IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC ..707
CS98/2022

COMMERCIAL HOUSE ONE (SEYCHELLES) LTD **Plaintiff**
(rep. by Frank Elizabeth)

and

EDEN ISLAND DEVELOPMENT COMPANY (SEYCHELLES) LIMITED **1st Defendant**
(rep. by Bernard Georges)

SUPERYATCH SERVICES (SEYCHELLES) LIMITED **2nd Defendant**
(rep. by Pesi Pardiwalla)

Neutral Citation:	*Commercial House One (Seychelles) Ltd v Eden Island Development (Seychelles) Limited & Anor* CS 98/2022) [2023] SCSC 707 (18 September 2023).
Before:	Vidot J
Summary:	Pleas in limine; whether and in what circumstances can such pleas be disposed of before hearing; sections 90,91 and 92 of the SCCP; res judicata and abus de droit
Heard:	parties filed written submission
Delivered:	11 September 2023

ORDER

Pleas in limine upheld; plaint dismissed on grounds of res judicata and abus de droit. Plaintiff ordered to pay cost to the second Defendant

RULING

VIDOT J

Background

[1] The Plaintiff has filed a Plaint in delict against the Defendants praying for damages SR1,500,000.00 with interest and cost.

[2] The parties are all companies registered and incorporated under the Laws of Seychelles.

[3] It is averred that on 06th February 2007, the Plaintiff entered into a lease agreement ("the Agreement") with the Government of Seychelles over land parcel V12708 together with all facilities attached therewith. The Agreement was registered with the office of the Land Registrar on the 09 February 2007. It further stated by the Plaintiff that it was an expressed term of the Agreement that the Plaintiff shall have use of all existing or future erections, buildings and structures or works situated on the Leased Premises or attached facilities thereon or attached facilities thereto including all existing pontoons, moorings, berths and quays or marinas.

[4] The Plaintiff further states that on a date unknown to them, the 1st Defendant entered into an agreement with the 2nd Defendant whereby the latter was allowed to build a marina with floating pontoons, moorings, berths and quays in front of and adjacent to the Leased premises for the purpose of renting the same to boat charters companies and allowed transfers to and from boats and catamarans berth to the floating pontoons on, and through the Leased Premises, to its clients, guests, invitees, staff and employees and/or agents.

[5] It is also averred hat the 1st Defendant does not own, leased or otherwise have control over the sea frontage in front of the Leased Premises and therefore could not have leased, give permission to, or otherwise authorised the 2nd Defendant to build and financially exploit the quay, marina, floating pontoons and berths in front of parcel V12708.

[6] It further averred by the Plaintiff that since the 2nd Defendant does not have planning permission to build and exploit the quay, marina, floating pontoons and berths in front of parcel V12708 and that construction and erection of the development above referred are unlawful is therefore liable to demolition under the law. They also state that as lessee of parcel of the Leased Premises, they should have preference, sole privilege and right to build and utilise a quay, marina, floating pontoons and berths in front of the said land parcel.

[7] It is alleged by the Plaintiff that the 2nd Defendant's clients, guests, invitees, staff and employees and/or agents unlawfully used their property and disturbed their tenants, their businesses and peaceful enjoyment and occupation of parcel V12708. Therefore, the Plaintiff considers this a "faute" for which they claim damages from the Defendants in the sum above mentioned.

[8] Apart from the claim of damages in the sum of SR1,500,000.00 against the Defendants jointly and severally, the Plaintiff also prays to Court to;

(i) Order the Defendants to remove the floating pontoons, marina, berths in front of parcel V12708;

(ii) Failing which, order the Seychelles Planning Authority to issue demolition notice to the Defendants in terms with the Town and Country Planning Act ordering the Defendants to demolish the floating pontoons, marina, berths in front of parcel V12708; and

(iii) Make such further orders as the Court might deem fit and necessary in the circumstances.

The Defences

[9] Both Defendants filed defences. The 1st Defendant filed a defence addressing points of law whilst reserving defence on the merits until the pleas in limine are addressed. The 2nd Defendant however too, raised pleas in limine litis and equally addressed the merits in their defence.

However, for the purpose of this Ruling, the Court shall deal with the points of law only.

The Points of Law

[10] Both Defendants raised res judicata as a point of law. The 1st Defendant objection states that the matter has been determined and disposed of by the Supreme Court and the Court of Appeal in CS112/2011 and SCA 26/2014 respectively.

[11] The 1st Defendant's pleas in limine litis reads;

i. the case has already been determined and disposed of by the Supreme Court of Seychelles in CS112/2011 and the Court of Appeal in SCA 26/2014. To institute proceedings concerning the same cause of action regarding the same subject matter between the same parties before this Honourable Court after having sought redress twice is an *abus de droit* and can only be considered as forum shopping on the part of the Plaintiff;

ii. The present suit is res judicata because the same matter was fully and finally determined through the judgments of the courts. It is, yet further, a breach of the Defendant's right to a fair hearing for the Plaintiff to canvass issues which have been heard and determined in a previous case; and

iii. the Plaint fails to disclose a cause of action.

[12] The 2nd Defendant states as follows;

i. The Plaintiff's claims have been previously adjusted in Civil Side 112 of 2011by the Supreme Court and in Civil Appeal SCA 26 of 2014 by the Court of Appeal, whose judgment of the 21 April 2017 on those claims are final and binding *(res judicata)*;

ii. In any event, the Plaint is an abuse of the process of this Honourable Court in that it seeks to litigate issues which were adjudicated or could have been properly raised in the previous proceedings (i.e. Civil Side 112 of 2011 and SCA 26 of 2014).

The Hearing of Pleas on Points of Law and Striking Out Pleadings.

[13] I note that the parties agreed that the points of law be disposed first rather than at the hearing of the case on the merits (proceedings of 16-11-22 AM) The Court, having considered the pleas found it most appropriate that it would be of benefit to parties to address the pleas first and only hear the matter on the merits if the pleas are not upheld. Section 91 of the Seychelles Code of Civil Procedure ("SCCP") provides that *"[I]f in the opinion of the Court the decision of such point of law substantially disposes of the whole cause of action, ground of defence, set off or counterclaim, the court may thereupon dismiss the action, or make such other order therein as may be just."*

[14] Section 90 of the SCCP provides that by consent of the parties or by Order of the Court, the points of law may be heard prior to hearing the case on the merits. In fact, the section states;

"Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, or by order of court, on the application either party, the same may be set down for hearing and disposed of at any time before the hearing."

The parties to this case agreed that the Court disposes of the points of law prior to hearing the case on its merits. Parties also agreed to settle the points of law by filing written submissions since Court diary is quite full to accommodate hearing of oral submissions. This should have allowed for early disposal of the case.

Res Judicata

[15] The principles governing res judicata are to be found in article 1351 of the Civil Code of Seychelles ("the Code") and for a plea of res judicata to succeed, there must be the threefold prerequisites; identity of the subject matter, cause and parties between the first and second case; see, **Pragassen v Vidot [2010] SLR 163** and **Pillay v Bank of Baroda SCA 28/2001 LC 218.**

Art. 1351 reads as follows;

"The authority of a final judgment shall only be binding in respect of the subject-matter of the judgment. It is necessary that the demand relates to the same subject-matter; that it relates to the same class, that it is between the same parties and that it is to be brought by them or against the same parties and that it be brought by them or against them in the same capacities.

[16] Therefore, the pre-requisites for a successful plea of res judicata are;

i. The claim in the second action is regarding the same subject matter as the first matter;

ii. The cause of action shall be the same as the first action;

iii. The parties are the same as in the first action; and

iv. The previous judgment should be a final judgment of a court of competent jurisdiction.

These are positions adopted in **Nourrice v Assary [1991] SLR 80, Pragassen v Vidot (supra)** and **Gabriel v Government of Seychelles [2006] SLR 169.**

In the present case I opine that the parties are not disputing pre-requisites iii. and iv. The Defendants maintain that pre-requisites i. and ii are also applicable to the case. They state that from the Plaint it is clear that it is the same as the one filed in C.S 112 of 2011 (and dealt on appeal in SCA26 of 2016) in that the subject matter and the cause of action are the same with this present case.

[17] Counsels for the Defendants noted that the rationale behind the res judicata principle was explained in the case of **Georgie Gomme v Gerard Maurel and Ors (SCA 06 of 2010)**. It reads as follows;

"We consider that it is opposite that at this stage we state a few things about multiplicity of litigation. This rule of res judicata provided for in article 1351 of the Civil Code was designed to stop abuses.

It adds; *"the rationale behind the rule of res judicata and its strict application is grounded on public policy requirement that there should be finality in court decision and end to litigation in a matter which has been dealt with in an earlier case....."*

"The proper adherence to the rule of law in a democratic society enjoins one to ensure that one is debarred from rehashing the same issue in multifarious forms. Litigation should be reserved for real and genuine issues of fact and law."

It is vital that there is finality in court decisions and that there is an end to litigation in a matter that has been dealt with in an earlier case. That is in fact the arguments being advanced by the Defendants. As stated, they submit that the case has been settled in CS112 of 2021.

[18] I have had the opportunity to look at the plaint in C.S112 of 2011. I find that that plaint just like the present one is based in tort, alleging several tortious acts against the Defendants in the construction and exploitation of a yacht marina at Eden Island, in front of land parcel V12708 of which the Plaintiff is the leaseholder. The alleged torts represent the what the Plaintiff termed as the unlawful construction and exploitation of the pontoons in front of parcel V12708 and the trespass of the rights of the Plaintiff's property.

[19] I find that Counsel for the 2nd Defendant made an acute observation of the similarity of pleadings in CS112 of 2011 and plaint of this present case. He noted paragraphs 1 to 5 and 7 to 10 (inclusive) of the plaint are in substance the same issues raised by the Plaintiff in CS112 of 2011 (and SCA 26 of 2014). He notes that paragraph 6 of the present plaint raises a new, if subsidiary issue to the effect that the Defendants lacked the permission of the Seychelles Planning Authority in building the marina. However, this issue became a live issue of fact in evidence at the proceedings of the previous case. The reliefs sought in this case are the same at the previous case, albeit that the quantum of damages claimed have now increased.

[20] I agree with Counsel for the 2nd Defendant that the plea of res judicata is not avoided where averments as to the alleged cause of action are formulated differently or where new or related subsidiary issues such as those raise in paragraph 6 of the present plaint, are pleaded

or new heads or other amounts of damages are claimed. Counsels again relied on **Gomme v Maurel and Anor (supra)**, wherein referring to **Henderson v Henderson [1843, 3 Hare 100, 115]** reproduced in the case of **Bradford & Bingley Building Society v Seddon Hancock & Ors [1999] I WLR 1482** held;

"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties of that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward the time."

[21] It is clear that the plaint filed by the Plaintiff is similar as the one filed in CS112 of 2011. The cause and the subject matter are also the same. I don't believe that it is contentious that the parties are the same and that the judgment is SCA 26 of 2014 from the Court of Appeal is a final judgment of a competent court. That being the case, I conclude the case is res judicata which means that the plaint in the present case should be dismissed.

Abuse of Process (abus de droit)

[22] In light of the decision that the present case is identical to the previous case and concluded that it is res judicata, the Court is now being called upon to make a pronouncement as to whether the action of the Plaintiff is an abuse of process. This is the second point of law raised by the Defendants. Courts do frown upon litigants who attempt to file multiplicity of cases under different guises, whereby there is no finality to a case.

[23] **Gomme v Maurel and Anor. (supra)** discusses the principle of abuse process which may be applicable in cases where the requirements of res judicata are not fully met. In fact, in

that case, referring **Bedford & Bingley Building Society v Seddon Hancock & Ors** (supra) noted;

"[i]t is important to distinguish between res judicata and abuse of process not qualifying as res judicata, a distinction delayed the blurring of the two in courts' subsequent application of the above dictum. The former, in its cause of action estoppel form, is absolute bar to re-litigation, and in its issue estoppel form also, save in "special cases" or "special circumstances" see Thoday v Thoday [1964] P.181, 197-198, per Diplock LJ and Arnold v National Westminster Bank Plc [1991] 2 A.C 93. The latter, which may arise where there is no cause of action or issue of estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and the other not to be unjustly hounded given the earlier history of the matter."

It adds that *"[t]hus the abuse of process may rise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between the new parties and/or determination of new issues should have been resolved in the earlier proceedings. it may also arise where there is such an inconsistency between the two that it will be unjust to permit the later one to continue."*

[24] Counsel for the second Defendant noted that **Gomme v Maurel (supra)** discusses the principle of abuse of process which may be applicable where the requirements of res judicata are not fully met and quoting from **Barrow v Bankside Agency Ltd. [1996] 1 WLR 257**, the following;

"The rule is not based on the doctrine of res judicata in a narrow sense (....). it is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that the defendant should not be oppressed by successive suits when one would do. This is the abuse at which the rule is directed."

[25] I found above that this suit is res judicata as the cause of action is similar to that in CS 112/2011 and against the same party. The alleged torts are principally the alleged unlawful construction and exploitation of pontoons in front of parcel V12708 and the alleged trespass of the Plaintiff in the property. However, as regards abuse of process, this case demonstrates such abuse whereby litigation is being prosecuted in a different guise just because the Plaintiff does not accept the decision given in the previous case and as a matter of public policy such cannot be condoned. There is clearly a misuse of the court's procedure which as per **Hunter v Chief Constable of West Midlands Police and Others [1981] UKHL 13**, *"although not inconsistent with the literal application of its procedural rules, would nevertheless, be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.*

[26] It was held in **Republic v Yuan Mei Investment (Prop) Ltd**. that *"abuse of process concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which although not inconsistent with the literal application of its procedural rule, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people."* Having considered the Plaint which is merely rehashing similar facts and claiming similar demands as that in CS112 of 2021, it would indeed be grossly unfair to the Defendants to allow this present plaint to proceed further. The Defendants cannot continue to be embarrassed by such plaint which the previous case (including the appeal) would have put to rest. This case is frivolous and vexatious and ought to be struck out and the suit dismissed. The Court cannot remain unconcerned where its own process is abused by litigants.

[27] In **Anna Jeanne D'Arc Marie-Therese Marzocchi v International School Seychelles [2022] SCSC 708; C.S90/2020**, Dodin J, explained the Court's power to deal with abuse of process as a point of law. At paragraphs [6] and [7] he explains thus;

> *"[6] Learned Counsel submitted further that our law does not contain any express provision which permits the Court to dismiss a plaint on the ground that it is an abuse of process. However, Order 18/19 of the Supreme Court Practice Rules*

provides rules to that effect. Moreover, paragraph 453 of Halsbury's Law of England – Volume 37 states that in addition to its powers under the Rules of the Supreme Court, the Court has an inherent jurisdiction to strike out pleadings and other documents which are shown to be frivolous, vexatious or scandalous, and to strike out or dismiss an action or to strike out a defence which is an abuse of process of the process of the Court"

[7] Therefore, the High Court in England has the power to strike out pleadings on basis that it is an abuse of the process of Court -in accordance with order 19 (1) (d) of the Supreme Court Rules – and to dismiss an action which is an abuse of the process under its inherent jurisdiction. By virtue of section 4 of the Courts Act, our Supreme Court enjoys both powers that the High Court of England has, under Order 19 (1) (d) of the Supreme Court Practice Rules and under the inherent jurisdiction of the Court……"

[28] This Court, therefore rules that the Plaintiff is abusing court processes and such cannot be condoned and the Court has to ensure that there is finality to litigation. Therefore, both pleas in limine succeed.

No Cause of Action

[29] The first Defendant has also raised as a point of law that the plaint fails to disclose a cause of action. However, very superficial allusion was made in regards to the plea. The point was not sufficiently addressed in the submission. Therefore, the Court does not consider it necessary to labour on point of law, though it may refer to it at a later stage.

The Plainitff's Submission

The Plaintiff's Counsel in his submission did not necessarily address that points of law put forth by the Defendants, but went completely on a different tangent and as explained above argued that in this case sections 90, 91 and 92 of the SCCP have applicability. Since the Plaintiff did not answer the points of law and raised arguments as identified herein, the Court decided to give the Defendants the possibility to answer to the Plaintiff's submission. Counsel for the second Defendant informed Court that he did not consider a response

necessary whilst Counsel for the first Defendant filed submission in reply. This explains the further delay in delivering this Ruling.

[30] In answer to the points of law that the Plaint does not disclose a cause of action raised by Counsel for the first Defendant but not adequately or competently argued on in the submission, Counsel for the Plaintiff noted that in a case where the pleading is shown to be frivolous and vexatious, the court may order the action to be stayed or dismissed. Counsel for the Plaintiff has submitted that in the present case neither Defendants have argued that the plaint is frivolous or vexatious. Furthermore, he argues that counsels for the Defendants did not argue that the case does not disclose a cause of action. As stated, Counsel for the first Defendant did in fact raised it as a point of law and though not explicitly submitted on it, addressed the issue when dealing with res judicata. Counsel for the Plaintiff argues that the points of law raised cannot be addressed at this stage of proceedings. He submits that to address the points of law at this stage of proceedings will be premature. The Court has already made findings about such submissions.

[32] Counsel had referred to **Worthington & Co. Ltd v Belton & Ors 18 T.L.R 438**, wherein Lord Justice Romer referring to **Habbuck & Sons v Wilkingson, Heywood and Clark [1899] 1 Q.B 86,** wherein Lord Lindley pointed out that there a two methods of raising points of law; one by raising the question as directed by Order 25 rule 2, and the other, by applying to strike the Statement of Claim under Order 25, rule 4 and said *"[T]he first is appropriate to cases which are plain and obvious, so that the Master or Judge can say at once that the Statement of Claim, as it stands is insufficient, even if proved, to entitle the Defendant to do what he asks."*

[33] The Law as regards points of law as to how they should be approached in couched in section 90, 91 and 92 of the SCCP on which Counsel for the Plaintiff also relied upon. Section 90 of the SCCP states;

"Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial"

This section grants a party the possibility to raise a point of law by his pleadings. This is exactly the position on this case. Both Defendants have raised similar points of law. The section also makes provision that any points of law may be disposed at the trial. However, if there is consent of the parties, or an order of court on application of either party the points of law may be disposed of before the trial. In the present case there was agreement by parties to hear the points of law before the trial and the Court made the appropriate Order that the points shall be disposed in that manner and parties agreed to file written submissions. Therefore, there was nothing illegitimate with the manner in which it dealt with the points of law.

[34] On the other hand, section 91 of the SCCP states

"If in the opinion of the court the decision of such point of law substantially disposes of the whole cause of action, ground of defence, set off or counterclaim, the court may thereupon dismiss the action, or make such other order therein as may be just."

I fail to understand Counsel for the Plaintiff's submission that that section would pose difficulty for the Court to have heard the points of law at this stage of proceedings. Section 91 grants the Court the power to deny or refuse to deal with the points of law at this stage of proceedings. The section definitely does not prohibit the Court from dealing with the points at this stage of proceedings. In this case, the Court finds that is reasonable ground on which to dismiss the action as it is res judicata and an abuse of process. It is absolutely evident this plaint cannot be entertained as expressed above therefore ought to be dismissed.

[35] Counsel for the Plaintiff further relies on section 92 of the SCCP which states;

"The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case, or in case of the action or defence being shown by the pleading to be frivolous or vexatious the court may order the action to be stayed or dismissed, or may give judgment, on such terms as may be just."

[36] In referring to **Worthington & Co. Ltd v Belton & Ors. 18 T.L.R 438**, Counsel for the Plaintiff states that that case provides that there are two methods of raising points of law; one by raising the question as directed by Order 25 r 2 and the other by applying to strike

out the Statement of Claim under Order 25 r 4. The first method it is argued is appropriate to cases requiring argument and careful consideration. The second and more summary procedure, is only appropriate to cases which are plain and obvious, so that the judge can say at once, that the statement of claim as it stands is insufficient, even if proved, to ask the Defendant s to what he asks.

[37] Section 92 of the SCCP grants the Court two options; to strike out pleadings that discloses no cause of action or in case of an action or defence to be shown by pleadings to be frivolous and vexatious, order the action or dismissed. The section does not place a prohibition on taking points of law as per section 90 of the SCCP to have such points of law resolved before hearing on the merits. So, the court decided to hear the points of law in accordance with section 90. It can also be considered that the plaint fails to disclose a cause of action as the cause of action raised is no longer valid and maintainable since other courts (both Supreme Court and Court Of Appeal) had already adjudged on a similar claim against the same parties in CS112 of 2021. This means that the case is res judicata and being such the plaint is frivolous and vexatious. Therefore, the plaint is hereby dismissed.

[38] The second Defendant has prayed for cost in his defence. The Court orders cost against the Plaintiff for the second Defendant.

Signed, dated and delivered at Ile du Port on 18th day of September 2023

Vidot J