Civil Appeal SCA04/2013* on the subject in favour of a strict interpretation of Article 46(1) read with s 20 of the Act.

[20] In the *Zena Entertainment case*, a contract of sale and transfer of land took place between the Appellant and the 1st Respondent. However the sale was not registered and similar to the argument raised by counsel in this case, it was argued that the failure to complete registration under the Act was fatal to the Appellant having title to the property. After having recited the law the majority members of the Court of Appeal held:

[33] *“...We have on various occasions explained the relationship between the Land Registration Act and the provisions of the Civil Code as concerns the sale of land. Both in terms of promises of sale (article 1589) and sales (article 1583) registration completes the sale between the buyer and third parties (right in rem).*

[34] *In Charlemagne Grandcourt and others vs Christopher Gill SCA 7/2011 we stated that the breach of the statutory provisions in the transfer documents in sales of property does not vitiate the agreement between the parties. In Hoareau v Gilleaux (1982) SCAR 158, a case which concerned a promise of sale under Article 1589 of the Civil Code, the Court of Appeal held that the sale was complete between the parties to the agreement but would be complete as between the purchaser and third parties in terms of section 46 of the Land Registration Act after registration. Similarly, in terms of Article 1583, the sale was complete as concerns the Appellant and the 1st Respondent and the Appellant is in rightful occupation of the property.”*

[21] It is for this reason as grounded in the settled case law of the land that I would not find merits in the argument of counsel for the Defendants on this issue. To my mind section 46 (1) of the Act serves only to validate a valid sale in the eyes third parties, hence the need for registration. It does not affect a sale or promise of sale that meets the requirements of Articles of the Civil Code. I therefore find that the contractual right of the Plaintiff in relation to the parcel subsists as of the date of this judgment. The Registrar of Lands would have been under a legal obligation to register the Instrument of Transfer and the instrument would have been registered had there been no restriction preventing the transfer at the time of presentation. The existence of the restriction did not void the contract of sale, but it only prevented it's registration. Therefore the right which the Plaintiff had enjoyed in the parcel at the time of presentation of the Exhibit P2 survived and subsisted up to the time that the restriction was duly removed and onwards. The restriction having been removed, the Registrar was under an obligation to register the transfer and to insert the Plaintiff as the owner of the parcel. Instead she transferred and registered the property in the name of the Defendants.

[22] To the merits of the Registrar, evidence reveals that she would at any rate have been aware of the sale at the time of the presentation of the Affidavit of Transmission by Death by the Defendants, as the document of sale was given back to the Notary and no endorsement of the registered parcel could have been effected against the parcel on the presentation of the Instrument. The copies kept at the Registration Division are not kept as per legal requirements but only for information purposes. The Defendants therefore did not have a right to the parcel as at the time of the deceased death as the title bare ownership of his land had effectively been transferred from the deceased to the Plaintiff. The Registrar of Lands in acting upon the Affidavit on transmission by death and registering the Defendants as owners acted erroneously. The passing away of the deceased also meant that his usufructuary right to the property also ended and the qualified right of ownership of the Plaintiff converted it into an absolute right of ownership in terms of Article 617 of the Civil Code as read with s 20 (a) of the Act. To that extent the Plaintiff acquired absolute title of ownership as from the 27th of March 2018. She had that absolute title to parcel V1487 at the time that the Defendants were erroneously registered as owners.

Final determination

[23] Therefore, for the reasons given in this judgment the Land Registrar shall in terms of section 75 of the Act and on the application of the Plaintiff and payment of the necessary Stamp duty and Registration fees, cancel the registration of Marie Myrna Flavia Morel and Francois Barnsley Allisop as co-owners of parcel V1487 and must instead register Rania Lucienne Dorothy Morel as the sole owner of the said parcel. I direct the Registrar to cause the Registrar of Lands to be served a copy of this judgment.

[24] Each party shall bear their own cost

Signed, dated and delivered at Ile du Port on 28 September 2020

Govinden J

Judge of the Supreme Court