SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 631
Mc 105/20

In the matter between

Elketha Paulette Esparon — **Appellant**
(rep .by Frank Elizabeth)

And

H . H Sheikh Sultan Bin Hamdan Bin Mohaned Al- Nahyan
(rep. by Elvis Chetty) — **Respondent**

Neutral Citation: *Elketha Paulette Esparon v H.H Sheikh Sultan Bin Hamdan Bin Mohamed Al-Nahyan* (MC 105/2020) [2021] SCSC 631 (4th October 2021).

Before: **Govinden CJ**

Summary: Appeal against decision of the Rent Board; droit de superficie; prescription not pleaded before Rent Board; Appeal dismissed

Heard: Written Submissions

Delivered: 4th October 2021

ORDER

Appeal dismissed with cost.

Ruling

GOVINDEN CJ

Background

[1] This is an appeal from a decision of the Rent Board in which the latter has ordered for the eviction of the Appellant from the property of the Respondent. The Respondent filed his application for eviction claiming that he is the owner of property B583 situated at La Misere, Mahe and that the Appellant was occupying a house on it. He applied for an order for her eviction as he wanted to demolish the existing house and build a new one. The Appellant in her Defence raised a number of plea in limine, namely that the Respondent had failed to establish any tenancy and roof of ownership and that the Rent Board Tribunal had no jurisdiction to hear the case. On the merits, she had denied meeting the Respondent and or negotiated the occupation with him.

[2] Having heard the case, the Tribunal found that a lessee under the Control of Rent and Tenancy Agreement Act, herein after also referred to as "the Act", would include any person enjoying the use and occupation of a dwelling house for which an indemnity is payable or not and that this would include the Appellant. It also found that contrary to her argument she was not a caretaker of the dwelling house or in the employment of the Respondent. The Tribunal further found that the Respondent was aware of the future developments of the owners and that she would have to vacate upon the request of the Respondent. Bearing in mind that prejudice and hardship would be caused to the Respondent as compared to the Appellant if the occupancy was made to last longer, especially that the Appellant had been given several notices to quit, the Tribunal granted to the Appellant three months to find alternative accommodation.

The Appeal

[3] In her Memorandum of Appeal, the Appellant has raised essentially two grounds of appeal. Which are, firstly, that the Chairperson of the Rent Board erred in law and in fact when she failed to consider the legal rights of the Appellant to stay and remain on the property or at all and secondly, that the Chairperson of the Rent Board erred in law when she made an eviction order against the Appellant.

[4] The Learned Counsel for the Appellant filed a Written Submission in support of the appeal. He proposes to address both grounds of appeal together as he considered that they are interlinked. In essence, he submitted that from the evidence it should have been abundantly clear to the Tribunal that the Appellant has acquired a *'droit de superficie"* and that she cannot be evicted until she has been properly and adequately compensated for the value of the building on the property. He argued that this right is founded on Article 555 of the Civil Code. He submitted that the Tribunal should have *ex mero motu* considered the issue of *"droit de superficie"* and it erred in law when it failed to address its mind to the issue at all. He supported his arguments in this regard with the Seychelles Court of Appeal case of *PTD Limited v Zialor [20019] SCCA 47.* As a result, he moves this court to allow the appeal and to order the Respondent to pay compensation for the value of the building on the property.

[5] On the other hand, in his Written Submissions in reply, Learned counsel for the Respondent argues in two folds. Firstly, that the Appellant failed to raise the issue before the lower court and the Appellant by raising this ground afresh before this court is tantamount to a new action within an appeal. Secondly, he submitted that even if this court was to consider the argument, the Appellant fails to fulfil the conditions of such right in that there is no consent, tacit or otherwise, to the occupation by the rightful owner and that as further the Appellant has not guilt on the property but rather profited from her rent free occupancy. As a result counsel moves for a dismissal of this appeal.

Issue for determination

[6] I have thoroughly considered the grounds of appeal and the reply thereto including their supporting submissions. Having done so, I find that the only point in issue in this appeal is whether the Tribunal below should have considered *ex mero motu* the issue of droit de superficie in favour of the Appellant event though this defence was not raised by her.

[7] Before I go on to consider this issue, I notice that the grounds of appeal refers specifically to the alleged errors in the decision as being made by the Chairperson of the Rent Board Tribunal. This is wrong and infelicitous, the decision of the Tribunal appealed against is not that of the Chairperson but that of the Rent Board Tribunal given unanimously by three

members under Section 17 of the Act. In the interest of justice, I would not dismiss the appeal on this basis, however the counsel is put on notice, that this kind of mistake would not be tolerated in the future.

[8] The Respondent came before the Tribunal below and made a claim for ejectment of the Appellant based on the following provisions of the Act:

> *10. (l) Every lessor wishing to eject his lessee shall apply to the Board for an order of ejectment.*
>
> *(2) No order for the recovery of possession of any dwelling house to which this Act applies, or for the ejectment of a lessee therefrom, shall be made by the Board unless ...*
>
> *(i) the dwelling house is bona fide required for the purpose of being demolished, reconstructed, moved or improved;*

[9] I have considered this and other provisions of the Act. I find that the Act was meant to cater both for the grounds of evictions and defences to such evictions, exclusively from other causes of actions and defences in the civil law. Once the Tribunal had satisfied itself on evidence that the Appellant was a Lessee and that the Respondent as a lessor required the dwelling house in good faith for the purpose of it being demolished under the provisions of the Act, the only thing that stood in the way of an order of ejectment is that of hardship under the provision of Section 10.

[10] This provision is to the following effect, *"Provided that an order shall not be made or given on any ground specified in paragraphs (g), (i), (j) and (k) (as added by section 13(l)) if the Board is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the lessor or the lessee, greater hardship would be caused by granting the order than by refusing to grant it".*

[11] The proceedings of the Tribunal below shows that it was alive to the necessity to consider the issue of hardship and alternative accommodation having regards to all the circumstances of the case. In coming to its final determination, the Tribunal after

considering the evidence found that the balance of hardship was in favour of the Respondent and proceeded to make the Order.

[12] This being the case, there was no necessity or duty in law for the Rent Board to proceed further and consider the Defence of "*droit de superficie*" in this case. This defence is not available to a lessee before the Rent Board Tribunal unless it has a bearing on the issue of hardship, and the latter was thoroughly considered by the Tribunal.

[13] As to the law on this subject, this is well settled in this jurisdiction. The Seychelles Court of Appeal captured it beautifully in the *PTD* case (supra). This decision supported the view that a court has to consider the defence of *"droit de superficie"* irrespective of whether it has been raised in the pleadings. It also confirm that this right can be acquired by prescriptive acquisition, which in turn must be specifically pleaded.

[14] Moreover, besides not having a contract of tenancy with the lessor, the Appellant did not plead the way she acquired this right before the Tribunal. This court is of the view that this could only have been acquired by way of acquisitive prescription, given the facts of this case. However, failure to plead and argue the prescriptive acquisition of the droit de superficie, or through any other modes, therefore proved fatal as per the *PTD* case. Accordingly, even if the Tribunal could have considered the defence of "*droit de superficie" de plein droit*, it was denied that chance by the Appellant's failure to specifically plead as to how this right was acquired.

[15] For these reasons, I find that the Rent Board Tribunal did not err and I therefore dismiss both grounds of appeal with cost in favour of the Respondent.

Signed, dated and delivered at Ile du Port on 4th October 2021.

R Govinden

Chief Justice