

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 367
CS 122/2020

PHILOMENA TALMA

PLAINTIFF

(rep. by Bernard Georges assisted by Ms. Ramruchaya)

and

TELMA CAMILLE

DEFENDANT

(rep. by Frank Elizabeth)

Neutral Citation: *Philomena Talma v Thelma Camille* (CS122/2020) [2021] SCSC (31ST May 2021).
Before: Vidot J
Summary: Referral of case to the Constitutional Court; whether the right of retrocession violates Article 26 (Right to property) of the Constitution
Heard: 06 April 2021
Delivered: 31 May 2021

ORDER

Application denied. Art 817-1 grants only a right to the proceeds of sale of the co-owned property and not a right in property itself; it is not a real right.

RULING

VIDOT J

- [1] The Plaintiff and her brother, Denis Camille (hereafter Denis) were co-owners for one half share each, of parcel V9038 situated at Beau-Vallon. On 28th February 2011, Denis transferred his one-half undivided share to his daughter, the Defendant and continued residing with the Plaintiff in a house which she had built at her own cost, on the said parcel.
- [2] The Plaintiff avers that the sale by Denis of his one half undivided share in the said parcel to his daughter constitutes a sale by a co-owner to a third party giving a right to the plaintiff, as another co-owner, to opt to buy the Defendant's said share. The Plaintiff made an offer to the Defendant, exercising her right of retrocession for the sum of SR500,000.00. The Plaintiff states the value of the entire parcel is SR673,800.00. The Plaintiff avers that she wishes to exercise her right of retrocession and buy back the one half undivided share belonging to the Defendant on the said land parcel.
- [3] The Defendant filed his defence in which he raises a plea in limine litis. The plea in limine avers the right of retrocession under the Civil Code of Seychelles is unconstitutional as it contravenes the Defendant's constitutional right to property under article 26 of the Constitution and therefore requests that this Court immediately refers the matter to the Constitutional Court to determine whether the right of retrocession is actually unconstitutional and contravenes article 26 of the Constitution.
- [4] It is this plea in limine that the Court shall be considering in this Ruling.

The Defendant makes this request in terms with article 46(7) of the Constitution. That article reads as follows;

"Where in the course of any proceedings in any court, other than in the Constitutional Court or the Court of Appeal a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court."

- [5] Counsel explained as to why he is of the considered opinion that the provision of the Civil Code dealing with retrocession violates the Constitution. Basically, he submits that it infringes on the right to property which is guaranteed under article 26 of the Constitution. The right of retrocession is couched in article 834 of the Civil Code and it reads;

"In the case of the 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 the 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 of the transfer."

- [6] However, Mr. Elizabeth, Counsel for the Defendant drew Court's attention to the fact that another case on the same issue is before the Constitutional Court. Court advised Leaned Counsel that if that was the case then to avoid duplicity and clog up the Constitutional Court it might be more advisable rather than send this case to the Constitutional Court to keep such matter pending until the Constitutional Court is adjudicate on the case before it.. Mr. Elizabeth agreed to that proposal. However, Ms. Ramruchaya, Counsel for the Plaintiff submitted that that she wanted to submit has a slightly different issue but directly linked to the right to retrocession and to the right to property guaranteed under the Constitution.

- [7] First, Counsel for the Plaintiff alleges that there is an agreement between Plaintiff and the Defendant whereby the latter has agreed to sell her share to the Plaintiff. She avers that they have correspondence on their file that confirms that. She submits that the only dispute was in regards to consideration for the sale. I note that one of the prayers in the defence, is for appointment of Nigel Roucou, Quantity Surveyor to re-value the land parcel. This might be interpreted as suggestive of a desire for sale. But that is only an assumption, though a sound one. Nonetheless, this Court at this stage is not hearing testimony and especially will not entertain evidence from the Bar, thus the reason why I will reject that argument.

- [8] The second point argued by Counsel for the Plaintiff pertains to whether the Defendant has a right of property in question or a right to proceeds of sale of her undivided share only. Counsel referred article 817-1 of the Civil Code which states that *"When property whether moveable or immovable is transferred to two or more persons, the right of co-ownership*

shall be converted to a claim to a like share in the proceeds of such property.” That essentially means that as per the present case since the Defendant is a co-owner of the property does not have a right to the property but a right to the proceeds of sale.

- [9] **In Jumeau v Anacoura & Anor.**[1978] SLR 42 it was held that;

“Plaintiff as a co-owner of the land, had no real right over the property, his right being only a personal one, a jus crediti or claim to a share in the proceeds of sale of the land, the right of co-ownership rested only with the fiduciary.”

- [10] Therefore, it is clear that a person’s right in a co-ownership is a personal right which is converted to a claim in the proceeds of sale in the property. This is supported by Article 817-1 of the Code. That means that there is no constitutional question that arises and requires that the case be referred to the Constitutional Court.

- [11] Counsel for the Plaintiff, further argued that when considering the constitutionality of the right of retrocession, one has to bear in mind that and consider that fundamental rights as guaranteed under the Constitution are not absolute. They are subject to derogations prescribed by law and *“necessary in a democratic society”*. The right to property found under Article 26 of the Constitution is subject to such a derogation. That derogation limits the exercise of that right. The right to retrocession is provided for in the Civil Code, which in this case is the prescribed law.

- [12] Therefore, one needs to ask how a right of retrocession is enforced in a democratic society. When one speaks of retrocession it necessarily imply a determination of the rights of co-owners. Retrocession ensures that co-owners are not obligated to join into co-ownership with people not of their choosing. Particularly it seeks to preserve co-ownership of family property. That allows absolute freedom for co-owners to choose who they enter into co-ownership with. In **Bernard Sullivan v the Attorney General & Anor SCA 25 of 2012** the Court of Appeal established a test of constitutionality of legal provisions. This test most commonly known as the Sullivan test provides that fundamental rights are subject to limitations prescribed by law in a democratic society. Actually, it lays down three tests to be applied to determine the constitutionality of legal provisions. These are;

- i. The prescribed law test;
- ii. The “necessary in a democratic society” test and
- iii. The proportionality test.

[13] The first test is satisfied. That is because that test requires that the prescribed law is clear and precise and framed so that its legal complication is foreseeable. In this case the Civil Code in effect is such a law and meets that test.

[14] The second test of what is necessary in a democratic society. Article 49 of the Constitution defines the term democratic society as follows;

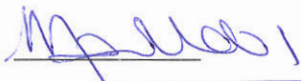
“ a pluralistic society in which there is tolerance, proper regard to the fundamental human rights and freedoms and the rule of law and where there is balance of power among the Executive, Legislature and Judiciary.”

Seychelles is said to be such a society. One of the tenets of this democracy is the observation of the rule of law and that includes the obligation to maintain and implement rights provided under the Constitution. Obviously, right to property as guaranteed under article 26. As per the Sullivan test the right is justifiable restriction in a democratic society. It is clear that the Defendant did not have a right to property but a right to the proceeds of sale only. The Defendant’s right to property is not being restricted in any way.

[15] The third test is the test of proportionality. This test looks at competing rights and to decide which should give way to the other. As stated in the Sullivan case, in some cases a judicial search for a compromise may be possible but in most cases the Court will need to undertake the unenviable exercise to determine which right deserves preference over the other. In this case we need to consider the right to retrocession and the Defendant’s alleged right to property. However, I find that in this case as per article 817-1 the right of the Defendant is limited to a right in the proceeds of sale only and she does not have a real right to property. Therefore, the Defendant’s alleged right to property is misconceived and the Court needs to protect the right of the Plaintiff without denying the Defendant’s right.

[16] I find that the application to refer this case to the Constitutional Court in an effort to enforce a right to property cannot be maintained. The request by the Defendant is frivolous. Therefore, the plea in limine litis is rejected and the Court shall proceed to hear this case on its merit.

Signed, dated and delivered at Ile du Port on 31st May 2021



Vidot J