

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2022] SCSC 930  
CS106/2020

In the matter between:

**THE ESTATE OF THE LATE**

**MARC BENOITON**

**Represented by its joint executors, Mervin Renaud**

**And Jose Renaud**  
*(rep. by Charles Lucas)*

**1<sup>st</sup> Plaintiff**

**MERVIN RENAUD**

**2<sup>nd</sup> Plaintiff**

**And**

**JOSE RENAUD**

**3<sup>rd</sup> Plaintiff**

**and**

**LORENZA NILOUFER BENOITON**  
*(unrepresented)*

**1<sup>st</sup> Defendant**

**AYESHA ROSALIND BENOITON**  
*(unrepresented)*

**2<sup>nd</sup> Defendant**

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**Neutral Citation:** *The Estate of the Late Marc Benoiton and Ors v Benoiton and Anor* (CS 106/202) [2022] SCSC 930 (26 October 2022).

**Before:** Pillay J

**Summary:** Rectification of Land Register - Fraud

**Heard:**

**Delivered:** 26<sup>th</sup> October 2022

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**ORDER**

- (1) *The Registrar of Lands shall cancel the registration of the Defendants' Affidavit of Transmission by Death and remove the joint names of the Defendants as co-proprietors of Title V9598 on the Land Register.*

- (2) *The Land Registrar shall enter the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as co-proprietors of Title V9598 of the Land Register.*
- (3) *The first and second Defendants shall jointly pay the second and third Plaintiff the sum of SCR 25, 000 at the legal rate.*
- (4) *Costs of this suit are awarded to the Plaintiffs.*

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## JUDGMENT

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### PILLAY J

[1] By way of a Plaint dated 17<sup>th</sup> September 2020 the Plaintiffs seek against the Defendants the following:

- a) *an order instructing the Registrar of Lands to cancel the registration of the Defendants' Affidavit of Transmission by Death and to remove the joint names of the Defendants as co-proprietors of Title V9598 on the Land Register.*
- b) *to instruct the Land Registrar to enter the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as co-proprietors of Title V9598 of the Land Register.*
- c) *to pay the 1<sup>st</sup> Plaintiff the sum of SCR 100, 000 and the 2<sup>nd</sup> and third Plaintiffs jointly the sum of SCR 200, 000 plus interest at the rate of 12% from February 2020 and costs of this suit.*

[2] The Plaintiffs aver in paragraph 6 of the Plaint that:

*...the Defendant knowingly, purposefully and fraudulently resisted to cancel the joint Affidavit of Transmission by Death in order for the 1<sup>st</sup> Plaintiff to administer the estate of the deceased. As a result, thereof Title V9598 has been alienated from the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and have impeded the 1<sup>st</sup> Plaintiff from completing the*

*administration of the estate of the deceased by transferring Title to the joint names of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as provided for in the Will and Testament.*

[3] The Plaintiffs further averred in paragraph 8 that:

*As a result of the fraudulent acts of the Defendants, the Plaintiffs have suffered prejudice loss and damage for which the Defendants are jointly and severally liable to make good.*

[4] The loss was particularized as follows:

- |    |   |                        |
|----|---|------------------------|
| a) | <i>frustration of the process of administration of the estate of the deceased</i>                                 | <i>SCR 100, 000.00</i> |
| b) | <i>loss of enjoyment of land and opportunity as proprietors of Title V9598 and continuing unto judgment date</i>  | <i>SCR 100, 000.00</i> |
| c) | <i>moral damage for anxiety, prejudice and inconvenience caused by the Defendants' continuing fraudulent acts</i> | <i>SCR 100, 000.00</i> |

[5] The first Defendant admitted to having sworn an Affidavit of Transmission by Death averring that herself and the second Defendants are the sole heirs of the deceased and having Title V9598 registered in their joint names. She claimed that the reason they did this was a result of the deceased wanting to change his Last Will following an argument he had with the third Plaintiff.

[6] The second Defendant failed to file a statement of Defence and the matter proceeded ex parte against her.

[7] Called on her personal answers the first Defendant stated that she was indeed the heir of the deceased as she is the niece of the deceased. She admitted to filing an affidavit of transmission by death on the death of her uncle Marc Benoiton, praying that she be entered along with her sister as joint owners by virtue of her uncle's intestacy.

[8] The facts of the matter are that deceased passed away on 8<sup>th</sup> January 2016. Thereafter on 31<sup>st</sup> January 2019 the Defendants signed an affidavit by transmission that they were entitled to the ownership of parcel V9598 and no other person is entitled to the same. The same was registered on 22<sup>nd</sup> July 2019.

[9] The Will was transcribed and registered on 2<sup>nd</sup> April 2019 with the relevant donations reading as follows:

*I give devise and bequeath the whole of my estate being a terrace house and a plot of land surveyed as parcel V9598 and all my interest therein, which terrace house is situated on same parcel, at Roche Caiman, Mahe, Seychelles, as follows:*

- (i) to Mervin Michel Nicole Renaud and Jose Vincent Renaud, the bare ownership of the plot of land and the terrace house thereon, jointly and in equal shares:*
- (ii) to my wife, Solange Agnette Benoiton, the usufructuary until her death in the house and the land thereof.*
- (iii) I hereby direct that the property including the house and the land parcel shall not be sold to any third party but shall remain for the heirs of both Mervin Michel Nicole Renaud and Jose Vincent Renaud.*

[10] On 10<sup>th</sup> February 2020 The Master appointed Mervin Renaud and Jose Renaud as joint Executors of the estate of the deceased Marc Benoiton.

[11] The issue is whether the Court can order the Registrar of Lands to cancel the registration of the Defendants' Affidavit of Transmission by Death and to remove their joint names as co-proprietors of Title V9598 on the Land Register and instead instruct the Land Registrar to enter the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as co-proprietors of Title V9598 of the Land Register.

[12] Section 89 of the Land Registration Act reads thus:

*(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.*

*(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or fault.*

- [13] In order for the Court to order the rectification then the Court has to be satisfied that there was fraud as alleged by the Plaintiffs.
- [14] As was found in the case of **Katz v Ward & Anor (CS 11/2015, CS 12/2015) [2017] SCSC 780 (04 September 2017) (Renaud v Ernestine and anor [1979] SLR 121, Bason v Bason (2005) SLR 129** “where fraud is alleged a higher degree of probability is required but not so much as is necessary in a criminal case”.
- [15] In **Bason v Bason & Ors (CS 17/1992) [2005] SCSC 3 (27 May 2005)** the Court held that “As regards the standard of proof in civil proceedings to prove a criminal act such as fraud, it is no higher than the standard of proof ordinarily required namely, on a balance of probabilities.
- [16] The first Defendant filed submissions and took the position that her Affidavit of Transmission trumps the Will in that the Will was never registered and the procedures in the Land Registration Act was not followed.
- [17] The first Defendant referenced Article 895 of the Civil Code of Seychelles which reads thus:

*A will is an act whereby the testator makes a disposition of the whole or part of his property to take effect upon his death, with power to revoke.*

- [18] She also referred to Article 913 of the Civil Code of Seychelles:

*Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he*

*leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915-1.*

*Nothing in this Article shall be construed as preventing a person from making a gift inter vivos or by will in terms of article 1048 of this Code.*

- [19] I fail to see the relevance of the above mentioned Article to the facts of this case. Neither of the Defendants are the children of the deceased. They are the deceased nieces. They are not reserved heirs under the provisions of Article 913 of the Civil Code.
- [20] Furthermore they cannot be next in line to succeed as the provisions of Article 750 of the Civil Code apply for intestate succession meaning that the Defendants could only have been next in line to succeed if the deceased died without a Will which he did not.
- [21] The first Defendant argues that the provisions of Article 1039 of the Civil Code are applicable. What she seems to suggest is that all the dispositions in the will are null as a result of the late Marc Benoiton's wife passing away before him.
- [22] The provisions of Article 1039 of the Civil Code are as follows:

*Every testamentary disposition shall be null if the person in whose favour it was made does not survive the testator.*

- [23] What this essentially means is that provisions relating to the particular person who dies before the testator becomes null. The whole will is not nullified unless that particular person was the only beneficiary under the will in which case the rules of intestacy would then apply. But this is not the case here. Only the bequest to the deceased wife who did not survive him is null. The other bequest to the Plaintiffs remain valid. They simply inherit the whole of the property as opposed to only the bare ownership had the deceased wife still been alive at the time of his demise.
- [24] The first Defendant further argues that section 72 of the Land Registration Act states that:

*(1) When a proprietor dies the person who under the will or the law relating to succession on intestacy, as the case may be, are entitled to any land, lease or charge registered in the name of the deceased proprietor shall, upon production and filing*

*of an affidavit by them in the prescribed form, be registered as the proprietors of the land, lease or charge for the interests and in the shares shown in the affidavit.*

*(2) The person or persons registered under this section shall hold the land, lease or charge subject to any liabilities, rights or interests which are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same but for the purpose of any dealing shall be deemed to have been registered as proprietor or proprietors thereof with all rights conferred by this Act, on a proprietor who has acquired land, a lease, or a charge, as the case may be, for valuable consideration.*

- [25] What she misses in the opening sentence of subsection 1 above is that if a proprietor dies, the person who “under the will or the law relating to succession on intestacy, as the case may be...” shall file an affidavit and be registered as the proprietor of the land. It is not a matter of first come, first served, but a matter of alternatives. If the deceased died testate, then the person who will file the affidavit and be registered as proprietor will be the person who inherits under the will. In their case, the Defendants could only have filed an affidavit and be registered as the proprietor if they had inherited under the intestacy rules if the deceased had died intestate which he did not.
- [26] It strikes me that the first Defendant in her submissions is throwing everything at the wall in an attempt to see what sticks.
- [27] The first Defendant insists that the deceased wanted to change his Will, however he never did on the evidence on record. The only evidence of this alleged intent is the testimony of the first Defendant along with a letter supposedly signed by the deceased. It is noted that the signature of the deceased on this letter dated 27<sup>th</sup> July 2015 is substantially different to his signature on the transfer of land dated 2<sup>nd</sup> February 2010. It is further noted that the letter is dated a few days before the first Defendant became the fulltime carer of the deceased.
- [28] For his part counsel Camille stated that he was informed by the first Defendant of this supposed intent.

[29] Furthermore the first Defendant averred that she personally approached the third Plaintiff and advised him to go with his brother the third Plaintiff to the lawyer who made the Last Will and Testament to start the process to have the property registered in their joint names.

[30] Therefore in the absence of clear evidence of the revocation of the Will it remains valid.

[31] I find support for the above finding in Article 1035 of the Civil Code which provides thus:

*A will shall only be revoked, wholly or in part, by a subsequent will or by a notarial document containing a declaration of a change of intention.*

[32] On a balance of probabilities I find that the first Defendant knew and the second Defendant ought to have known that the deceased had drawn up a Will and that the Plaintiffs were beneficiaries under the Will when they went and registered their interest in the land, swearing that they and no other was entitled to the property. They could not and should not have taken it upon themselves to register themselves as co-owners of the land. They should have sought legal advice and challenged the Will in the proper manner.

[33] On the basis of the above I find that the Defendants did indeed fraudulently transfer the property in question on to their names. With that said the transfer by way of Affidavit by Transmission on Death is null and void.

[34] Having found that the Defendants acted fraudulently, in accordance with section 89 above I order the rectification of the register by cancelling the registration of the Defendants Affidavit of Transmission by Death.

[35] With regard to the claim for damages, I find that there is insufficient evidence of the manner in which the Defendants frustrated the process of administration to the value of SCR 100, 000.00. All the second Defendant said in that regard is that he felt as if their hands were tied as executors.

[36] Nor is there sufficient proof of loss of enjoyment of land and opportunity as proprietors. The second Plaintiff testified that they lived in the house after the deceased death. There is no evidence that they vacated the house at any point in time.



[37] In terms of moral damage for anxiety, prejudice and continuing inconvenience caused by the Defendants' continuing fraudulent acts it was the second Plaintiff's testimony that they felt depressed every day. The second Plaintiff testified that the first Defendant would come and harass himself and his brother at times but they did not bother themselves with her as they "knew this would go away." Noting their demeanour neither the second nor the third Plaintiff seemed particularly upset or anxious as a result of the Defendants actions. However I would agree that the process has been an inconvenience to them in addition to the first Defendant's total refusal to transfer the land to them as it became clear that they were indeed the heirs under the will. I find that a sum of SCR 50, 000.00 is reasonable given the circumstances.

[38] I therefore make the following orders:

- (1) *The Registrar of Lands shall cancel the registration of the Defendants' Affidavit of Transmission by Death and remove the joint names of the Defendants as co-proprietors of Title V9598 on the Land Register.*
- (2) *The Land Registrar shall enter the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as co-proprietors of Title V9598 of the Land Register.*
- (3) *The first and second Defendants shall jointly pay the second and third Plaintiff the sum of SCR 50, 000 at the legal rate.*
- (4) *Costs of this suit are awarded to the Plaintiffs.*

Signed, dated and delivered at Ile du Port on ..... 26<sup>th</sup> October 2022 .....

