SUPREME COURT OF SEYCHELLES

Reportable
CS 21/2020

In the matter between

Edita Virginie LADOUCE **Plaintiff**
(rep. by Mr J. Camille)

and

Julita RATH **Defendant**
(rep. by Ms. A. Benoiton)

Neutral Citation: *Edita Laouce v Julita Rath* (CS21/2020) (16th July 2024)
Before: Judge Esparon
Summary: The plaintiff is seeking an Order from this Court that the said transfer agreement relating to land parcel title LD 504 be declared null and void on account of fraud**.**
Heard: 27th February 2023
Delivered: 15th July 2024

ORDER

The plaintiff is seeking an Order from this Court that the said transfer agreement relating to land parcel title LD 504 be declared null and void on account of fraud- The 2nd Plea In Limine Litis is upheld since the action is prescribed by law and hence the plaint is dismissed with cost.

JUDGMENT

ESPARON J

Background

[1] The Plaintiff and the Defendant are mother and daughter. On the 6th September 2006 a transfer was registered by notary William Herminie transferring a plot of land known as parcel LD504, situated on La Digue, from the Plaintiff to the Defendant.

[2] On the 14th November 2014, the Plaintiff signed an affidavit before Notary Alexia Amesbury for an application on LD 504 claiming an equitable interest on the basis that she was in the process of filing a case for lesion. A case against the Defendant C.S. 02/2016 was subsequently filed in January 2016, which was dismissed due to the cause of action being prescribed. The Plaintiff filed this present case on 19th February 2020.

Pleadings

[3] The Plaintiff avers in her plaint that sometimes in 2006 she had applied for a loan from SHDC with a view to construct a house.

[4] The Plaintiff avers at paragraph 6 of her plaint that the defendant had opted and offered to take over repayment of the loan on condition that once the loan is repaid, the Plaintiff was to make arrangements with her with a view that she may get an interest in land title LD504, to the agreement of the parties.

[5] She further avers that sometime after the 6th September 2006, the defendant took the Plaintiff to the offices of Attorney William Herminie, on Mahe and get her to sign documents which the plaintiff was advised and verily believed to be documents relating to the agreement referred to in paragraph 6 above.

[6] The Plaintiff further avers in her plaint that in 2016 she came to know through one of her son namely Derrick Ladouce that she had purportedly transferred to the defendant the land parcel LD 504 and purportedly reserved the usufructary interest in the said parcel for her own benefit, for a consideration sum of Rs 150,000.

[7] The Plaintiff avers in paragraph 10 of her plaint that the purported transfer referred above and the condition contained therein, was induced by fraud and accordingly is null and void ab initio on account of the said fraud.

[8] The Plaintiff prays this Hounorable Court that the said transfer agreement relating to land parcel title LD 504 be declared null and void on account of fraud.

[9] The defendant in this matter filed her defence and raised two plea In Limine Litis as well as filing her defence on the merits.

[10] The plea In Limine Litis raised by the defendant are as follows;

i) The matter before the Court is frivolous and vexatious and an abuse of the Court's process as it is the second claim concerning the same matter already disposed of which could have agitated in a previous action, Edita Ladouce v Julita Rath (born Ladouce) CS. 02/2016. The Plaintiff had previously filed a case on the grounds of lesion in 2016 against the defendant in relation to the same property and arising out of the same transaction.

ii) The action is one under fraud and is time barred under article 2271 of the Civil Code of Seychelles as the Plaintiff was aware of the transfer since 2014 when she filed the caution at the land Registry and thus, it should not be entertained by this Honourable Court and ought to be dismissed.

Analysis and determination

[11] This Court shall first deal with the plea In Limine Litis namely as regards to the Defendant's plea that the matter is frivolous and vexation and an abuse of process of Court. According to Counsel a vexatious claim is one that is a sham and amounts in effect in harassing the opposite party and put a party to unnecessary trouble and expenses in opposing a wholly unmeritorious litigation and relied on the case of R V Agathine (CO 38/2005) (2007) SCSC 128 (21 June 2007).

[12] As regards to the issue of abuse of process of Court, counsel for the defendant submitted that since it is a second set of proceedings filed under the same event notably the signing of the transfer of land, it amounts to the principles of res judicata, issue of estoppel and abuse of process would apply. Counsel relied on Halsbury's Laws of England, 5th edition, vol 12 paragraph 1166, the case of Henderson v Henderson (1843) 3 Hare 100, 67 ER 313, the case of Gomme V Maurel SCA 6 of 2010 (2012) SCCA 28, the case of Bradford & Bingley Building Society.

[13] Counsel submitted to the Court that the rule of law is meant to ensure that is debarred from respect of them: Gomme (Supra)

[14] Counsel further submitted that as the previous case was not on the same cause of action but as a result of the same matter, with no new discoveries between the two cases this plaint is squarely within the realms of abuse of process.

[15] On the other hand, counsel for the Plaintiff relied on Article 1351 of the Civil Code and submitted to the Court that the requirements set out under Article 1351(2) has not been met in relation to their objection namely the plea of res judicata and as such the Court must dismiss their objections.

[16] As regards to the 1st point of law that the action of the Plaintiff is Frivolous and vexatious, and an abuse of process of Court, in the case of **Kivanga Estate Ltd versus National Bank of Kenya Ltd Civil Appeal No. 217 of 2015**, it was observed that;

"An action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense."

[17] As to whether the case is an abuse of process of Court, this Court shall consider case laws both locally and in other jurisdictions. In the case of Gomme V/s Maurel, Court of Appeal 6/ 2010, the Court relied on the case of Bradford and Bingley Building society V/S Sedon Hand Cock and Org (1999) 1 WLR 1482 where the Court held ;

> *'The rule of abuse of process encompasses more situations than the three requirements of res- Judicata. Courts cannot stay unconcerned where their own processes are abused by parties and litigants. There is a time to decide enough is enough, where lawyers have not advised their clients. Abuse of process will also apply where it is manifest on the facts before the Court that advisors are indulging in various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as harassing parties against whom they have brought actions or others who may not be parties. Courts*

have a duty to intervene to put a stop to such abuses of legal and judicial processes.'

[18] In the case of Bradford and Bingley Building Society (supra) Auld LJ Stated the following;

> *'In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the Courts 'subsequent application of the dictum. The former, in its cause of action estoppel form, is an 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 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not to be unjustly hounded given the earlier history of the matter.'*

[19] In the case of Gomme V/S Maurel (supra) Domah JA stated the following;

> *'Abuse of process is not a new discovery under the rule of law and the Court's control of cases coming to Court. The source of the doctrine of abused of process' may be traced to a 1947 decision of Somervell LJ in Greenhalgh v mallard (1947) 2 All ER 255 at 257. The scope may be found in the following pronouncement of the Court that abuse of process is:*
>
> *…not confined to the issues which the Court is actually asked to decide, but …covers issues or facts which are so clearly part of the subject matter of litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.'*

[20] The Court in the Case of Gomme (supra) stated the following;

'So much for the scope. Now for the limit that may be found in what Lord Wilberforce delivering the opinion of the Board of Brisbane City Council V Attorney General for Queensland (1979) AC 411 at 425, stated when he confined it to its ' true basis' the prohibition against re-litigation on decided issues. Abused of process-

…. ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'

[21] The Court held in the above-mentioned case the following;

'To come back to the present Appeal, we have gone through the record of the history of the dispute which started 11 years ago. The decision of the Chief Justice cannot be impugned when he found that the Appellant was engaged in re- litigation. The case of Bradford and Bingley Building society (supra) is pretty clear on this point that even parties who were not originally in the case may be caught by the doctrine of abuse of process if seek a re-litigation of a case which has already decided upon'.

[22] In the case of Ascent Projects (Sey) Ltd V/S Evelyn Fonseka and Ors, CS 19/2017 whereby in this matter a Plea In Limine Litis was raised that the plaint is an abuse of process of Court since identical plaints between the same parties raising the same cause of action were dismissed by this Honoiurable Court in CC 01/2013 and CC 27/2014. The Court in this case relied on the case of Board of Brisbane Council V/s Attorney general for Queens land (1979) AC. 411, 425, the case of DPP V/S Humphrys (1970) A.C 1 at 46 and the case of Hui Ming VR (1992) 1 A.C 34, Judge S Govinden as she was then stated the following;

'Now in the case, this Court based on the above analysis of the facts in line with the rule of abuse of process and its irrelevant criteria as set out by case law both in the Jurisdiction and other relevant Jurisdictions. I find that the Plea in Limine Litis as raised, has no reasonable basis, for

there is no evidence ex-facie the pleadings of any manipulation and or misuse of the process of the Court so as to deprive the defendants of a protection provided by law or to take advantage of a technicality and or that the defendants will be prejudiced in the preparation or conduct of their defense'.

[23] I find that in this matter there is no evidence ex-facie the pleadings of any manipulation and or misuse of the process of the Court so as to deprive the defendants of a protection provided by law or to take advantage of a technicality and or that the defendants will be prejudiced in the preparation or conduct of their defense'(Vide: Ascent Projects (Sey) Ltd V/S Evelyn Fonseka and Ors, CS 19/2017 and hence I find that *the facts are such as not to amount to an abuse* of process of Court. Here we are not in a situation where the defendant is being unjustly hounded by the Plaintiff engaging in re-litigation against the defendant since the case had not been decided on the merits.

[24] As regards to the plea of Res Judicata, this court hereby reproduces Article 1351 (1) of the Civil Code of Seychelles Act which 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 relate to the same subject-matte; that it relate to the same class, that it be between the same parties and that it be brought by them or against them in the same capacities.'

The case of Nourice V Assary (1991) SLR 80, Attorney general V Mazorchi SCA 8/ 1996 LC 312 laid down the four pre-requisites for a successful plea of Res judicata –

(a) The subject matter should be the same;

(b) The cause of action should be the same;

(c) The parties should be the same;

(d) The previous Judgment should be the same

[25] It is not in dispute that in the present matter, the case is between the same parties namely one with the cause of action being based on fraud and the other with the cause of action being 'Lesion' which had been dismissed by the Court. Even though this Court finds that the subject matter between the two suits remains the same which is regarding the sale of the same parcel of land and the parties are the same, this Court finds that the cause of action being different namely in the present matter being based on fraud and the action which was dismissed is based on lesion for a plea of Res judicata to be upheld.

[26] Furthermore, it is not in dispute that in the present matter, the case of that Edita Ladouce V/S Julita Rath (born Ladouce) CS. 02/2016 which was a previous case filed by the Plaintiff with lesion as cause of action was dismissed on the ground of prescription and that the present action concerns the plaintiff asking for a rescision of the contact of sale of land on the grounds of fraud. This Court is of the view that since the CS 2/2016 has not been decided on the merits of the case but rather on a plea of prescription it cannot be said that the principle of res judicata or estoppel would apply in the present matter.

[27] As a result. I accordingly dismiss the plea of Res Judicata and that of abuse of process of Court for the above reasons and further I find that there is no abuse of process of Court.

[28] As regards to the issue as to whether the action of the Plaintiff is Frivolous and vexatious, the plaintiff has averred in her Plaint that the purported transfer referred to above and the condition contained therein, was induced by fraud and accordingly is null and void ab initio on account of the said fraud. The Plaintiff has given evidence that she had only gone to the notary to sign a document giving certain interest to the defendant as regards to the property and not to transfer the whole property to her which she later found out. Without going and deciding on the merits of the case, this Court finds that the facts of the present matter does not show that:

> *the action is without substance or groundless or fanciful to be frivolous nor does is show to be vexatious that it has not been made bona fides and*

is not hopeless nor offensive and certainly this Court finds that such an action does not tend to cause the opposite party unnecessary anxiety, trouble or expense ***(vide:*** **Kivanga Estate Ltd versus National Bank of Kenya Ltd Civil Appeal No. 217 of 2015).**

[29] As regards to the 2nd plea In Limine Litis namely that the action is one under fraud and is time barred under article 2271 of the Civil Code of Seychelles as the Plaintiff was aware of the transfer since 2014 when she filed the caution at the land Registry and thus it should not be entertained by this Honourable Court and ought to be dismissed, Counsel for the defendant submitted that in light of the facts, based on evidence and authorities, the Plaintiff's cause of action is prescribed as the material event, the signature of the document was on the 6th September 2006 and the registration thereof took place on the 18th April 2007.That the caution application and its accompanying affidavit, signed by the Plaintiff is dated 14th November 2014. By virtue of signing an application against LD504, it infers that the Plaintiff knew at least at this time, that she was no longer the owner.

[30] Counsel for defendant further submitted that if the court is to take into account these dates, the computation to the date of filing is as follows;

a. 6th September 2006 – 13 years, 5 months, 14 days
b. 18th April 2007 – 12 years, 10 months, 2 days
c. 14th November 2014 – 5 years, 3 months and 6 days.

at its latest, the plaint was filed 8 years, 5 months and 15 days late and if the benefit of the

doubt is given to the Plaintiff, 5 years, 3 months and 6 days at the earliest.

[31] On the other hand, Counsel for the Plaintiff submitted to the Court that Counsel for the Defendant has objected to the Plaint on the ground that the claim of the Plaintiff is prescribed by virtue of Article 2271 of the Civil Code. He further submitted that Article

2271 relates to prescription of 5 years. Counsel for the Plaintiff submitted that it is the defendant's submission that the signature of the transfer, having been effected on 6th September 2006 and registration of the same transfer having been done on 18th April 2007, would mean that the plaint is prescribed. It is submitted by Counsel for the Plaintiff that this argument is misconceived in law and must be dismissed.

[32] Counsel for Plaintiff cited Article 1304 of the Civil Code stating that the claim is one in fraud. He submitted that the above provisions relate to contractual obligations in general. That in cases relating specifically to real actions in respect to rights of ownership of land, then a different regime of prescription is provided for by virtue of Article 2262 of the Civil Code. He further submitted that the same Article provides that all in rem actions in respect of rights of ownership of land or interest in land are barred by prescription after twenty years. That the Plaintiff in this matter is clearly claiming ownership of LD504. She therefore, benefits from the provisions contained in Article 2262 of the Civil Code.

[33] In dealing with the point of law arising on the plea of prescription, this Court takes note that Article 2271 of the Civil Code of Seychelles Act is subject to the exception in Article 2262 of the said Code.

[34] The Civil Code of Seychelles Act distinguishes between real actions and personal actions. The general rule for personal actions is that they are barred by extinctive prescription of five years after the cause of action arose. Article 2271 of the Civil Code of Seychelles Act stipulates that personal actions are barred by extinctive prescription of five years as follows:

> "All rights of action shall be subject to prescription after a period of five years except as provided in Articles 2262 and 2265 of the code".

[35] A "personal action" has been defined by the Merriam Webster dictionary as "an action brought to enforce or recover a debt or personal duty or damages in lieu of it or damages for an injury to person or property or for the specific recovery of or enforcement of a lien upon goods or chattels."

[36] On the other hand, the general rule for real actions is contained in Articles 2262 and 2265 of the Civil Code of Seychelles Act. Article 2262 of the Civil Code of Seychelles Act reads as follows:

> "All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not."

Hence Article 2262 of the said Code contains a limitation in respect of real actions for rights of ownership of land.

[37] A "real action" has been defined in Stroud's Judicial Dictionary, as "that action whereby a man claims title to land, tenaments or hereditaments, in fee or for life, and these actions are possessory, or ancestral; possessory, of man's own possession and seizing; or ancestral, of the possession or seizing of his ancestor".

[38] Hence a person seeking to enforce a right of ownership of land must have a real or vested right. However, such rights must be enforced within 20 years. Otherwise the person in possession would acquire the land by acquisitive prescription even though "*he can produce a title or not, and whether he is in good faith or not* ''(Article 2262 of the Civil Code of Seychelles Act)..

[39] From the above, it is clear that the contention of counsel for the defendant is that prescription in this case is applicable under Article 2271 while the plaintiff submission is that prescription in this case is applicable under Article 2262.

[40] That being the case of the contention of both parties, however this court takes the view that prescription in this case is found in neither provisions but rather under article 1304 of the same Code. Before we expound on the reason as to why article 1304 is applicable let us for the sake of clarity illustrate with case laws the distinction between action in respect of rights of ownership of land i.e. real action (droit reel) and action to recover the value of the property (droit personnel/droit de creance).

[41] Where the action is for the latter, a prescription of 5 years may apply. It was held in the case of Savy v Rassool (1982) SLR 191 that the right of action for recovery of <u>the purchase price of a transfer of rights in a property</u> was subject to prescription after a period of 5 years. In Hoareau v Contoret (1984) SLR 151, the action was brought to reduce the disposition to the disposable portion pursuant to Article 920 of the Civil Code. It was held that an action for reduction of the disposable portion was an action for recovery of compensation and therefore not an action in respect of rights of ownership in land. Hence the five-year prescription period provided in Article 2271 applied.

[42] Where there is any action relating to rights of ownership of land or other interests therein the former article 2262 of the Code applies. In Khany v Cannie (1983) SLR 65, the plaintiffs were co-owners, and they alleged that the Defendant had usurped their rights and sold the properties under a disguised donation. That was clearly a claim based on right of ownership of property by succession. The plaintiffs there were seeking to enforce a vested right of ownership of land.

[43] I agree with the submissions of Counsel for the Plaintiff to the extent that in cases relating specifically to real actions in respect to rights of ownership of land, then a different regime of prescription is provided for by virtue of Article 2262 of the Civil Code. However, both counsels admitted that the present claim is one of fraud and it is the prayer of the Plaintiff that the Court orders the transfer relating to land title LD504, referred in the plaint be declared null and void on account of fraud by the Defendant. Hence I disagree with the submissions of Counsel for Plaintiff that Article 1304 relates to contractual obligations in general. Article 2262 of the Civil Code is not applicable to an action for nullity on the ground of fraud which is governed solely by Article 1304 of the same Code.

[44] Article 1304 of the Civil Code of Seychelles Act as regards to fraud and action for nullity or rescission of a contract reads as follows;

> "<u>**In all cases**</u> in which the exercise of action for nullity or rescission of a contract is not limited to a shorter period by special legislation, **that action shall be available for five years**. That period shall only run in the case of

duress as from the day that the duress came to an end; **in the case of** mistake or **fraud**, as from the day when they were discovered."

[45] As a result of the above provision of the law, the prescriptive period is 5 years in all cases in which there is an action for nullity or rescission of a contract for fraud. It is therefore also clear that it is applicable to matters involving land.

[46] Counsel for the Plaintiff also cited the case of Gayon v Collie SCA 8/2021, LC 251 where it was held that real actions for rights of ownership in land are subject to the limitation period of 20 years. That it was further held that only those who have a right to claim ownership can rely on article 2262 of the Civil Code.

[47] It is this Court's view that the above case cited differs from the present one in the sense that in Gayon (supra) the Appellants (the plaintiffs in the case) sued the respondent (the Defendant) for loss and damage suffered by them as a result of an alleged failure to transfer a land for a certain price or in the alternative, inter alia to declare that there had been a sale of land by the Defendants to the Plaintiffs alleging rights of ownership of land with no allegation of fraud.

[48] As regards to the present case, it is a contractual one pertaining to a transfer agreement relating to land title LD504 whereby the Plaintiff himself is seeking an action for nullity of the contract on account of fraud by the defendant. In view of article 1117 of the Civil Code, contracts entered into by … fraud shall not be null as of right but shall only give a right to an action for nullity or rescission, and with the operation of article 1304 of the Civil Code such action will be time barred after a period of five years.

[49] It is not in dispute that the transfer agreement between the parties was signed on the 6th September 2006 and registered on the 18th April 2007. This Court notes that the plaint in the present matter was filed on the 19th February 2020 more than 13 years and 5 months from the signing of the parties and 12 years and 10 months from its registration. Since such an action is prescribed by 5 years, the action would have been out of time for evidently being filed more than 5 years from the date of the transfer agreement.

[50] In 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".

[51] The case of AG v 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.''

[52] 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'.**

[53] In this matter since the cause of action is one of fraud, the time starts running from the date of the discovery of the fraud. This Court has perused meticulously the proceedings regarding the evidence in the matter to ascertain at what point of time was the fraud discovered.

[54] At page 28 of the proceedings of the 27th February 2023 relating to the evidence of Travis Ladouce relating to cross-examination by counsel for the defence, I find the following;

Question: How long was that after you went to Herminie that your little brother found the documents? Just clarify.

Answer: it could have been four to five years.

[55] Further at page 45 of the proceedings of the same date relating to the evidence of Arsene Ladouce under cross- examination by counsel for the defence, I find the following;

Question: When you found out that the property belongs to your sister what did you do?

Answer: yes I told my mum

Question: did you tell your brothers and sisters?

Answer: yes I told my brothers and sisters

Question: And this would have been in 2008 and 2009 correct

Answer: Yes

[56] This Court has also perused exhibit D1 being a letter regarding caution against LD504 and there is a caution dated the 14th November 2014 supposedly signed by Edita Ladouce, stamped on the 6th October 2015 and at the back there is an Affidavit purported from Edita Ladouce.

[57] Hence taking the dates of the discovery of the fraud from the evidence of Travis Ladouce and Arsene Ladouce which took us to the discovery of the fraud between the year 2008 to 2009, it would have been at its best around 10 to 11 years between the discovery of the fraud and the filing of the present suit of which would be more than the 5 years prescription and hence the action would be prescribed by law.

[58] However at the least if we are going take the date of the signing of the letter of caution dated the 14th November 2014 purportedly signed by Edita Ladouce, the plaintiff in the matter, it would be 5 years and 3 months between the date of the discovery of the fraud and the filing of the present suit on the 19th February 2020.

[59] As a result of the above, this Court finds that since the discovery of the fraud was more than 5 years from the time of the filing of the suit, the action is prescribed by law and hence I accordingly uphold the 2nd Plea In Limine Litis.

[60] In view of the circumstances, I find no necessity to make any pronouncement on the merits of the case and hence I accordingly dismiss the plaint with cost.

Signed, dated and delivered at Ile du Port on the 15th July 2024.

……………………………………….

Esparon Judge