

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS79/2013

201 6 1 SCSC 894

Franky Joseph Laporte

Plaintiffs

versus

Edmond Joseph Bastienne

Defendant

Heard: 10th October 2016

Counsel: Nichol Gabriel for plaintiffs

Elvis Chetty assisted by Manuella Parmentier for defendant

Delivered: 15th November 2016

JUDGMENT

M. TWOMEY, CJ

- [1] The Plaintiff, the godson of the Defendant, by two deeds of sale, transferred two parcels of land, namely Parcel C2360 and C1199 to the Defendant on 6th October 2009 in consideration of the total sum of SR one million and fifty thousand.
- [2] He remains in occupation of the said property, averring that despite the consideration stated in the transfer documents, it had been agreed by the parties that the real price of the properties was SR one million nine hundred and thirty five thousand and that all that has

been paid by the Defendant so far is SR Seven hundred, seventy-seven thousand and five hundred. He refuses therefore to leave the property until he has been fully paid.

- [3] He also claims that the properties should be transferred back to him and that he is entitled to retain the monies paid over by the Defendant thus far as a deposit or that in the alternative the Defendant pays the balance of the purchase price which he states is SR one million one hundred and fifty-seven thousand four hundred and twenty four together with interest. He also claims SR 300,000 for moral damages.
- [4] In his statement of defence and counterclaim, the Defendant denies any secret agreement (back letter) purporting to state a different consideration price for the properties other than that stated in the registered deed of sale, which he claims has been paid in full.
- [5] He further states that the Plaintiff had asked that he be permitted to stay on the property for a year after the transfer so that he could find alternative accommodation. He has since not vacated the property.
- [6] The Defendant therefore prayed for a dismissal of the Plaint and for the eviction of the Plaintiff from his house.
- [7] At the trial, the Plaintiff attempted to produce a document which was either a purported acknowledgment of debt by the defendant, or a purported promise of sale. Mr. Chetty for the Defendant objected to its production. I disallowed the production of the document and stated that I would give my reasons later. I do so now.
- [8] In his objection to the production of the document Mr. Chetty submitted that the production of the document would be contrary to several legal provisions: firstly, it would be contrary to section 10 of the Stamp Duty Act, secondly that it failed to meet the criteria of Article 1326 of the Civil Code and thirdly that it breached Article 1321 (3) of the Civil Code.
- [9] Mr. Gabriel for the Plaintiff submitted that the document was a beginning of proof in writing and that it was entitled "Sale Agreement" and stated the consideration for the properties to be transferred. He was not of the view that the document was comparable to

an acknowledgement of debtor that its non-conformity with Article 1326 was fatal to its production.

[10] He further submitted that the document was in fact a sale agreement between the parties and that it was valid for the sum stated in the agreement between the parties. He admitted that the document was under private signature and had never been registered.

[11] Insofar as Mr. Chetty's argument in relation to the Stamp Duty Act is concerned, I am not of the view that is applicable to the issue at hand. The purpose of the Stamp Duty Act is to provide for duties to be paid by stamps. Section 10 of the Act provides for instruments that are chargeable with duty. Obviously this provision only applies to documents that are sought to be registered. Documents under private signature are privy to the parties that signed them and do not provide notice *in rem*. If the agreement was admitted it would indicate an intention to evade stamp duty by the parties when compared with the deed of transfer in which the consideration price was stated for a lesser value.

[12] However, the issue here is not whether there was an attempt by the parties to evade stamp duty or whether the Defendant deprived the Plaintiff of the agreed consideration price for the transfer of the properties but rather whether the secret document (back letter) is admissible in law.

[13] Mr. Chetty is also on weak ground insofar as the provisions of Article 1326 are concerned. Article 1326 concerns acknowledgments of debts. It provides in relevant part that:

"1. A note or promise under private signature whereby only one party undertakes an obligation towards another to pay him a sum of money or something of value shall be written in full, in the hand of a person who signs it; or at least it shall be necessary that apart from his signature he adds in his own hand the formula "valid for" or "approved for" followed by the amount in letters or the quantity of the thing..."

[14] Mr. Gabriel has submitted that the document sought to be produced is not an acknowledgment of debt but rather a sale agreement. That being the case, the lack of conformity of the document with the statutory formula is irrelevant.

[15] However, Mr. Chetty's third submission has much substance. He relies on article 1321(4) which provides in relevant part:

Any back letter or other deed, other than a back letter or deed as aforesaid, which purports to vary, amend or rescind any registered deed of or agreement for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease or charge of or on the immovable property to which it refers(emphasis mine).

[16] As has been pointed out before by the Court of Appeal in *Guy vs Sedgwick and another* [2014] SCCA 5, the repercussions of these measures are draconian as "they supplant or at the least qualify other provisions of the Civil Code in relation to evidence and the validity of contracts in general". The consequences of Article 1321(4) are reiterated in section 82 of the Land Registration Act which provides in relevant part:

(1) Any counter letter (contre-lettre) or other deed sous seing privé which purports to show that the real consideration for the sale or exchange of an immovable property, fonds de commerce, or ministerial office is greater than the consideration set down in the deed of sale or exchange, or that a donation inter vivos of an immovable property, fonds de commerce or ministerial office is in reality a sale, exchange, mortgage, transfer, or charge, shall be deemed to be fraudulent and shall in law be of no force or avail whatsoever.

(2)(a) Any counter letter or other deed other than a counter letter or deed as aforesaid which purports to vary, amend, or rescind any registered deed of or agreement (promesse) for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease, or charge on any immovable property is simulated (simulé) shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for

sale, transfer, exchange, mortgage, lease, or charge of or on the immovable property to which it refers...

(4) The Supreme Court may, on the grounds of ignorance of the law due to illiteracy, fraud of any party not being the holder, incapacity of the holder due to unsoundness of mind, or imprisonment of the holder at the appointed day, extend the maximum period within which a counter letter or other deed must be registered under this section for a further period not exceeding three months in the case of fraud, incapacity, unsoundness of mind or imprisonment at aforesaid, from the time of the discovery of the fraud or the termination of the incapacity or imprisonment and, in the case of ignorance of the law through illiteracy for such further period as the court may think reasonable under the circumstances.

- [17] The provisions above stated do not allow for any wriggle room by the Court in any circumstance. A registered document is authentic in law. The object of registration is to give notice to the world that such a document has been executed, to prevent fraud, forgery, circumvention of the law and to secure a reliable and complete account of all transactions affecting the title to the property. Unregistered documents cannot be made to compete with registered documents as this would undermine rights and titles in immoveable property.
- [18] There has been a long and unbroken line of authorities on this issue: namely *Ruddenklau v Botel* (unreported) SCA 4/1995, *Hoareau v Hoareau* (unreported) SCA 38/1996, *Adonis v Larue* (unreported) SCA 39/1999, *Aarti Investments [Proprietary] Limited v Peter Padayachy and Anor* (unreported) SC 5/2012 and *Guy v Sedgwick* (2014) (supra).
- [19] *Contre-lettres* or back letters are therefore null and of no force whatsoever unless they have been registered. The irony is that the purpose of back letters is to conceal the true intention of registered agreements from third parties. That they would be registered would be to defeat the purpose of the concealment. The effect of article 1321(4) and section 82 of the Land Registration Act is to ensure the authenticity of registered documents. For these reasons back letters or unregistered documents are inadmissible against registered documents.

- [20] I could have permitted the document from the Plaintiff in evidence but its contents would have been of no use whatsoever in the determination of this case for the reasons given above.
- [21] What is left of the Plaintiff's case is the testimony of the Plaintiff supporting his claim. He testified that that he received two cheques from the Defendant amounting to Pound Sterling fifty-three thousand seven hundred. There was an attempt in the pleadings to show that the price paid for the properties in sterling (£53,700) was not equivalent to the price stated in Seychelles rupees on the transfer documents. However, this was not pursued at trial and the Court is not obliged to consider it.
- [22] The Plaintiff also produced in evidence what he states is an acknowledgement of debt from the Defendant.
- [23] The document signed by the parties before William Herminie, Attorney at law is ambiguous to say the least. It is hereby reproduced in relevant part:

Acknowledgment of Debt

Article 1326 of the Civil Code of Seychelles

Between: Mr. Edmond Joseph Bastienne ... (hereinafter referred to as the Debtor)

And: Mr. Franky Joseph Laporte ... (hereinafter referred to as the Creditor)

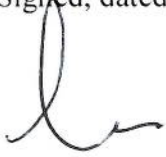
- 1. That it was an agreement between the Debtor that the amount of Seychelles Rupees One Million Nine hundred and thirty-five thousand ... nett, be fully paid to the Creditor (sic) for the purchase of his properties at Point au Sel, Mahé.*
- 2. That the Creditor has upon signatures of the transfer documents, paid a part payment of Pound Sterling Fifty-Three thousand seven hundred...*
- 3. That the Debtor hereby acknowledges that he is now indebted to the Creditor for the sum of Seychelles Rupees One Million and fifty-seven thousand four hundred and twenty four which sum will be fully payable to the Creditor within three years as of today's date with an agreed rate of interest between themselves...(Emphasis mine).*

- [24] The agreement is dated 2009 with no month or day entered. The parties' signature and that of the Attorney appear on the document.
- [25] The ambiguity in the document lies in the fact that it appears that both parties have paid sums to each other. Is this a mistake by the Attorney or did the parties exchange sums of money for reasons that remains unexplained? In any case where a document is ambiguous the Court will construe it to the benefit of the debtor under the *contra preferentem* principle (see Article 1162 of the Civil Code).
- [26] The document also breaches the provisions of Article 1326 of the Civil Code (supra) in that the formula provided for the validity of such an acknowledgment is not adhered to.
- [27] Further, insofar as it is attempted to produce the document as evidence against the registered transfer document it has no validity for the reasons articulated above in relation to the back letter.
- [28] The oral testimony of the Plaintiff that he remains in occupation of the property because he not been paid is not corroborated in any way and has little effect given the superiority of documentary evidence over oral evidence.
- [29] The Defendant testified that he was a pensioner, a Seychellois currently living in England with the hope of purchasing property in Seychelles which would have enabled him to return and retire here. He bought two properties in 2009 for which he paid the total sum of SR One million and fifty thousand: Parcels C2360 and C1199; that was the price agreed for the properties and that was the price he paid. He testified that he had never occupied the land as the Plaintiff continued to reside on the property.
- [30] In cross examination, he stated that he had allowed the Plaintiff to remain on the property for a year after the purchase. He stated that he travelled to Seychelles in 2013 and the Plaintiff tried to pressurise him into signing the land back to him so that he could sell it off. He reiterated that he did not owe the Defendant any other money.
- [31] Neither Counsel made any closing oral or written submission despite having been invited to do so by the Court.

[32] Having observed the demeanour of the witnesses and examined the documents and evidence and heard the parties' testimony, I am of the view that on a balance of probability it is the version of the events as related by the Defendant that I believe.

[33] In the circumstances I dismiss the Plaintiff's claim and grant the Defendant's prayer. I order that the Plaintiff quit, leave and vacate the Defendant's property and pay the costs of this suit.

Signed, dated and delivered at Ile du Port on 15th November 2016.



M. TWOMEY
Chief Justice



Dr. Mathilda Twomey
Chief Justice
Supreme Court of Seychelles

