

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC ...
CS159/2019

In the matter between

HERDULE BARBE
(rep. by Edith Wong)

Plaintiff

and

GINETTE ESPARON
(rep. by Frank Elizabeth)

Defendant

Neutral Citation	<i>Herule Barbe v Ginette Esparon</i> (CS159/2019) SCSC delivered on 10 th December 2021
Before:	Vidot J
Summary	Constructing on another’s land with permission; droit de superficie; not raised in a counterclaim. Whether the droit de superficie was in perpetuity or of limited in time. Tiers de bonne fois or mauvaise fois
Heard:	01-06-2021 and 28-10-2021
Delivered:	10 December 2021

JUDGMENT

VIDOT J

Background

A. The Plaintiff

[1] The Plaintiff and the Defendant are cousins. The Plaintiff is the registered proprietor of land parcel V3331 situated at Creve Coeur .Mahe, (“the Property”). He purchased the Property from his father on the 13th March 1984 as per deed registered on 02nd April 1984 in transcription volume 71, number 113 (Exhibit P1). On the 03rd May 1988, the Property

was registered on the new land register subject to one encumbrance being a charge in favour of the Seychelles Housing Development Company (“the SHDC”)

- [2] At a time unknown to the Plaintiff, the Defendant built a wooden house on the Property without the permission of Plaintiff and allegedly without a permission of the Plaintiff’s predecessor in title, who was the father of the Plaintiff, Julien Barbe.
- [3] It is averred that on the 19th November 1991, the Defendant through means unknown to the Plaintiff, obtained a document wherein the mother and the sister of the Plaintiff, (Angele Barbe and Julienne Barbe respectively) averred that the father of the Plaintiff allegedly granted the Defendant permission to build a house on the Property in April 1974. The Plaintiff further claims that he has instructed numerous lawyers to send several letters to the Defendant requesting that the Defendant vacates the Property.
- [4] The Plaintiff therefore prays that the Court declares that the Defendant a “*tiers de mauvaise fois*” and therefore order that she removes her house from and leave the Property. In the alternative, the Plaintiff prays that if the Court finds that the Defendant is a “*tiers de bonne fois*” that she is ordered to vacate the Property upon payment of the value of the wooden house.

B. The Defence

- [5] The Defendant filed a Defence both on merits and raising four pleas in limine. This Court in its Ruling dated 31st July 2020, dismissed all the pleas in limine. Therefore, this judgment shall address only the merits of this case.
- [6] On the merits the Defendant refutes the Plaintiff’s claim. She alleges that she received permission from the then “owner” of the land to build the house and that she has been living on the Property without interruption ever since. She avers that she has thus acquired title to the Property by operation of law by way of prescription. She therefore claims a “*droit de superficie*” by virtue of having constructed the house thereon with permission. The Defendant further claims that the document (Exhibit P4) signed the Plaintiff’s mother and sister gives her a *droit de superficie*.

[7] The Defendant therefore prays that the Court dismisses the case and makes the following orders;

(a) Declare that the Defendant has acquired rights of owner in the property by virtue of prescription in law;

(b) In the alternative declare that the Defendant has acquired a *droit de superficie* in law over the property ; and

(c) Order the Land Registrar to register land title V3331 in the name of the Defendant within 14 days of making the Order.

Prescription

[8] Prescription was raised as one of the pleas in limine. The Defendant was claiming acquisitive prescription. The Defendant had also claimed that she had acquired a “*droit de superficie*” over the property and that right was granted to her by her aunty Angele Barbe and her husband Julien Barbe. This Court has already adjudicated on that issue of prescription and concluded that the action is not prescribed. The claim of prescriptive acquisition was dismissed. The Court considered various provisions of the law, in particular Articles 2219, 2229, 2231, 2262, 2265 and 2271 of the Civil Code of Seychelles. This court ruled that when a person is granted a *droit de superficie* he cannot, based on that, lay claim to the property by way of prescription

[9] Since, I have already in the Ruling dated 31st July 2020 addressed at length the issue of prescription, I shall not herein repeat myself, save to reiterate that the Court held that the matter was not prescribed.

Droit de Superficie

The Law

[10] The Defendant in her defence argues that she has acquired a *droit de superficie* over the property. She claims that she was given that right by the father of the Plaintiff, Mr. Julien Barbe, when he gave permission to her to build her house on the land parcel. She relies

on a document signed on 19th November 1991 (exhibit P4). In **De Silva v Bacarie [1992] SLR 249**, a droit de superficie is described as a real right severed from the right of ownership of land conferred on a party other than the owner of land, to enjoy and dispose of the things rising above the surface of the land, such as construction , plantations and works. It also provides that a droit de superficie is constituted by a division, not by dismemberment, or the right of ownership of the ground from that of the things on the ground. The right is commonly constituted by agreement though it may also be acquired by prescription. The agreement needs not be witnessed by a written document, although if no document exist, difficulty may arise to prove the existence of the right by oral testimony.

[11] It was held in **Juliette v Chang-Leng [1992] SLR 124**, that a person who has acquired a droit de superficie over another's land, that landowner cannot require that person to remove any extension built or to vacate the property. The land owner has the option of paying the occupier the cost of labour and materials, in addition to the value given to the land by the building of extension until fully repaid.

[12] In the case of **Payadachy v Jean & Anor CS NO. 112 of 2013**, Twomey CJ stated;

“the droit de superficie however, must be created by an agreement between the owner of the land and the third party claiming the right of retention. In Seychelles, it is normally created by a registered agreement outlining the right to build on someone's land. Such an agreement is exemplified by Exhibit P2 in which the first defendant's mother gave the first defendant a right to build on her land. Such agreement infers that the third party building on the owner's land will have the right to remain in the building once constructed. It is also possible to have an oral agreement to that effect.”

Discussions

[13] Counsel for the Defendant claimed that the Defendant has a droit de superfice and that this is evidenced by Exhibit P4. That document which is allegedly signed by Julienne Barbe and Angele Barbe reads thus;

“We, Julienne Barbe and Angele Barbe, nee Santache, both of Roche Bois, Mahe, Seychelles, hereby confirm that in the month of April 1974, Julien Barbe, now deceased, authorised Ginette Esparon, nee Santache to build her house on his property at Roche Bois, Mahe”

The document is dated 19th February 1991 and signed before G. Maurel, Notary Public.

[14] The burden of proving a droit de superficie is on the claimant. This Court has difficulty to rely and rely on this document. It avers that Mr. Julien Barbe gave permission to the Defendant to build on his land. Mr. Julien Barbe is deceased. The Plaintiff even questions whether the alleged signature of his mother, on the document is authentic.

[15] The Defendant claims that she received such permission from Mr. Julien Barbe and his wife. At that Mr. Julien Barbe was the owner of the land parcel. That is because she had been living with and taking care of Mr, Julien Barbe and his wife. I do not dispute that. I do believe that at the time Mr. Julien Barbe did grant her permission. Even the Plaintiff admits that this could be possible, but adds that the Defendant was told that once the land becomes his, she would have to vacate therefrom. I do believe the Plaintiff that this right was not in perpetuity. I believe that in actual fact the Defendant was granted a right to remain on the land until the land was subdivided and that portion of land transferred to the Plaintiff. Mrs. Denis, witness for the Defendant insisted otherwise. However, I did not find her to be a truthful witness considering the hostile, argumentative and defensive approach she adopted when being cross-examined.

[16] I find that it was never the intention of Julien Barbe to grant to the Plaintiff a droit de superficie in perpetuity. That right was to extinguish upon the happening of some event that is once the property was extracted from its mother parcel and transferred to the Plaintiff. Mrs. Denis and the Defendant testified that Julien gave such permission as the Defendant looked after them and was almost like a member of the family. Julien had a plot of land which he subdivided and transferred a portion on each of his children. Mrs. Denis and Julienne barbe were allocated their plots. Exhibit P1 states that the Defendant bought the property for SR5,000.00. If the Defendant was to be treated as a member of Mr. Julien Barbe’s family how come she was not given a plot of land but was only

allowed to build on a plot that would in future be sold to the Defendant? I believe that the reason why Mr. Julien Barbe never formalised the grant of permission to build on the property via a executed document was because that droit de superficie was for a specific period only.

[17] As Sauzier J said in **Albest v Stravens (No) [1976 SLR 158]**; a “*droit de superficie may be conferred into perpetuity or for a period of time according to the intentions of the parties. It would appear therefore that everything depends upon the intention of the parties at the time the contract was entered into.*” Above, I have stated that I believe the version of evidence of the Plaintiff. I do believe him as well when he testified that Julien Barbe had informed the Defendant that she needed to move her house. I do not believe that his father would have encumbered the land that was to be sold to him and yet not encumbered the land he gave to his other children. This Court finds it hard to believe the Defendant’s evidence, though it recognises that the evidence of Julienne Barbe was more truthful. In fact she was not actually “au fait” with details of what the discourse between the Plaintiff and the Defendant was, save that they had been to Court.

[18] Counsel for the Plaintiff relied on **Maria Adonis v William Celeste SCA 28 of 2016** and **Payet & Anor v Payet CS No. 13 of 2019**. In the former case Robinson JA (at paragraphs 17 and 18 of the judgment) stated;

“At the hearing of the appeal, Counsel for the respondent acknowledged that the respondent’s defence had no counter-claim, and that it was not specifically pleaded that the respondent had a droit de superficie. However, he contended that the statement of defence had a clear plea at para 3 and a clear invitation at prayer (b) on which the trial court could make a finding that the respondent had a droit de superficie.

Therefore, we hold that it was essential for the Respondent to plead a counter claim in accordance with section 80 of the Seychelles Code of Civil Procedure which stipulates that:

80(1) Subject to sub-section (2), where the defendant in any action wishes to make any claim or seek any remedy or relief against a plaintiff in respect of anything arising out of

the subject matter of the action, he may, instead of raising a separate action make a claim or seek the remedy or relief by way of a counter claim in the action; and where he does so, the counter claim shall be added to this defence to the action”

[19] Therefore, since droit de superficie was not raised in a counter-claim that defence should fail.

[20] Furthermore, the Defendant effected repairs on the house. In fact, even if the Plaintiff and Mrs. Denis tried to downplay that fact, Julienne Barbe testified that the Plaintiff effected repairs to the house and has even extended the house. Therefore, any droit de superficie would have ended at that point. Therefore, applying Payadachy the droit de superficie would have already ended.

Tiers de bonne fois / tiers de mauvaise fois.

[21] The Plaintiff insists that the Defendant acted in “*mauvaise fois*”. This is on the basis that the Defendant knew that the Plaintiff’s father had asked her to leave the premises once it was transferred to him. Therefore, remaining in occupation is tantamount to bad faith. I unequivocally agree with counsel for the Plaintiff. Once the Defendant started to extend and improve her house failed to honour the agreement reached with Mr. Julien Barbe she became a tiers de mauvaise fois and that in effect frustrated the Plaintiff’s plans to sell his property, yet she acknowledges that she owns other immovable property.

Point of Law

[22] At the close of the hearing, Counsel for the Defendant prayed that the Court allows him to amend the defence by raising another plea in limine. He made application in terms with section 90 of the Civil Procedure Code. The point of law is to the effect that ‘the action amounts to an abuse of process and liable to be dismissed’. Plaintiff’s counsel did not object to the amendment. However, she failed to address that preliminary objection in her written submission. The Defendant on his part did not file any submission at all. So, I should treat this plea as having been abandoned.

[23] Nonetheless, this plea has to do with fact that the Plaintiff previously filed action before the Rent Board and the Supreme Court for a writ of habere facias possessionem of the property. Now the Plaintiff has filed this case. The Plaintiff is a simple man with no knowledge of the law. Counsels who appeared for him, to whom had given instructions to resolve this issue had mislead him. He has had to incur legal cost. Now, Counsel has filed appropriate action before the Supreme Court. I am not prepared to condemn the Plaintiff for Counsels having given him the wrong advice. Therefore, I find that this plea in limine has no remit and is dismissed.

Conclusion

[24] In view of matters above discussed, I find that the Plaintiff has established his case and entered judgment for the Plaintiff against the Defendant and make the following orders;

(a) I declare the Defendant a tiers de mauvaise fois and order that she vacates the property within 2 months of this judgment.

(b) The Defendant shall pay cost of the suit to the Plaintiff

Signed, dated and delivered at Ile du Port on 10 December 2021

M Vidot J