

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC ...66
MA 162/2022
(Arising in 48/2022)

LEONARD GILL
(rep. by Aldrick Govinden)

Applicant

and

CHRISTOPHER GILL
(rep. by Alexia Amesbury)

1st Respondent

DANKY GILL
(rep by Alexia Amesbury)

2nd Respondent

Neutral Citation: *Leonard Gill v Christopher Gill & Anor* (MA 162/2022) [2023] SCSC...
66..... (31 December 2020).

Before: Vidot J

Summary: interlocutory injunction, Articles 304 and 305 of the Civil Code of Seychelles

Heard: Counsels filed written submission

Delivered: 27 January 2023

ORDER

Application granted; interlocutory injunction imposed

RULING

VIDOT J

Background

[1] The Applicant has moved this Court for an interlocutory injunction. The Applicant has filed a Complaint against the Respondents praying for several Orders. The dominant issue in contention between the parties concerns parcel PR5617 which used to belong to the

Applicant. On 2nd June 1992, the Applicant granted a General Power of Attorney (“the POA”) to the first Respondent to act as his agent and which POA was registered on 09th January 1995.

[2] It is alleged that by virtue of a purported agreement dated 14th June 2018 and registered on 30th June 2021, the first Respondent purportedly sold and transferred parcel PR5617 into his name and that of the second Respondent, who is the first Respondent’s wife, by using the POA. The Applicant states that the second Respondent was aware that the first Respondent was not under the POA authorised to sell and transfer the said land title. The Petitioner and the first Respondent are brothers.

[3] The purported sale consideration for the transfer of the aforesaid land parcel was SR300,000.00 which is alleged was never paid. It is averred that the sale was unlawful in that;

- (i) The Applicant has never given the first Respondent any written authorization or otherwise to the Respondent to sell and transfer parcel PR5617 or any share therein,
- (ii) The POA is couched in general terms only and only covers acts of administration, and;
- (iii) The POA does not expressly grant any power relating to the sale or any other act in respect of the ownership of parcel PR5617.

[4] The Applicant has prayed to Court for the following Orders;

- (a) An Order declaring the Agreement between the parties dated 14th June 2018 and registered on 30th August 2021 as null and void
- (b) An Order declaring that the first and second Respondents are not owners of parcel P5617 nor have any propriety interest therein;
- (c) An Order declaring that he is the sole owner of parcel PR5617;

- (d) An Order notifying the Registrar General to rectify the land register accordingly and record the Petitioner as the sole owner of parcel PR5617 and that the Respondents do not hold any interest in the said land parcel; and
- (e) To order costs of this action against the Respondents in favour of the Applicant.

The Notice of Motion for Injunction

- [5] In a supporting affidavit attached to the Notice of Motion, the Applicant rehearsed the averments listed here above but adds that he has been advised by his Attorney that this Court has power to make an order inhibiting, until final determination of the main case CS48 of 2022, any dealings with land parcel PR5617. He also adds that should his application be denied, he will suffer more inconvenience and hardship than the adverse party Fshould the Court grant the same.

Answer to Notice of Motion

- [6] In response the Respondents filed an Answer in reply raising pleas in limine litis as follows;
- i. The Applicant fails to state under which section of the law the Application is being made;
 - ii. The Applicant fails to disclose whether he has a prima facie and if so, what that case is. The Applicant has not disclosed a prima facie case;
 - iii. The Applicant fails to disclose the balance of convenience; there should be a balance between the convenience caused to the Applicant and the balance of inconvenience caused to the Respondents if the injunction is granted, this is not disclosed;
 - iv. The Applicant fails to disclose the nature of irreparable loss or injury to be caused to him if the injunction is not granted; an irreparable injury if caused, would imply that no amount of monetary compensation can

restore the party to its position before the suit was filed. A temporary injunction is used as a preventive measure against an irreparable loss.

[7] A clear mention of the purpose of the cause that has led to the filing of the suit is not disclosed.

Injunctions; The Law

[8] An interim injunction is unlike any other matter, an equitable remedy. This means that in theory the party seeking an injunction must comply with usual basic equitable requirement, for example coming with clean hands and that there is no delay. The application is being made in pursuance to Section 304 of the Seychelles Code of Civil Procedure.

[9] **In D’Offay v The Attorney General (1975) SLR 118**, it was held that in matters of injunction, although the application is made pursuant to section 304 of the Seychelles Code of Civil Procedure, this court should be guided by precedents of the courts of England. It was held in **Pickwick International Inc. (G.B) Ltd v Multiple Sound Distributors Ltd. (1972) 1WLR 1213** that there was no requirement that the writ be served on the Defendant prior to the hearing. This same approach is echoed in **France Bonte v Innovative Publication (1993) SLR 138**.

[8] An interim injunction is granted at the discretion of the Court. In the case of **American Cyanamid Company v Ethicon Ltd. [1975] AC 396**, it was held that in dealing with interlocutory injunctions, the court shall be guided by 3 considerations;

- (a) whether there is a serious question to be tried,
- (b) Inadequacy of damages to either side; and
- (c) that on the balance of convenience an interim injunction should be granted

These are the same considerations considered in **Techno International v George SSC 147/2002, (31st July 2002), Laporte & Anor v Lablache [1956-1962] SLR No. 41** and **France Bonte vInnovative Publication (supra)**.

Discussions

(i) The Respondent's Answer

[9] Firstly, I wish to note that the Respondents filed answer addressing the pleas in limine only. The Answer states that “*Response on merits Reserved*”. The acceptable practice in this jurisdiction is that the merits of a suit, petition or application have to be addressed together with any pleas in limine. Though, there is failure on the part of the Respondents to have filed a response on the merits this Court does not consider such to be fatal.

[10] However, I note that the Respondents failed to attach affidavit to the Answer. That makes the Answer to the Notice of Motion praying that the injunction is not granted incompetent. There should have been affidavits sworn by the Respondents. Such affidavits would have served as evidence of the Respondents in this case. The Court relies on the affidavits of parties as sworn evidence to make a reasoned decision. An affidavit is in fact a statement of evidence and therefore subject to the law of admissibility of evidence. This was confirmed by Twomey CJ in **Elmastry & Anor v Hua Sun MA 195/2019 (arising in CC13/2014)[2020]SCSC35(09 January 2020)**.

[11] I note that there are three incidental demands arising from case CS48/2022. These are MA140/2022, which is an application for Security for Cost, MA98/2022, an application for an Order of Inhibition in respect of PR5617 and MA162/2022 which is the subject of this Ruling. The Respondents filed Answers in response to MA48/2022 together with Answer in this present case and attached thereto several documents as exhibits, some of which I consider not to have any connection or relevant to this case. It is not the Court's duty to sort out documents pertinent to this case amongst the bundle of exhibits produced and this Court refuses to embark on such a task.

The Applicant's Application

[12] Despite considering the Answer to the Notice of Motion incompetent, I shall be evaluating the application on its merits and see whether it can be maintained and the Court can uphold it based on matters which I consider pertinent only.

Failure to Quote provisions of Law applicable

[10] I shall first consider the issue of failure of the Applicant to quote provisions of the law under which the application is made. Counsel for the Applicant argues that the application is in conformity with of Form 17 Schedule C of the Seychelles Code of Civil Procedure ("the SCCP"). Section 328 of the SCCP states that "*[T]he forms set forth in Schedule C, with such variation as the circumstances of each case require, shall be used for respective purposes therein mentioned and where no form for any proceeding is given, they shall be looked upon as models and followed so far as possible, according to the requirements of the case.*" Counsel for the Applicant quoted **Hoareau & Anor v Karunakaran & Ors. SCA 3 of 2017**[2017] SCA 33 (18 September 2017) where in Fernando JA remarked;

"A motion is a request for action by the Court, citing the legal authority that allows the court to take action while an affidavit is a sworn statement that sets forth the facts that support the motion. It is trite law that civil procedure rules are enacted to govern the methods and practices used in civil litigation. In view of the mandatory provisions of section 118, I am of the view that an affidavit cannot complement the motion."

[11] My interpretation of those remarks made by Fernando JA is not saying that the Motion should not identify the provisions of the law under which an application is being made. The forms in the SCCP just provide a general format as to how Notice of Motion should be set out but it is necessary that they are adapted to particular circumstances of the case. It makes it more complete to quote the provisions of the law under which the application is made. Form 17 states that the Motion needs to "*state the subject matter of the intended motion*". Though the SCCP does not provide a definition of that phrase, to my mind, in stating the subject matter, the Motion has to provide clear indication as to provisions of

the law under which the application is made. However, I do not consider that omission to be fatal. This is because the Motion clearly states that this is an application for injunction. It is well known that such application is made pursuant to section 304 and 305 of the SCCP. In the Notice of Motion, the Applicant made it clearly known that they are seeking an injunction pendente lite to prevent the Respondents from;

(a) Entering or executing any further dealings in relation to parcel PR5617; and/or

(b) Signing or registering any instrument that will affect the use and/or ownership of parcel PR5617.

Failure to make out a serious case and triable issue

[12] This Court finds that the Notice of Motion and affidavit is lacking in that it does not, to the satisfaction of this Court, fully address the issues to be considered in an application for relief of injunction. The Notice of Motion should clearly states the ground of the application being made and address the issues to be canvassed. Counsels leave these to be addressed in the affidavit. The affidavit should address the facts. However, it has been the accepted practice here, which I feel should change, that the Notice of Motion merely states the application being made without more and leave other matters to be included in the affidavit and which sometimes do not fully address the relevant issues. Since it is customary to accept Notice of Motion and affidavit in the form presented in this application, I will allow it in the format presented but I hope that Counsels take note and do things differently.

[13] The affidavit does not address the issue of serious question to be tried in an explicit manner but reference is made to it. There is need for counsel to be attentive to these issue and deal with them in a concise manner. However, the gist of the application is clear from averments of the affidavit of the Applicant. It is abundantly clear that the Applicant seeks to challenge the sale and transfer of Parcel PR5617 to the Respondents by using a general power of attorney as opposed to sale subject to a specific or special power of attorney. This is to be found in paragraphs 6 and 7 of the affidavit. The Respondents' position I

presume is that not only was the sale done pursuant to the POA but equally pursuant to a purported agreement dated 14th June 2018.

[14] Base on the above, I find that there will be a trial on the merits of the case and the Court is satisfied that there is a serious question to be tried. In fact in **Delorie v Dubel [1993] SLR 193** Perera J noted that the House of Lords in **American Cyanamid v Ethicon Ltd (supra)** changed the requirement that the applicant shows that he has a prima facie case and held that “*it was not necessary for the Plaintiff to establish a prima facie case to succeed, but that it was sufficient if there was a serious issue to be tried*”. In the **American Cyanamid** case Lord Diplock states thus;

“It is not part of the Court’s function at this stage of the litigation to try and resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately deponed nor to decide difficult questions of law which call for detailed argument or mature considerations. These matters are dealt with at the trial.”

In **Delorie v Dubel** Perera J went on to say; “[T]he ascertainment of a “serious question to be tried” necessarily involves at least a cursory examination of the conflicting claims of the parties short of deciding the issues in the case. Although the House of Lords disapproved of the need for the Plaintiff to establish a prima facie case in practice by requiring the Court to determine whether there is a “serious question to be tried” the same requirement is maintained in an indirect matter.” In the present case, this Court has adopted similar standard in coming to the conclusion that there is a serious question to be tried.

Balance of Convenience

[15] Again I find that the affidavit of the Applicant does not identify the balance of convenience sufficiently, but he has addressed it and the Court cannot just ignore that these averments are present in the affidavit. I also note weakness in the submission of Counsel for the Respondents in not addressing the point effectively. It is not sufficient to just state that it is pleaded. It is clear that should the injunction not be granted, the Respondents will be able to dispose of the property and it will be lost forever to the

Applicant. However, if refused but the decision of the main suit is decided in favour of the Respondent then at that stage they be at liberty to deal with the property as they so wish.

- [16] In addressing and evaluating the balance of convenience the court considered;
- (a) whether more harm will be done by granting or refusing the injunction,
 - (b) whether the risk of injustice is greater if the injunction is granted than the risk of injustice if it is refused and
 - (c) whether the breach of the Applicant's rights would outweigh the rights of others.

[17] In making this assessment, I consider that if the injunction is not granted, the Applicant will suffer more and that is mainly because he may not recover the land parcel if he wins the main suit. I also conclude that there is greater risk if the injunction is refused. That again has to do with the possibility of the Respondents transferring the land to a third party as opposed to the Respondents delaying any projects they had had for the property and the Respondents are also known to have other properties. That follows that since a breach of the Applicant's right outweighs the right of the Respondents considering that the suit before Court is that the Respondents had no power to transfer parcel PR5617 into their names.

Irreparable harm and Damage

[18] Irreparable harm and damage that will be caused to either party should the application be granted also be assessed by the Court. It is necessary to consider the actions and conduct of both parties before exercising its discretion whether or not to grant the application. The Court shall also evaluate if the parties can be adequately compensated for any damages suffered should the application be denied. The court shall ensure that any further loss or damage, especially if such will be irreparable, is contained.

[19] I have already noted the damage that will be caused the Applicant. I do not think that he can be adequately compensated should he win the main suit because land does not only hold a monetary value but can have an emotional attachment.

Conclusion

[20] I have carefully considered the Notice of Motion together with the affidavit and find that the conditions of **American Cyanamid Company v Ethicon Ltd.** (supra) are satisfied. I find that the Applicant will suffer greater harm if the injunction is not granted and a serious injustice will be done since the Petition will most certainly not be able to retain ownership of “his” property if it is decided that the sale and transfer were not lawful.

[21] Therefore, I grant an interlocutory injunction pendente lite, ordering the Respondents not to

(a) Enter or execute any further dealings in relation to parcel PR 5617; and

(b) Sign or register any instrument that will affect the use and/or ownership of land parcel PR5617.

I also order the Registrar of Land not to allow the registration of any instrument against the said land until further order from this Court,

Signed, dated and delivered at Ile du Port on 27 January 2023

Vidot J