

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC ...
MA207/2019
(arising in CS100/2019)

In the matter between

MARIE-MAY KOLSCH
(rep. by Mr. S. Rajasundaram)

PETITIONER

and

CHALETS ENTERPRISE (PTY) LTD

1ST RESPONDENT

HARALD G. KUEHN
(rep. by Mr. Daniel Belle)

2ND RESPONDENT

Neutral Citation: *Marie-May Kolsch vs Chalets Enterprise (Pty) Ltd & Ors (MA207/2019)*
[2021] SCSC

Before: G. Dodin

Heard:

Delivered: 22 October 2021

RULING

Dodin J

[1] The Petitioner who is the Plaintiff in the main case CS 100 of 2019, petitions this court for an ex-parte *ad interim* injunction against the 1st and 2nd Respondents restraining and prohibiting the Respondents from constructing a road or any type of construction and/or attempting to construct any road on parcels of land T182 and T1370 at Intendance, Mahe until the disposal of the main suit filed against both the Respondents.

[2] The Respondents oppose the Petition maintain that the plots of land in question are owned by the 1st Respondent and managed by the 2nd Respondent for agricultural

purposes from which the 2nd Respondent makes a living, and no road construction has been undertaken on the said plots.

[3] The main case is for the determination of the validity of an agreement purportedly signed by the Petitioner and the Respondents, namely a Promise of Sale, and its enforceability by way of specific performance.

[4] Learned counsel for the Petitioner submitted that the promise of sale by the Defendants on one part who purportedly promised to sell the said two plots of land to the Plaintiff for a sale price of Euros 45,160.00. It is for this limited purpose of ascertaining the merits in the injunction application that this court needs to verify the genuineness of the Plaintiff's Defence. Learned counsel submitted that the Defendants simply put forth a vague denial in their defence of the purported promise of sale. It avers that the first defendant is not a party to the promise of sale nor did it approve. There is no mention whatsoever as to the stance of the 2nd Defendant whether or not he admits or denies the existence of the promise of sale.

[5] Learned counsel further submitted that the main crux of the Petitioner's case is that she is the owner of a Title T516 which is adjacent to T182 one of the two titles under the above referred promise of sale. The predecessor of the title T516 had long back built a residential house and a part of the house namely veranda falls on title T182. The Petitioner has thus got a substantial interest in her property in T516 which partly falls on T182 and she is again a party to the promise of sale in respect of the same T182 out of the two parcels. While the Petitioner avers in her affidavit that the Defendant delayed, denied the execution of promise of sale but at the same time, has been doing formalities to construct a road on T182 and the proposed road construction would run along in her house on veranda which would result in its demolition.

[6] Learned counsel submitted that Government authorities including planning and other agencies never granted any permission to build a road on T182, thus she avers that the construction if allowed to be commenced and completed will be unlawful and directly affects her right and interest in terms of convenient enjoyment of her title. The Petitioner avers that the construction of the road is not necessary for the Respondents while the

attempts of road construction is to harass the Petitioner in terms of demolition of part of the house, namely veranda on T516. The demolition of the part of the veranda is not a matter of monetary compensation payable to the Petitioner but would substantially affect her use and enjoyment of her own property.

[7] Learned counsel submitted that the Defendants regardless of the final outcome of the case in respect of the promise of sale of titles T182, and T1370, can use those properties (vacant lands) without any construction of anything including but not limited to road.

[8] Learned counsel submitted that in determining whether to grant an injunction the court has to take the following principles into account:

1. Where there is a serious issue to be tried
2. Whether damages would be inadequate to address the harm caused by the grant of the injunction and
3. Whether on a balance of convenience it would be just to grant rather than deny the injunction.

Further the court has to consider the following:

1. Whether more harm would be done by granting or refusing the injunction
2. Whether the risk of injustice is greater if the injunction is granted than the risk of injustice if it is refused and
3. Whether the breach of the appellant's rights would be outweigh the rights of other in society

Learned counsel referred the court to several cases, namely:

Olivier Levi vs Dianna Levi (2020) SCSC 341 arising in DV 56/2020, *Pest Control vs Gill 1992 SLR 177*; *Techno International vs George. (unreported) CS 147/2002*; *Dhanjee vs Electoral Commission 2011 SLR 141*; *Lefevere vs Beau Vallon Properties Ltd (MA 154/2018 SCSC 617*

- [9] Learned counsel submitted that the Petitioner has submitted many documents in support of her Complaint which she avers is part of her affidavit for injunction application. There are documents exhibited, shown and disclosed in that the Lands Registrar has twice registered restriction orders on T182, including the registration of a restriction dated 19th April 2017, thus the bona fide fact exists in favour of the Petitioner.
- [10] Learned counsel submitted that the Respondents have never established any right and or fact as to why the construction of any road on T182 is essential and in what way would they be affected if there is no road construction and how would they be affected if there is a road. All they are saying is that the promise of sale is vitiated and also rely on constitutional rights of peaceful enjoyment. They maintain that they at one point in time had planned to build a drive and at the request of the Petitioner it was averted. Thus, it is apparent that the Respondents tried to build a road.
- [11] Learned counsel submitted that the Respondents' undertaking given in open court and forms part of the records could very well be regularized in terms of a temporary injunction order where the Respondents would never be prejudiced.
- [12] Learned counsel submitted that the Petitioner has come with clean hands to this Court while seeking a temporary injunction setting out valid, genuine reasons including a promise of sale inter related to the purported demolition of the veranda.
- [13] Learned counsel moved the Court to grant the injunction as prayed for restraining the Respondents from constructing any road and or any other construction on the title T182 and T1370.
- [14] Learned counsel for the Respondents submitted that the main suit filed is for specific performance related to a purported agreement signed between the Petitioner and the 2nd Respondent. However, in the main suit there is no prayer for injunctive relief or permanent injunction. The order sought in the Application for ad interim injunction did not form part of the prayers in the main suit. The interim relief sought in the Application has no relation with the final reliefs sought in the main suit.

[15] The Respondents object to the application for such ad interim injunction and in their Affidavit in reply, the Respondents pray this Court to refuse to grant the injunction as more harm would be done to them by granting it pending the disposal of the suit. This suit will most likely be disposed of after the beginning of next year mainly because the Petitioner lives in South Africa, she has asked for postponement of the case many times on accounts of her not being able to come to Seychelles due to Covid 19 restrictions and her not being comfortable with electronic conferencing.

[16] Learned counsel submitted that during the course of the sitting of this Court on the 17 September 2019, the averment of the Petitioner with regard to the construction of a road was denied by the Respondents who gave commitment and assurance to this Court that there is no road constructed or under construction. It is now over two years since that sitting. The Respondents have still built no road and have maintained the status quo and the Petitioner has at no time during that period till this date contradicted or refuted that declaration made in Court by the Respondents. Thus, there is no wrongful act caused to or that could be caused to the Petitioner by the Respondents.

[17] Learned counsel submitted that the principles and doctrine guiding ad interim injunctions are that in exceptional circumstances based on sound judicial discretion to protect the Petitioner, the ad interim injunction may be granted and at times without giving notice to the opposite party. The general tests applied are i) whether the Plaintiff has a prima facie case, ii) Whether the balance of convenience is in favour of the Petitioner and iii) whether the Petitioner/Plaintiff would suffer irreparable injury if the prayer for temporary injunction is disallowed. In this present case, apart from a false allegation of a road constructed or to be constructed, strict evidence of which has not been produced and there is no other reason averred by the Petitioner for which the Petitioner needs to be protected by an ad interim injunction.

[18] Learned counsel submitted further that generally, before granting the injunction, the Court must be satisfied about the following aspects:

- i) One who seeks equity must come with clean hands;

- ii) One who seeks equity must do equity
- iii) Whenever there is right there is remedy.

The power to grant equity is at the discretion of the court. This discretion however should be exercised reasonably, judiciously and on sound legal principles depending upon the circumstances of each case. Injunction should not be lightly granted as it adversely affects the other side.

[19] Learned counsel submitted that in line with the assurance given before this Court by the Respondents that there is no road construction or to be constructed on these two plots, as requested by counsel for the Petitioner to be placed on the Court's record, there exists to date, no contradiction nor report with regard to any wrongful act or behaviour of the Respondents concerning the construction of a road or any other action not sanctioned by this law. The Respondents have never committed, nor repeated nor continued any wrongful act to this present day as falsely alleged in the Petition for an ad interim injunction as provided for by the statutory authority Article 304 of the SCCP to necessitate a grant of injunction.

[20] Learned counsel submitted that relief of injunction may be refused by the courts on grounds of delays, laches, acquiescence or whether the applicant has not come with clean hands or has not produced evidence, among others.

[21] In respect of delays: In this suit, it is the 2nd Respondent and the members of the 1st Respondent who are being harassed and pressured by the circumstances beyond their control in what appears to them a never ending case. These delays are being contributed to mostly by the Petitioner who is currently residing in South Africa. She invoked her age, and her inability to follow by video link causing the delays in the normal disposition of the case, at the expense of the also the vulnerable 2nd Respondent and members of the 1st Respondent. This suit is now over two years awaiting for the appearance of the Petitioner for a hearing.

- [22] On the issue of clean hands learned counsel submitted that the Petitioner in this suit has not come with clean hands: i) She averred in para.4 of her affidavit that the predecessor in Title T516 had long back built the residential house, and a “part of veranda of the said house partly encroached on T182 owned by Chalets Enterprise (Pty) Limited”. She made no mention of the tortoisises den nor the septic tank and waste which encroached further into the vegetation on T182 belonging to the 1st Respondent/Defendant which will be developed in the main suit. The cordial hostilities began precisely when Petitioner was asked by the 2nd Respondent to remove the den and the septic tank. ii) Using her influential connections, the Petitioner managed to obtain an insufficiently founded restriction against Title T1370 and T182 for years during which time the Petitioner exerted undue pressure on the second Respondent with a view to acquire, the proverbial “by hook or by crook”, her chosen parts of those two said parcels. The Petitioner desperately wanted to obtain an agreement to acquire two portions of Title T1370 and T182 “in order to formalize the said encroachment committed by the predecessors in title of my land T516...”. Vide Paragraph 6 of her Affidavit.
- [23] Learned counsel submitted that in so doing the Petitioner has been, throughout those years from 2008 to this date and counting, continually and systematically infringing the constitutional and inalienable right to property of the 1st Respondent restricting its right and restricting the enjoyment by its members by coercion and continued subtle harassment of its members. In legal jargon, this is ‘*ex turpi causa*’ and in such circumstances where the Petitioner is the cause of her own misfortune, she cannot expect to profit from her own illegal act.
- [24] Learned counsel submitted that the 2nd Respondent is a registered farmer and decided to invest his own time and money in the development of a small arable farming project on the flat part of the 1st Respondent’s property. He needed to erect a water tank on the higher part of the land to provide for indispensable sufficient, reliable and regular water supply. That was precisely the purpose of an application made by 1st Respondent to the Planning Authority and it obtained approval as evidence shall be produced in the main suit. There was never an application to Planning Authority for the building of a road nor a plan thereof by either the 1st or the 2nd Respondent as falsely alleged by the Petitioner.

- [25] Learned counsel submitted that the main reason for use of an ad interim injunction is the need for immediate relief where there is great degree of inconvenience or irreparable loss that the Petitioner would suffer which is obviously not the case here. It is a discretionary and equitable relief that is granted by the Court where it is absolutely necessary. There is in the Application for ad interim injunction before this Court obviously no need for immediate relief. The Respondents have given their commitments before court since September 2019 and counsel for the Petition had acquiesced, if this be so that we proceed to the main suit.
- [26] Learned counsel submitted that as per the case of *Techno International vs Georges, unreported 147 of 2002 Supreme Court*, the Court is to be guided by 3 considerations: i) a serious issue to be tried, ii) whether damages would be adequate by redress to redress harm caused by grant of injunction and iii) whether on a balance of convenient it would be just to grant rather than refuse the order. In *Dhanjee vs Electoral Commission SCA 20 of 2011*, the balance of convenience is to include consideration of i) whether harm would be done by granting or refusing injunction, ii) risk of injustice would be greater if injunction was granted than refused.
- [27] The Respondents contend that any ad interim injunction granted against them by the Court will definitely cause them irreparable injury given the nature of the perishable produce of the 2nd Defendant's farming activities and that will impair the considerable investments of the 2nd Respondent, especially in the preparation of the site for his ongoing agricultural development on the property. Learned counsel referred the Court to the case of *Sabrina Julienne vs Jean Claude Woodcock 2016 SC677*, which stated that on balance of convenience, in the case of doubt, the object of the ad interim injunction against the Respondents' needs to be weighed against the corresponding need of the Respondents to be protected against injury resulting from them having been prevented from exercising their own legal rights for which they could not be adequately compensated.
- [28] Learned counsel moved the Court to refuse the grant of the ad interim injunction and to dismiss the Petition.
- [29] As per Lord Diplock in *American Cyanamid Co v Ethicon Ltd [1975] AC 396*:

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from him having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.”

[30] The modalities and legal consideration to be taken have been addressed above by both learned counsel in their respective submissions. It comes down to the principles set out in several decided cases including the case of Julienne vs Woodcock in CS 30 of 2016 which are;

- i. Whether there is a serious question to be tried;
- ii. Whether damages would be adequate remedy to either side; and
- iii. Where the balance of convenience lies.

The Court must of course consider whether the degree of harm if at all would be caused to either party and whether granting or refusing the injunction would lead to social and economic imbalance, difficulties and hardship to either party.

[31] In this case, it is not in dispute that the 1st Respondent is the registered owner of the land titles in contention and the 2nd Respondent uses the land for agricultural purposes. This Court has been called upon to determine the validity and enforceability of an agreement between the Petitioner and the Respondents which purports to be a Promise of Sale. It is also admitted that currently, part of the Petitioner's house, namely the veranda, encroaches onto plot T182. It is also a fact that until the present day, the 2nd Respondent has not built any road on either parcel of land which are subject to the main case.

[32] Considering all the facts that are not in dispute and having read the pleadings in the main case, I am satisfied that there is a serious question to be tried, namely, whether the agreement, Promise of Sale, is valid and enforceable by way of specific performance as prayed for by the Plaintiff in the main case.

[33] Since the 2nd Respondent depends on his agricultural activities for a living, and since the land parcels in question are still registered on the 1st Respondent, it is premature for the Petitioner to seek cessation of the 2nd Respondent's activities on the land. Secondly the Petitioner has not shown that she would be able to compensate the Respondents in the event that her claim in the main case fails. On the other hand, the Respondents do not necessarily have to compensate the Petitioner if the Petitioner's claim is successful since she will become owner only after the Court orders specific performance of the sale agreement. Compensation therefore becomes an issue only if the Respondent is prevented from cultivating and developing the land. I find that the Petitioner may not be able to adequately compensate the Respondents for the loss suffered if an injunction is granted to stop the 2nd Respondent from continued farming and other development on the land.

[34] Further to the above, since the reason for which the injunction is prayed for is to stop the construction of a road for which no proof of such construction has been adduced, this Petition is not grounded on facts.

[35] Considering all the circumstances of this case the balance of convenience clearly lies in favour of the Respondents for not granting the injunction as prayed for.

[36] Consequently, this Petition for injunction fails and is dismissed.

[37] I award cost to the Respondents.

Signed, dated and delivered at Ile du Port on 22 October 2021.

G Dodin

Judge