

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2022...] SCSC 599

CS. No MC 56/2013

In the matter between:

Innocence Francis Leonel

(rep. by Ms. K. Domingue)

Petitioner

and

Marie-Ange Hyacinth Turner

(ex-parte)

1st Respondent

Jean-de-Dieu Leonel/Pascal Leonel

(represented by Mr. E. Chetty)

2nd and 3rd Respondents

Leonard Leonel

(represented by Mr. E. Chetty)

4th Respondent

Louis Arsene Leonel

(ex-rate)

5th Respondent

Alex Leonel

(ex-parte)

6th Respondent

Neutral Citation: Innocence Francis Leonel v Marie-Ange Hyacinth Turner & Ors (MC No. 56/2013) [2022] SCSC 599

Before: Andre JA - Sitting as a Judge of the Supreme Court.

Summary: Co-owned land –division in kind – permission to build/*droit superficie* –Article 821 of the Civil Code (Cap 79)

Heard: 30 May 2022 (last mention date)

Delivered: 7 July 2022

ORDER

The following Orders are made:

- (i) The petition is granted with the subdivision as prayed for by the petitioner to the portions proposed by quantity surveyor Joalene Sinon on 26 May 2016, (*Exhibit P8*).

- (ii) I further grant the prayer of the 4th respondent and order the 3rd respondent to demolish part of his building that has encroached onto the plot of the 4th respondent.
- (iii) No order as to costs is made given the circumstances.
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JUDGMENT

ANDRE J Andre JA sitting as a Judge of the Supreme Court.

Introduction

- [1] This Judgment arises out of an application for division in kind of Parcel number V 5147 (property) by Innocence Francis Leonel (petitioner) filed on 6 November 2013. The petitioner moves the Court for an order that the land comprised in the property be divided in kind so that the petitioner will obtain his share in the property. The property is co-owned by Marie-ange Hyacinth Turner (1st respondent); Jean-de-Dieu Leonel (2nd respondent usufructuary interest holder on the property), Pascal Leonel (the son of the 2nd respondent and co-owner by the purchase of the share of the 2nd respondent and bearer of permission to build) (3rd respondent); Leonard Leonel (4th respondent); Louis Arsene Leonel (5th respondent); and Alex Leonel (6th respondent).
- [2] The matter proceeded ex-parte as against the 1st, 5th, and 6th respondents. The 2nd and 3rd respondents seek the alleged *droit de superficie* of the 3rd respondent by permission to build should first be taken into account, then the other heirs would be entitled to their shares, in the remaining portion.
- [3] The 4th respondent admits the petition and concedes that it is urgent and necessary that the land in the property be partitioned per the petitioner's entitlement.
- [4] The parties filed written submissions to which due consideration has been given for this judgment.

Background of pleadings and evidence on records of proceedings

[5] The petitioner is one of six children of Leonard Leonel (the deceased). The petitioner prays that the court grants a division in kind of parcel T5147, the property of the deceased which by law the petitioner and his siblings are entitled to as per the Will/Testament of the deceased (*Exhibit P2*). The said Will/Testament of the 31st October 1994 and duly registered on the 26 August 2009 articulated the wishes of the deceased in respect to Parcel V.5147 as follows:

- (i) *Alex Leonel to receive the house and curtilage where the deceased was dwelling;*
- (ii) *Francis Innocence Leonel to receive the house and curtilage of where he is presently dwelling;*
- (iii) *Jean Dedier Leonel the house and curtilage of where he is presently dwelling;*
- (iv) *The remainder of Parcel V.5147 to be shared among his remaining three children.*

[6] On 26 May 2016, quantity surveyor Joalene Sinon submitted a proposed division in kind (*Exhibit P8*), which factored in the deceased's Will/Testament. As such, Joalene Sinon mapped out the property and has proposed subdivision into six plots, although in unequal sizes.

[7] There are six respondents in the matter, five of which are the petitioner's siblings. The 1st, 5th, and 6th Respondents do not oppose the application and in particular the proposed division of the property into six portions Joalene Sinon's suggestion and prayer thereof by the Petitioner.

[8] The 2nd and 3rd respondents dispute the nature and extent of division that is to be taken.

[9] The 3rd respondent, in particular, is the grandchild of the deceased. In November 2005, a few months before the opening of the succession of the deceased, the 3rd respondent received *permission to build* a dwelling house on parcel V.5147. The said permission to build was given in perpetuity with the right to sell, mortgage, assign and let the said premises with his curtilage as if it were his own. The permission to build was registered

on 6 December 2005. Since the permission to build is perpetual, the 3rd respondent argues that it carries the right to build on any part of the property. In addition to the permission to build, the 3rd respondent received/purchased a share of undivided share from his father, the 2nd respondent (*Exhibit P4*).

[10] Against this background, the 3rd respondent claims that any division in kind, the court may order, must take into account his *droit de superficie*.

[11] As a result of the permission to build, the 3rd respondent is seen to have encroached onto what would be the share of the 4th respondent in what would be the division in kind. Therein, the 4th respondent claims that the 3rd respondent has built on both proposed plots 3 and 5, contrary to the intention of the deceased. It is the submission of the 4th respondent that the intention of the deceased was to allow the 3rd respondent to either renovate and extend the 2nd respondent's house or build his own house next to the 2nd respondent's house. The 4th Respondent further claims that as a result of the exercise of the *permission to build* and contrary to the wishes of the deceased, the 3rd respondent has encroached onto his plot. Moreover, the 4th respondent submitted that the 3rd respondent is in contempt of court when he continued to build on the property contrary to a restraining order of 2 June 2017 in **Leonel v Leonel [2017] SCSC 453**.

[12] For the sake of clarity, the restraining order reads as such:-

“ [7] having given careful thought to the entire circumstances of the case and in the interest of justice and in terms of the equitable powers conferred on this court in pursuance to Sections 5 and 6 of the Courts Act (cap 52), I hereby grant the motion for a Restraining Order to the effect that the Respondent shall cease construction as per planning permission referred to above and also any further constructions and or building works on any other part of the property forthwith pending the full and final determination of the main suit on its merits or until further Order of this Court.”

[13] Against this background, the 4th respondent supports the petition by the petitioner and the proposed subdivision of land as provided by Joalene Sinon. In addition to this, the 4th respondent prays that the Court grants an order to demolish the property that has

encroached onto his portion of the property and built in contempt of the court order (supra).

Legal Analysis and findings

[14] Article 821 of the Civil Code substantively provides as follows/;

“1. In the case of immovable property held in co-ownership, if the fiduciary or a co-owner decided to proceed to licitation, the court may, upon the application of any interested party, order the postponement of the sale for a fixed period, which may subsequently be renewed. In that case, the Court shall instruct the fiduciary or the executor, as to the case may be, who shall be bound by such instructions.

The Court may make such order on two alternative grounds-

1st That greater hardship would be caused by refusing to grant the order staying the proceedings in licitation than by granting it;

2nd That the property may be conveniently and profitably divided in kind amongst those entitled. In that case, the Court, in order to effect such partition, shall decide the manner of partition and the allocation of the divided property amongst the persons entitled.

2. In respect of this article, the procedure laid down in the Immovable property (Judicial Sales) Act, Cap 94, or any law amending or replacing it, shall be applicable.”

[15] Applications for division in kind as indicated by the provisions above are governed procedurally by the provisions of the immovable Property (Judicial Sales) Act (Cap 94), section 107 (2) of which state in the relevant part:-

“2) Any co-owner of an immovable property may also by petition to a Judge ask that the property be divided in kind or, if such division is not possible, that it be sold by licitation”.

[16] The main legal questions to be determined by this Court are as follows:

- (i) Firstly, whether or not the property, Parcel V.5147 can be subdivided into the proposed six plots. This must be considered against the backdrop of permission to build enjoyed by the 3rd respondent, as well as the reserved regime of the applicable succession law (*before the Civil Code of Seychelles Act, 2020*).
- (ii) Secondly, where the property is subdivided into the proposed plots, whether or not there has been encroachment on part of the 3rd respondent onto the property of the 4th respondent. Where such has been the case, the Court will also have to determine whether or not to grant demolition as argued and prayed by the 4th respondent.

[17] The law relating to succession has changed since the onset of the new Civil Code which took effect in July 2021. There is now testamentary freedom without the curtailment of the reserved portion accruing to children of the deceased. However, in this instance, I take note that the succession in question opened in 2006 upon the death of the testator/deceased and to this end, the old regime on succession is applicable.

[18] Under the old regime, there is a reserved portion of the deceased's estate that goes towards his or her children. As the old Article 913 unequivocally provides, where three or more children are surviving the deceased, the disposable portion therein will be no more than a quarter of the estate. In this case, it is to be noted that the property would form part of the estate, and what is disposable therein cannot amount to more than one quarter.

[19] Disposable portion aside, there is also a valid and uncontested Will/Testament of 1994 which was made by the deceased (*Exhibit P2*). As per the Will/Testament, the deceased bequeathed all of the property, Parcel V.5147, to his six surviving children, and expressed how he wished for the said property to be subdivided. The deceased took note of two of his children who had already built on the land and he proceeded to bequeath them those respective plots. At the same time, the deceased is cognisant of one of his children as better suited to inherit the dwelling house the deceased was living in. Finally, the deceased gave the remaining of the property, Parcel V.5147 to his three other children to share equally among themselves.

[20] On the other hand, the deceased had given the 3rd respondent, his grandson, *permission to build/droit de superficie* ‘his dwelling house’ on the property, Parcel V5147. A *droit de superficie* is defined as follows:-

“...the right which a person (the “superficiare”) has on immovable property found on or under land belonging to another person (the “tréfoncier”) who owns the land or under which the immovable property of the superficiare is found. Therefore, a person who has a “droit de superficie” on a property is the owner thereof without being the owner of the land on or under which the immovable property is situated.” (**per Robinson JA in *Monthly v Seychelles Licensing Authority & Another* (SCA 37/2016) [2018] SCCA 44**).

[21] In essence, as per the *Monthly* case, Robinson JA explains a *droit de superficie* as a real right on part of the *superficiare*, which is severed from the right of ownership of the *tréfoncier* (see also ***De Silva v Bacarie* (1982) SCAR 45**). To also state the obvious, the *superficiare* does not own the land on which his or her immovable property lies. This is important to remember as I consider the rights of the 3rd respondent.

[22] Twomey JA in ***Khudabin v Porice & Anor* (SCA 68/2018 (Appeal from CS 2/2017) [2018] SCSC 976) [2021] SCCA 34 (13 August 2021)**, further explains that a *droit de superficie* is a creation of French jurisprudential law which was inherited in our laws and further qualified. Such qualification extends to the consequence on part of the land owner as well as the limitations on part of the constructor.

[23] To begin, ***Juliette v Chang–Leng* (1992) SLR 124**), confirmed that the *tréfoncier* cannot require the *superficiare* to remove an extension built or to vacate the property unless compensation of the construction is paid. This secures the real right on part of the *superficiare*, which carries with it the right to enjoy the use of the land as long as the construction covers the land. Moreover, Perera J (as he then was) in ***Adrienne v Pillay* (2003) SLR 68** held that a *droit de superficie* is an overriding interest where it is registered in terms of section 25 of the Land Registration Act. This position was confirmed by Twomey JA (with the concurrence of Robison JA and Fernando JA as he was then) in ***Cable and Wireless (Seychelles) Ltd v Innocente Gangadoo* (Civil Appeal SCA 14/2015) [2018] SCCA 29 (31 August 2018)**.

- [24] Our jurisprudence has also qualified the *droit de superficie* by taking into account the intention of the parties as an important factor when determining the duration of the said right (see **Ministry of Land Use and Housing v Stravens (Civil Appeal SCA 24/2014) [2017] SCCA 13 (21 April 2017)**). In addition to this, the Court in **Adonis v Celeste, (CS 124/2012**, highlights that a purchaser or successor in title will take the land subject to the *droit de superficie*. This further cements the notion that it is an overriding interest.
- [25] In this instance, and following the jurisprudence laid out above, I am of the view that what the 3rd respondent holds is an overriding interest. I am also of the view that the successors in title of the property, Parcel V.5147 are bound by the *droit de superficie* and therefore cannot ask the 3rd respondent to vacate unless they offer him compensation. I will qualify this finding below.
- [26] Notwithstanding the above, I am not prepared to agree that a *droit de superficie* can be applied to essentially disinherit the heirs of the deceased from their reserved portion. I am also not prepared to accept that a *droit de superficie* can run counter to the intention of the *tréfoncier*. Intention in the context of **Ministry of Land Use and Housing v Stravens** (supra), related to the duration of a *droit de superficie*. In this case, however, the intention of the parties is about what the *tréfoncier* intended when he granted a *droit de superficie*. This intention should have been comprehensible to the *superficiare*.
- [27] It is this court's view that the intention of the parties can be deduced from the permission to build itself, and any other evidence to support the same. From a closer reading of the registered permission to build, it appears what the deceased gave to the 3rd respondent was 'to build his dwelling house'. The evidence on record shows that the 3rd respondent did so, showing his comprehension and concurrence to the same. However, evidence on records also shows that there was not necessarily a designated physical area where the *droit de superficie* was to be enjoyed. Moreover, the evidence on records shows that the 3rd respondent also took the liberty to construct apartment buildings which are now utilized for real estate commercial purposes. This was done on the premise that there was a *droit de superficie*. It was also done on the premise that when the *droit de superficie* was granted, it did not designate the area where the right may be exercised. As such, the

3rd respondent argues that in those circumstances, he had a right to build anywhere on the property, Parcel V.5147.

- [28] The 4th respondent disagrees with the 3rd respondent and submits both in pleadings and in oral evidence that the intention of the deceased was to have the 3rd respondent renovate and extend the 2nd respondent's property (the father of the 3rd respondent). In the alternative to this, the deceased had anticipated that the 3rd respondent would build his dwelling house in the portion of the 2nd respondent's share of the property, Parcel V.5147.
- [29] I accept the testimony and said the argument of the 4th respondent because, in the court's opinion, it reasonably echoes what the permission to build expressly provides with respect to the 3rd respondent's '*dwelling house*'. At the same time, the arguments and oral evidence put forward by the 4th respondent are more consistent with the 1994 Will/Testament of the deceased, where he expressly and unequivocally left the property, Parcel V.5147 to his six children.
- [30] As one might imagine, several challenges ensue where the *droit de superficie* does not designate the physical area where the dwelling house may be constructed. However, the absence of such does not imply that the *superficiare* may build on any part of the land. It is commendable that the drafters of the new Civil Code were cognizant of this, and therefore require that a written agreement of a *droit de superficie* must designate the physical place and area where the right may be exercised (per article 554 (4) (c) (ii) of the Civil Code of Seychelles).
- [31] However, I will not be boggled down by the shortcomings of the old regime on *droit du superficie*. I opine that there must be limits to how far a *droit de superficie* extends on the land in issue. Such limits are capable of being reasonable factoring in the circumstances. Failure of having such limits will otherwise mean that a person who is given a *droit de superficie* may very well cover all the land of the *tréfoncier* in the absence of a clear demarcation of where they ought to enjoy this surface right. It would be absurd to allow this. The Court is always ready to ensure to arrive at a position that is not repugnant to justice to all parties involved.

[32] Based on the above, the court is of the view that while the 3rd respondent enjoys permission to build/*droit de superficie*, it cannot be one which runs contrary to the intention of the deceased. Thus, the intention was for the 3rd respondent to build a dwelling house next to his father's house or in the alternative, extend and renovate his father's house which was already on the property, Parcel V.5147. To go on and build apartment buildings for commercial purposes runs counter to the intention of the *tréfoncier*.

[33] In running counter to this clear intention, I find that the 3rd respondent encroached onto the 4th respondent's portion of the property, Parcel V.5147 as pleaded and amply supported by the testimony on records as analyzed above. I further find bad faith in how the 3rd respondent conducted himself after an order was given by this Court in **Leonel v Leonel [2017] (SCSC 453)** to *cease* all construction until the matter of subdivision has concluded. The 3rd respondent proceeded to continue with construction in contempt of court.

Conclusion

[34] In the light of my above legal analysis and findings on evidence, I order as follows:

- (i) The petition is granted with the subdivision as prayed by the petitioner to the portions proposed by quantity surveyor Joalene Sinon on 26 May 2016, (*Exhibit P8*).
- (ii) I further grant the prayer of the 4th respondent and order the 3rd respondent to demolish part of his building that has encroached onto the plot of the 4th Respondent.
- (iii) No order as to costs is made given the circumstances.

Signed, dated, and delivered at Ile du Port on the 7th day of July 2022

ANDRE JA - Sitting as a Judge of the Supreme Court.

