

SUPREME COURT OF SEYCHELLES HELD AT ILE DU PORT

Reportable

[2022] SCSC 864

CS92/2020

In the matter between:

Florent Hermenegilde Servina

(Represented by Mr Serge Rouillon)

1st Plaintiff

Graciana Tirant (born Servina)

(Represented by Mr Serge Rouillon)

2nd Plaintiff

Carol Williams

(Represented by Mr Serge Rouillon)

3rd Plaintiff

And

Flory Norbert Servina

(Represented by Ms Dick)

1st Defendant

Frank Ally

(Represented by Mr Basil Hoareau)

2nd Defendant

Neutral Citation: *Servina vs Servina* (CS92/2020) [2022] SCSC 864 (7th October 2022)

Before: Esparon J

Summary: Complaint alleging breach of contract and an action in delict- *Plea in Limine Litis*

Heard: 15th June 2022

Delivered: 7th October 2022

ORDER

Plea in Limine Litis- the action is prescribed in terms of Article 2271 of the Civil Code of Seychelles Act- *Plea In Limine Litis* is dismissed.

Plea In Limine Litis - the plaint is bad in law since different causes of action have been joined contrary to section 105 of the Seychelles Code of Civil Procedure- *Plea in Limine Litis* upheld and the plaint is dismissed.

RULING

ESPARON J

Introduction

[1] This is an action of which the Plaintiffs alleges that there is a breach of contract regarding a transfer of land against the 1st defendant and an action in tort of which the Plaintiffs alleges that that there were misrepresentation and fraud on the part 2nd Defendant in respect to the said transactions.

The Pleadings

[2] For the purpose of the stage of the proceedings that this ruling is concerned this court will rehearse the relevant averments in the pleadings relevant to the *Plea In Limine Litis*.

[3] The Plaintiffs avers Paragraph 4 of the Plaint that the 1st defendant with full Knowledge of the legal status of B1399 informed the 1st and 2nd Plaintiffs that the 3rd Plaintiff was residing on title B1399. 1st defendant told the 1st and 2nd Plaintiffs that the late Marguerite Servina made a verbal promise to transfer B1399 to the 1st defendant without any proof of fact.

[4] The Plaintiffs aver in Paragraph 5 of the Plaint that the 1st and 2nd Plaintiff came to a decision without accepting what their brother had told them and agreed to transfer their undivided rights to the 1st defendant on strict condition that the 1st defendant to thereafter transfer B1399 to his daughter the 3rd Plaintiff.

[5] The plaintiffs aver in paragraph 6 their Plaint that by two identical transfers of undivided shares In title B1399 dated 26th July 2012 prepared, executed and registered by the 2nd

defendant, 1st and 2nd Plaintiffs transferred their undivided shares to the 1st defendant and thereby the whole of B1399 to the latter.

[6] The Plaintiffs in Paragraph 8 of the Plaint avers that the 2nd defendant was at all material times in correspondence with the 1st defendants and the 3rd Plaintiff particularly by email communication around April 2016 where he even prepared and sent a blank power of Attorney document to the 3rd Plaintiff for her to appoint someone to represent her for the eventual transfer in Seychelles and the latter was assured by the 2nd defendant of getting B1399 registered in her name subject to a restriction against on selling the property.

[7] The Plaintiffs avers in Paragraph 9 of the Plaint that in breach of the agreement between the Parties herein the 1st defendant failed to transfer B1399 to the 3rd Plaintiff and instead fraudulently transferred it elsewhere for his private gain on the 21st July 2016 without informing the Plaintiffs.

[8] Paragraph 10 of the Plaint, the plaintiffs aver that the Plaintiff only found out about the fraudulent transactions in August 2019 whilst on a telephonic conversation with the 1st defendant after 1st Plaintiff made enquiries about the status of 3rd Plaintiff and about title B1399. It was then that the 1st defendant declared to the 1st Plaintiff that the 1st defendant does not owe the Plaintiffs anything and that B1399 belongs to him. That the 1st plaintiff then visited the land Registry and was shocked to find that B1399 was registered in the name of Mrs Melisa Sharon Crutzen.

[9] The Plaintiffs avers in paragraph 15 of the Plaint that as a result of the gross misrepresentation, breach of agreement and fraud of the defendants jointly and severely; namely;

- a) 1st defendant failing to transfer B1399 to the 3rd Plaintiff as agreed with the Plaintiffs; and
- b) the misrepresentation, fraudulent statements, and failures by the 2nd defendant to ensure that B1399 was transferred to the 3rd plaintiff as stated by the 2nd defendant when the 1st and the 2nd plaintiffs signed the land transfer of their shares in Title B1399.

[10] The 1st defendant has filed his defence whereby he has raised a point of law in his *Plea In Limine Litis* namely;

- i) The plaintiffs' action challenging the valid and registered title of B 1399 dated 26th July 2012 is prescribed in terms of article 2271 of the civil code of Seychelles.

[11] On the other hand Counsel for the 2nd defendant filed his defence and raised 4 points of law in his *Plea In Limine Litis* namely;

- i) The Plea is bad in law since different causes of action have been joined contrary to Section 105 of the Seychelles Code of Civil Procedure Act.
- ii) The suit ought to be struck out against the 2nd defendant as it discloses no reasonable cause of action against the 2nd defendant.
- iii) The Plea ought to be dismissed against the 2nd defendant in accordance with section 92 of the Seychelles code of civil procedure as it is frivolous or vexatious.
- iv) Further the Plea ought to be dismissed against the 2nd defendant under the inherent Powers of the Court on the ground that it is frivolous or vexatious or an abuse of the Court's Process.

[12] On the last mention date Counsel for the 2nd defendant informed the court that he has abandoned the 2nd, 3rd and 4th point of law raised in his *Plea In Limine Litis* and that he is only proceeding on his 1st *Plea In Limine Litis* namely that the Plea is bad in law since different causes of action have been joined contrary to section 105 of the Seychelles Code of Civil Procedure. Hence this Court shall only deal with the 1st point of law raised by the 2nd defendant in his *Plea In Limine Litis* in this ruling. The parties to the case have also agreed to proceed by way of written submissions.

Plea In Limine Litis of the 1st Defendant.

Submissions of Counsels

- [13] As for the point of law raised by the 1st defendant namely that the Plaintiffs action challenging the valid and registered title of B 1399 dated 26th July 2012 is prescribed in terms of article 2271 of the Civil Code of Seychelles Act. Counsel for the 1st defendant relied on the Article 2271 of the Civil Code of Seychelles act which provides that all actions are prescribed by 5 years except as provided by articles 2262 and 2265 of this Code.
- [14] Counsel for the 1st defendant submitted that the right of action by the plaintiffs was triggered in July 2012 and exhausted in July 2017 by virtue of the 5 year limitation rule contained in Article 2271 since the present action was only filed on 22nd September 2020.
- [15] Counsel for the 1st defendant further submitted that since the Plaintiffs' Action does not seek a real right but rather to invalidate a transfer which falls under the applicable prescription period of 5 years provided under Article 2271 (1) of the Civil Code of Seychelles Act rendering filing of the Action out of time by 3 years.
- [16] Learned Counsel for the 1st defendant relied on the Authority of Nourice and Ors V/S Nicette CS 57.2015, Reddy and Ors V/S Ramkalawan CS NO. 97/2013.
- [17] Counsel for the Plaintiffs submitted to the Court that the 1st Plaintiff found out about the fraudulent transactions in August 2019 whilst on a telephonic conversation and the 1st Plaintiff made inquiries about the status of the 3rd Plaintiff and about title B1399. Counsel for the Plaintiffs relies on the case of Voysey V/S Government of Seychelles SCA 12 of 1995.
- [18] Counsel for the Plaintiffs also relied on the case of Gummery V/S Ernestine case no. SCA 5/2014 Where the Court held that where the matter Concerned property it is Article 2262 that applies and hence subject to a twenty years prescription.
- [19] Counsel for the Plaintiffs also relied on the case Lazarus Estates LTD V/S Beastly (1956) 1QB702 whereby the Court was careful not to find fraud unless it is distinctly pleaded and proved and once it is proved it vitiates the Judgments or contracts and all transactions whatsoever and hence Counsel for the Plaintiffs submits that since the pleadings in the case concerns one of a clear fraud allegation which unravels everything if proved by evidence and hence the Court should not dismiss the Plaint based on prescription.

The Law

- [20] Article 2271(1) of the Civil Code of Seychelles Act provides that ‘all actions shall be subject to prescription after a period of five years except as provide in Articles 2262 and 2265 of this code’.
- [21] Article 2262 of the Civil code provides that ‘ All real actions in respect of rights of ownership of land or other interest therein shall be barred by prescription after 20 years whereby the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.’
- [22] Article 2265 of the Civil Code of Seychelles Act provides that ‘If a party claiming the benefit of such prescription produces a title which has been acquired for value in good faith, the period of prescription in article 2262 shall be reduced to ten years.

Determination

- [23] In the case of Attorney- General v Robert (CS 428/1995 (1997) SCSC 17 (29TH October 1997), Counsel for Defendant raised the point of law arising on the plea of prescription “*on the basis that the Plaintiff has sued on the contract where the five years period of prescription is applicable under article 2271 of the Civil Code, but he conceded that the point of law should fail if it is decided by the Court that the action of the Plaintiff is real action in respect of rights of ownership of land or other interests therein*”. The Court concluded on this point raised:

“I am satisfied that on the Plaintiffs' pleadings and the admissions by the defendant it is established that the action before this Court is real action in respect of the Plaintiffs' right of ownership acquired by a purported purchase of parcel S 365 established by exhibits P1 and P4 for valuable consideration. Hence the period of extinctive prescription applicable to the instant action is 20 years which has not yet elapsed since the offer and acceptance and the presumed sale dates back to the year 1986. I therefore deny the Defendant's point of law.”

- [24] In the Case of Yves Maurel V/S and Ors V/S Mary Gears and Ors Civil Side no 30 of 2015 Esparon J. Stated ‘It should also be noted that there is a distinction between action in respect of rights of ownership of land (droit reel) and action to recover the value of the property (droit personnel/droit de creance). Where the action is for the latter, a prescription of 5 years may apply, The Court in the Case relied on the case of **Reddy & Ors v Ramkalawan (CS 97/2013) [2016] SCSC 31 (26 January 2016); Albert v St Jorre (2002) SLR 30; Gayon v Collie (2004-2005) SCAR 67; Armand Khany & Others v Leonel Cannie (1983) SLR 65; Nourrice & Ors v Nicette (CS 57/2015) [2016] SCSC 208 (29 March 2016)**)
- [25] This Court has considered the submissions of Counsel for the Plaintiffs and Counsel for the 1st defendant on this issue. This Court takes cognizance of the above referred case law referred to in paragraphs 23 and 24 above of this ruling and this Court holds since the action before us is one of breach of contract against the 1st defendant and also one of action in delict/tort namely alleging gross misrepresentation, fraudulent statements and failure by the second defendant to ensure B1399 was transferred to the 3rd Plaintiff. Hence the Action is one of an action to recover the value of the property (droit personnel/droit de creance which is prescribed by 5 years as opposed to an action in respect of rights of ownership of land (droit reel) which is not the case here.
- [26] Since this Court has ruled that the said action is prescribed by 5 years and since the action challenging the validity of the registered title was dated 26th July 2012 and the action was only filed on 22nd July 2020, then what would be the faith of the plaintiffs since the time period of 5 years has elapsed since the registration of the deed of transfer.
- [27] *The case of Camille v Government of Seychelles (CS 8/1997) [1998] SCSC 21 (14 December 1998)* which followed the decision in the case of *AG v Voysey (SCA 12/1995) [1996] SCCA 5 (05 July 1996)* where the Court held that;

“There is no statutory provision that confers power on the Court in this jurisdiction to postpone the accrual of a right of action because of ignorance of the Plaintiff of the material facts relating to the cause of action”.

[28] The case of AG v/s Voysey (SCA 12/1995) is also an authority whereby the Court held that the right of action may not accrue if the facts were fraudulently concealed by one of the parties. The Court in the case of *Camille v Government of Seychelles* (supra) further stated in obiter regarding the case of *AG v Voysey* decision;

“Ayoola JA stated, albeit obiter, in the case of Voysey stated that –

*Normally, a right of action accrues when the essential facts exist and, barring statutory intervention, does not arise with the awareness, for instance, of the attributability of the injury to the fault of the other party, **unless there has been fraudulent concealment of facts.** The date of manifestation of damage may be specifically made the commencement of a right of action.*

[29] *In Hanbury on Modern Equity (8th edition) dealing with equity in relation to the Statute of Limitations, the author states the following on page 307;*

*‘The doctrines of laches and acquiescence in the case of purely equitable claims, substituted by equity for the statutes of limitation as deterrents to the tardy assertion of rights unless one of those statutes had expressly included equitable claims within its orbit. In the case of legal claims, or even of equitable claims which it would regard as analogous to legal claims, equity rigidly enforced the observance of the statutory periods. But one important reservation equity permitted to itself. **If there had been fraud on the part of the defendant, and the Plaintiff did not discover it, through no fault of his own, until the statutory period had elapsed, equity would consider that the period had not begun to run until the date of its discovery.***

[30] At paragraph 10 of the Complaint the plaintiffs aver that the Plaintiff only found out about the fraudulent transaction in August 2019 whilst on the telephonic conversation with the 1st defendant and when the Plaintiff visited the land Registry to verify and she was shocked to find out that B1399 was registered in the name of Mrs. Melisa Sharon Crutzen.

[31] At Paragraph 15 of the complaint, the Plaintiffs aver as a result of the gross misrepresentations, breach of contract and fraud of the defendants.

[32] Base on the averments in paragraph 30 and 31 of this ruling, this Court finds that since there is an allegation that seems to be fraudulent concealment of material facts or an allegation of fraud, in this case the manifestation of the damage or the discovery of the fraud may be specifically the Commencement of a right of action as highlighted above in the case of AG v/s Voysey (SCA 12/1995 and Camille v Government of Seychelles (CS 8/1997) [1998] SCSC 21 (14 December 1998).

[33] Hence this Court holds that the commencement of the right of action would have started in August 2019 when the Plaintiff only found out about the alleged fraudulent transaction. Therefore the Plaintiffs' action is not prescribed by law. Hence this court dismisses the *Plea in Limine Litis* of the 1st defendant.

[34] Furthermore since fraud or concealment of material facts needs to be proved it would be unfair to bar the Plaintiffs to continue with their action at this stage.

Plea In Limine Litis of the 2nd Defendant

[35] As regards to the point of law raised by the 2nd defendant namely that the Plaintiff is bad in law since different causes of action have been joined contrary to section 105 of the Seychelles Code of Civil Procedure Act, Counsel for the second defendant relied on Article 105 of the Seychelles Code of Civil Procedure and submitted that it is clear from the reading of section 105 of the Seychelles Code of Civil Procedure that one of the conditions for the joinder of different causes of action in the same suit, is that the causes of action must be between the same parties. In other words, different causes of action cannot be joined in the same suit if they are between different parties. This is known as misjoinder of causes of action.

[36] Furthermore Counsel for the 2nd defendant submitted to the Court that in the present case Counsel for the Plaintiffs has joined two different causes of action, against different parties namely a cause of action for breach of contract against the 1st defendant and secondly an action in delict on the grounds of allege gross misrepresentation and fraudulent statements against the second defendant only and refers to paragraph 5, 9 and 15 of the Plaintiff in support of his submissions.

- [37] Counsel for the 2nd Defendant submitted to the Court that the two causes of action could not have been joined in the same suit since they are between different parties.
- [38] Counsel for the 2nd Defendant relied on the Authority of Andre V/S Jupiter SCA 19/ 2018 and submitted to the Court in the light of the authority that since the 2nd defendant has raised as part of his defence, the issue of misjoinder of causes of action as a plea in Limine and therefore the Court ought to dismiss the plaint on the ground of misjoinder of causes of action.
- [39] On the other hand Counsel for the Plaintiffs without admitting that the plaint discloses 2 causes of action in the same suit submitted as regards to this issue that section 105 clearly allows the Court to have a discretion to allow different causes of action to be tried together as it saves time and wasted cost and courts time in going over the same facts in separate proceedings.
- [40] Counsel for the Plaintiffs relied on section 107, section 109, section 110, section 111 and section 112 of Seychelles Code of Civil Procedure without addressing section 105 of the Seychelles Code of Civil Procedure which is the issue in lite in the present case.
- [41] Counsel for the Plaintiff relied on the case of Hortense V/S Songoire SCA 36/2017 whereby the Court joined a notary to the suit in accordance with section 112 of the Seychelles Code of Civil Procedure since Mr Wilby Lucas is an interested party whose presence may be necessary in order to adjudicate upon and settle questions involved in the case. In this case the Appellants claimed that Respondent and Mr. Wilby Lucas acted in fraud of her rights.

The Law

- [42] Section 105 of the Seychelles Code of Civil Procedure deals with joinder of causes of action and provides that *‘Different causes of action may be joined in the same suit, provided that they be between the same parties and that the parties sue and are sued respectively in the same capacities but if it appear to the Court that any of such causes of action cannot be conveniently tried or disposed of together, the Court may, either of its own motion or on the application of the Defendant, order separate trials of any of such*

causes of action, or may make such other order as may be necessary or expedient for the separate disposal thereof, or may order any of such causes of action to be excluded, and may make such order as to costs as may be just”.

Determination

[43] It is very clear that section 105 of Seychelles Code of Civil Procedure when it comes to joinder of causes of actions that in principle joinder cannot be raised *proprio motu* by the Court and hence Counsels have to raise it on behalf of their clients to join parties to their pleadings. If the Courts were to do that, they would be juxtaposing themselves in the places of parties and this would be unethical. This Court takes note that no necessary application for joinder was made by Counsel for the Plaintiffs.

[44] Furthermore, although joinder of causes of action is permitted under Section 105 of the Seychelles Code of Civil Procedure, the proviso thereunder stipulates that it should satisfy three conditions which are that the *causes of action should have arisen between the same parties. Secondly, that the parties should sue and be sued in the same capacities and thirdly that it should appear to the Court that such causes of action can conveniently be tried or disposed of together in the same suit.*

[45] The Plaintiffs have averred in paragraph 15 of the Plaint that as a result of the gross misrepresentation, breach of agreement and fraud of the defendants jointly and severely ; namely;

- a) 1st defendant failing to transfer B1399 to the 3rd Plaintiff as agreed with the Plaintiffs; and
- b) the misrepresentation, fraudulent statements, and failures by the 2nd defendant to ensure that B1399 was transferred to the 3rd plaintiff as stated by the 2nd defendant when the 1st and the 2nd plaintiffs signed the land transfer of their shares in Title B1399.

[46] The Plaintiffs avers in Paragraph 9 of the Plaint that in breach of the agreement between the Parties herein the 1st defendant failed to transfer B1399 to the 3rd Plaintiff and instead

fraudulently transferred it elsewhere for his private gain on the 21st July 2016 without informing the Plaintiffs.

[47] I have meticulously considered the submissions of Counsel for the Plaintiffs and Counsel for the 2nd defendant, based on paragraph 9 and 15 of the Plaint as referred in paragraphs 43 and 45 of this ruling, this Court finds that the Plaint contains two different causes of action against two different parties in the same suit namely an action for breach of contract against the 1st defendant and an action in delict/tort against the 2nd defendant alleging misrepresentation, fraudulent statements, and failures by the 2nd defendant to ensure that B1399 was transferred to the 3rd plaintiff as stated by the 2nd defendant when the 1st and the 2nd plaintiffs signed the land transfer of their shares in Title B1399.

[48] This Court holds that since the Plaint contains two different causes of action against different parties in the same suit, it cannot be conveniently tried or disposed of together. The case of *Hotense V/S Songoire SCA 36/2017* relied upon by Counsel for the Plaintiffs should be distinguished from the present case since in *Hortense (supra)* the plaintiff disclosed only one cause of action in the suit as opposed to the present matter whereby the Plaint discloses two causes of action in the same suit.

[49] In the case of *Andre v/s Jupiter SCA 19/2018*, the Court of Appeal quoted with approval paragraph 15/1/6 of the Supreme Court Rules 1979 which reads –

“Objection to Misjoinder of Causes of Action – Where the Plaintiff has not obtained the requisite leave and so has improperly joined several causes of action in the same action, the Defendant may enter a conditional appearance and apply to set aside the writ.

If the Defendant takes a step in the action without raising the objection, he waives the irregularity, (Lyoyd v. g. W. etc., Dairies Co., [1907] 2k. b. 727. C. A., explaining Pilcher v. hinds, 11 Ch.D. 905); but the objection may be taken after appearance before taking any step (hunt v. Worsfold, [1896] 2 Ch.224). it is too late to object at the trial (Re Deborn (1888). 58 I.T.519)”

On the basis of paragraph 15/1/6 of the Supreme Court Rules 1979, the Court of Appeal observed that –

“30. In the light of Section 105 of the Code of Civil Procedure and English authorities mentioned above, Counsel for the Appellant ought to have raised the issue of misjoinder of causes of actions as a *Plea in Limine Litis* and had he done so, the suit ought to have been dismissed or set aside on the ground of misjoinder of causes of action”.


[50] *The Case of Yves Maurel and Ors V/s Mary Gears and Ors civil side CS 30 of 2015 followed the decision in the case of Andre v Jupiter SCA 19/2018.*

[51] In the present case, the 2nd Defendant have raised the issue of misjoinder of causes of action as a *Plea in Limine Litis* and the Plaintiffs have not made any Applications for joinder of causes of action and hence following the principles in the case of Andre V/S Jupiter SCA 19/2018 and the case of Yves Maurel and Ors V/S Mary Gears and Ors Civil side No. 30 of 2015. I accordingly uphold the first *Plea In Limine Litis* of the 2nd Defendant as I find that the Plaint is not maintainable in law.

[52] As a result of the upholding of the *Plea In Limine Litis* of the 2nd defendant, I accordingly dismiss the Plaint.

[53] This Court makes no further Order as to cost.

Signed, dated and delivered at Ile du Port on 7th October 2022


Esparon J

