

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC ...

CC66/2021

YOUSUF DARWISH

(rep. by Brian Julie)

1st PLAINTIFF

HEATHER DARWISH

(rep. by Brian Julie)

2nd PLAINTIFF

and

ECO VILLAS

DEFENDANT

Represented by Adrea Colluci

(rep. by Serge Rouillon)

Neutral Citation: *Yousuf Darwish & Anor v Eco Villas* (CS 66/2021) [2018] SCSC (30 January 2023).

Before: Vidot J

Summary: Contract, breach, failure to deliver. Wrong party being sued; privity of contract.

Heard: 03 and 04 October 2022

Delivered: 30th January 2023

ORDER

Plaint dismissed; Wrong party being sued.

JUDGMENT

VIDOT J

The Claim

- [1] The suit concerns an alleged breach of contract. The Plaintiffs were at all material times clients of the Defendant who is involved in the importation and assembling of pre-fabricated wooden houses. The house was to be assembled and ready for habitation on the Plaintiffs' property. The terms and conditions associated with this transaction and assembling the house were couched in a contract date 20th December 2018 (Exhibit P13)
- [2] The price for the purchase and delivery of the house was Euros Eighty-Four Thousand Four Hundred (€84,400.00). The parties also agreed that an additional sum of Euros Twenty Four Thousand, three Hundred and Sixty Five (€24,365.00) as additional payment to local sub-contractors. The Plaintiffs states that to date they have made payment of 80% for commencement of the project. It is not clear from the pleadings if that 80% payment includes payment for the €24,365.00).
- [3] The Plaintiffs also claim that the Defendant breached the agreement as a result of which they claim to have suffered loss and damages amounting to €91,565.00 (SR1,616,122.25) moral damage of SR25,000.00 making a total of SR1,641,122.25 and they pray for that sum from the Defendant with interest and cost. As a result of such alleged breaches the Plaintiff by letter dated 22nd March 2021 informed the Defendant that they were suspending the contract as a result of failure to account for all monies received as noted below.
- [4] The Plaintiffs aver that breaches include failure, refusal and neglect to implement the project and the Defendant failed to produced invoices, receipts, import permits as proof of expenses for the project. The Plaintiffs also aver that the Defendant further requested for payments for which 80% of the contract price which they had already made and 20% of the total of the project cost outstanding even before importing the materials for the house.

The Defence and Counter-Claim

- [5] The Defendant/Counter-Claimant (hereafter “the Defendant”) filed a defence and counter-claim. The counter-claim makes a claim for damages for the sum of €39,300.00. The Defendant prays that the Court dismisses the Plaint and order judgement in their favour in the said sum quoted on the counter-claim. They also pray for an Order that the parties be ordered to continue with the contract as amended by external interventions and changes beyond their control. They admit that there has been delay in the implementation of the project but blames this on the Covid 19 pandemic and that the Seychelles Authorities have implemented new requirements which has increased its cost and that since the house could not be shipped it is impossible to provide documentary evidence of shipping and such extra charges were communicated to the Plaintiffs who were advised of the extra charges that was payable due to increased cost due to an increased price in materials.
- [6] The Defendant alleges that the project was approved by the Seychelles Planning Authority (“the SPA”) with no conditions to be fulfilled that were not put before the SPA in the project details. They deny that an additional payment of €24,365 representing payment to local contractors or that the Plaintiff has already made payment of 80% of the total cost to commence the project. They aver that they were always willing to carry out the terms of the agreement. The Defendant nonetheless deny that the Plaintiffs have made payments for items paid especially the remaining 20% of the contract price due after delivery of works on the project as alleged by the Plaintiffs.
- [7] The Defendant claims that the newly imposed regulation by the Seychelles Authorities has placed them under extra burden. Cost of the project has increased substantially. These costs include treating the wood for a second time upon arrival in Seychelles and new protection guidelines as to treatment of grounds and the foundation against termites. Therefore, they claim that the extra costs demanded are justified and such extra costs arose out of external circumstances and these extra costs are particularised in the counter-claim. The Defendant is ready and willing to commence construction to these subject extra costs.
- [8] The particulars of extra costs are:

| | | |
|-----|---|------------|
| (a) | balance for house project 20% | €16,800.00 |
| (b) | Pressure treatment under new state regulations | €5,500.00 |
| (c) | Packaging of house elements for shipping | €500.00 |
| (d) | increase in shipment cost | €5,500.00 |
| (e) | Extra materials to complete the house | €6,000.00 |
| (f) | Factory storage of the house deposit | €3,000.00 |
| (g) | Extra costs for new regulations for site assembly | €2,000.00 |
| | Total | €39,300.00 |

Response to Counter-Claim

[9] In answer to the counter-claim, the Plaintiffs state that they do not want to engage in any further dealings with the Defendant as the Defendant is involved in similar disputes with other clients and the fact that the Defendants keep asking for additional sums despite payment of 80% of the total cost of the project. They state that payment was effected long before the Covid-19 pandemic and that they were misled into believing that the house was ready for shipment and furthermore that the Defendant has not produced any proof of payment to the supplier despite various requests, written and verbal from the Plaintiffs. The Plaintiffs further state that after the last payment the Defendant did not communicate to the Plaintiffs. The Defendant has also not issue them with any receipt of payment for purchase and shipment of the house.

Wrong Party Being Sued

[10] I wish to note that Counsels were given ample time to file submissions. Counsel for the Defendant filed his submission on 24th October 2022. It is sad to note that Counsel for the Plaintiffs filed none.

[11] In his submission, Counsel for Defendant submitted that the Plaintiffs file the suit against the wrong Defendant. It is clear from the Contract (Exhibit P13) that it was signed between the first Plaintiff and Eco Villas Ltd Seychelles. The suit is filed against Eco Villas. I have doubts as to whether Eco Villas is a legal entity, but be that as it may Eco Villas is for legal purposes a different entity to Eco Villas Ltd. Seychelles. It is clear from Article 1165 of the Civil Code that contracts shall only have effect as between the contracting party and that they shall not bind third parties. Eco Villas was not a contracting party to the agreement.

[12] Counsel for the Defendant relied on section 109 of the Seychelles Code of Civil Procedure (“SCCP”) which provides thus;

“All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. And judgment may be given against such or more of the defendants as may be found to be liable, according to its respective liabilities without any amendment.”

Counsel also referred to section 110 of the SCCP which provides;

“The plaintiff may at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.”

[13] The attention of the Court was also drawn to section 146 of the SCCP which reads;

“The court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that a plaint shall not be amended so as to convert a suit of one character into a suit of another and substantially different in character.”

In this case, Counsel for the Plaintiffs made no application for joinder or amendment of the Plaint to replace the Defendant with another with legal capacity. It is unfortunate and

disappointing that despite the Court on more than one occasion alerting Counsel for the Plaintiffs of that probable mistake, Counsel chose to ignore Court's advice to the detriment of his clients. En passant I will also note that the second Defendant was not a party to the contract and therefore could not sue on that contract.

- [14] In the case of **Madeleine v NDEA SCA 31 of 2017**, the court referred to the Ugandan case of **Sempasa v Sengendo (MA 557 of 2013) [2013] UGHCCD 108** wherein the trial judge said;

“Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by mention or summons or at the trial of the suit in a summary manner.”

Apart from the above, adding or striking off a party to pleadings, whether on application of the parties or on the court's own motion, it is the discretion of court. Like all discretion, however, it must be exercised judiciously based on sound principles.”

Determination

- [15] In failing to amend the pleadings in order to identify the real Defendant, Counsel for the Plaintiff failed his clients. Therefore, since the Defendant as per the agreement is not properly identified, the Court is left with no option but to dismiss the Complaint.
- [16] The counter-claim is too in the name of Eco Villas as opposed to Eco Villas Ltd. Seychelles. As has already been said, Eco Villas was not party to the agreement, therefore, this Court cannot grant its claim under the counter-claim which is hereby dismissed.
- [17] Each party shall bear its own cost.

Signed, dated and delivered at Ile du Port on 30 January 2023

Vidot J