

COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] (18 December 2023)

SCA 26/2022

(Arising in CS 106/2020)

In the matter between

Lorenza Nilloufer Albert (nee Benoiton)
(rep. by Mr. Divino Sabino)

Appellant

And

The Estate of the late Marc Benoiton
(rep. by Mr. Charles Lucas)

First Respondent

Mervin Renaud
(rep. by Mr. Charles Lucas)

Second Respondent

Jose Renaud
(rep. by Mr. Charles Lucas)

Third Respondent

Neutral Citation: *Albert v The Estate of the late Marc Benoiton and Others* (SCA 26/2022)
[2023] (Arising in CS 106/2020 (18 December 2023))

Before: Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza, JJA

Summary: pleading — cause of action — material facts — action of fraud — cause of action of fraud— acts alleged to be fraudulent must be set out, and then it must be stated that these acts were done fraudulently — section 71 (d) and 92 of the Seychelles Code of Civil Procedure

Heard: 6 December 2023

Delivered: 18 December 2023

ORDER

1. The appeal is allowed for the reason that the plaintiff does not disclose a reasonable cause of action.
2. We make orders striking out the plaintiff and setting aside the judgment of the Supreme Court.

3. Consequently, the following orders of the learned Judge are quashed —

- "(1) [t]he Registrar of Lands shall cancel the registration of the Defendant's Affidavit of Transmission by death and remove the joint names of the Defendants as co-proprietors of Title V9598 on the Land Register.
- (2) [t]he Land Registrar shall enter the names of the 2nd and 3rd Plaintiffs as co-proprietors of Title V9598 of the Land Register.
- (3) [t]he first and second Defendants shall jointly pay the second and third Plaintiffs the sum of SCR50,000 at the legal rate.
- (4) [c]osts of this suit are awarded to the Plaintiffs."

4. We make no order as to costs.

5. A certified copy of the judgment of the Court of Appeal to be served on the Registrar of Lands.

JUDGMENT

Robinson JA (Dr. M. Twomey-Woods, Prof. L. Tibatemwa-Ekirikubinza, JJA concurring)

THE BACKGROUND

1. This appeal arises from a plaint filed by the Respondents, the Plaintiffs then, praying to the trial Court to make the following orders in their favour —

- "a) an order instructing the Registrar of Lands to cancel the registration of the Defendants' Affidavit of Transmission by Death and to remove the joint names of the Defendants as co-proprietors of Title V9598 on the Land Register.
- b) to instruct the Land Registrar to enter the names of the 2nd and 3rd Plaintiffs as co-proprietors of Title V9598 of the Land Register.
- c) to pay the 1st Plaintiff the sum of SCR 100, 000 and the 2nd and third Plaintiffs jointly the sum of SCR 200, 000 plus interest at the rate of 12%

from February 2020 and costs of this suit." [Verbatim].

The Pleadings

2. In what appeared to be an action of fraud, the following cause of action has been pleaded. The Respondents, claiming to be the foster sons of the Deceased, made an allegation (at paragraph [6] of the plaint) that the Appellant and her sister, Ayesha Rosalind Benoiton, the Second Defendant then, intentionally, fraudulently and knowingly resisted the cancellation of the affidavit on transmission by death.
3. The Respondents claimed that the act of the Appellant and the First Defendant resulted in hindering the administration of the estate of the Deceased, and also prevented the First Respondent from fulfilling the provisions of the will that bequeathed parcel V9598 of the extent of 176 square metres to the Second and Third Respondents.
4. The loss and damage to the First Respondent are particularised as follows — "*Frustration of the process of administration of the estate SCR100,000.00.*" The prejudice, loss and damage to the First and Second Respondents are particularised as follows —

<i>"a. Loss of enjoyment of land and opportunity as proprietors of Title V9598 and continuing until the judgment date</i>	<i>SCR 100,000</i>
<i>b.Moral damage for anxiety, prejudice and inconvenience caused by the Defendants' continuing fraudulent acts"</i>	<i>100,000</i>

5. The Appellant filed a defence denying the claims of the Respondents. The Appellant averred that she and the Second Defendant are the nieces of the Deceased. She denied that the Second and Third Respondents are the foster sons of the Deceased. Instead, she claimed that they were the grandchildren of the Deceased's late wife, who predeceased him. She admitted to having sworn an affidavit on transmission by death, averring that she and the Second Defendant were the sole heirs of the Deceased. She also admitted having registered parcel V9598 in both their names. The Appellant disputed paragraphs [6], [7] and [8] of the plaint, by claiming that the Second and Third Respondents had not approached them to settle the matter amicably and had instead acted in defiance.

The Evidence

6. **The evidence of the Second Respondent (PW-1).** The Second and Third Respondents are siblings. The Second Respondent testified that he and the Third Respondent lived with the Deceased since they were very young. After their grandmother passed away on 11 May 2015, the Second and Third Respondents continued to live with the Deceased until his passing.
7. They came to know of the existence of the will in 2019. They collected the will from the office of Mr. Camille (DW-2). A document entitled, "Transcriptions", concerning the "Last Will and Testament of Marc Benoiton", transcribed on the 2 April 2019 in Volume 88 No. 21 and registered on the same date in Register B35 No. 1718, Repertory Volume 49 No. 439 to 442, was admitted as exhibit P1.
8. After registering the will, the Second and Third Respondents sought advice from their Counsel of record on becoming executors of parcel V9598. Exhibit P2 attests to the appointment of the Second and Third Respondents as joint executors. After registering the will, it was discovered that parcel V9598 was registered in the names of the Appellant and the Second Defendant. A document entitled, "REPUBLIC OF SEYCHELLES THE LAND REGISTRATION ACT CERTIFICATE OF OFFICIAL SEARCH", dated the 12 November 2020, was admitted as exhibit P3. A document entitled, "THE LAND REGISTRATION ACT CAP 107 RESTRICTION", registered on the 26 January 2021, was admitted as exhibit P4.
9. The Deceased had informed them that he intended to bequeath the land and house to them. The Second Respondent testified that the Deceased's will had left the joint ownership of parcel V9598 and the terraced house situated thereon to the Third Respondent and himself. The will also granted the usufructuary interest to the Deceased's wife, Solange Agnette Benoiton, until her death.
10. Upon discovering that the Deceased had left the will in their favour, the Appellant and the Second Defendant became hostile towards them. They refused to transfer the ownership

of parcel V9598 to the Third Respondent and himself. As a result, the Second and Third Respondents have placed a restriction on any dealings related to parcel V9598.

11. The Second Respondent has faced frustration in transferring the ownership of parcel V9598 to the Third Respondent and himself, leading to a claim for damages of SCR100,000/-. He testified that the Third Respondent and himself, as joint executors, cannot fulfil their duty as executors to the estate of the Deceased by transferring the ownership of parcel V9598 to themselves.
12. The Second and Third Respondents were also asking for SCR100,000/- in damages for loss of enjoyment of parcel V9895, as owners of same.
13. The Second Respondent prayed for moral damages of SCR100,000/- because of the anxiety and inconvenience caused by the Appellant's and Second Defendant's refusal to transfer ownership of parcel V9598, despite being aware that the will had bequeathed the bare ownership of the said parcel to them. He added that he feels depressed because he wakes up every morning not knowing what will happen.
14. During cross-examination, the Second Respondent testified that he only became aware of the Deceased's will after the death of the Deceased. The Deceased had promised to leave the property to the Second Respondent and himself. He was unaware that the Appellant had taken the Deceased to Mr. Camille's office to make a will. He only learned of the existence of the will when the Third Respondent told him about it, and later received a call from the secretary of Mr. Camille informing him that the will was ready to be collected. Mr. Camille's office registered the will. He claimed that the Appellant had manipulated the situation to prevent the will from being registered.
15. **The evidence of the Third Respondent (PW-2).** The Third Respondent adopted the evidence given by the Second Respondent.

16. **The evidence of the Appellant (DW-1).** The Appellant testified that she accompanied the Deceased to Mr. Camille's office, where he had prepared his will. She presumed that the Deceased had bequeathed the bare ownership of parcel V9598 to the Second and Third Respondents because he thought he would pass away before his late wife. If that had happened, the Second and Third Respondents would have inherited the property from the Deceased's late wife. She stated that she would not have contested the will in that case because she had much respect for the Deceased's late wife.
17. She stated that if the Second and Third Respondents had registered the will before she filed the affidavit on transmission by death, she would have pursued legal action against them. She testified that they were not entitled to the property due to issues that arose when her uncle was still alive. According to her, the Second and Third Respondents are the reasons why her uncle fell ill and died.
18. During cross-examination, the Appellant testified that she had a copy of the will and agreed with it. However, later in the proceedings, she expressed her dissatisfaction with the will, claiming that the Second and Third Respondents did not deserve to inherit the property.
19. The Appellant was questioned about her decision to register the First Defendant and herself as co-owners of the property, despite having a copy of the will. She explained that when she registered the affidavit on transmission by death, the will had not been registered yet. She reiterated that had the will been registered, she would have taken legal action against the Second and Third Respondents as advised by Mr. Camille. She testified that she did not have to bring the Second and Third Respondents to Court as she had already registered the affidavit on transmission by death.
20. She explained that she visited Mr. Camille at the request of the Deceased, who wanted to cancel his will, and that she was looking after the Deceased at the time. She also testified that some of the Deceased's siblings were born outside of the marriage and, hence, were not entitled to the Deceased's property. She testified that her father and the Deceased were the only legitimate sons. She testified that she and the First Defendant were entitled to the property as they were the nieces of the Deceased and the only "Benoiton" left in the family.

21. **The evidence of Mr. Camille (DW-2).** Mr. Camille testified that the Appellant came to see him regarding a will that he had prepared for the Deceased in accordance with the instructions of the Deceased. The Appellant had informed Mr. Camille that the Deceased was unable to come and see him personally due to his illness but wanted to give him instructions and make changes to his will. Mr. Camille had told the Appellant that the Deceased should come to see him personally in his office for any such changes to his will. Mr. Camille later learned that the Deceased had passed away.

The determination of the learned Judge

22. The learned Judge concluded on a balance of probabilities that the "Appellant knew and the Second Defendant ought to have known that the deceased had drawn up a will and that the Plaintiff were beneficiaries under the will when they went and registered their interest in the land, swearing that they and no other was entitled to the property. They could not and should not have taken it upon themselves to register themselves as co-owners of the land. They should have sought legal advice and challenged the will in the proper manner" (at paragraph [32] of the judgment).
23. The learned Judge concluded that the "[d]efendants did indeed fraudulently transfer the property in question on to their names" (at paragraph [33] of the judgment). Hence, she made an order that the "transfer by way of Affidavit by Transmission on Death is null and void" (at paragraph [33] of the judgment).
24. The learned Judge awarded moral damages to the Second and Third Respondents in the sum of SCR50,000/- at the legal rate (at paragraph [37] of the judgment).
25. The learned Judge made the following orders in favour of the Respondents —
- "(1) [t]he Registrar of Lands shall cancel the registration of the Defendant's Affidavit of Transmission by death and remove the joint names of the Defendants as co-proprietors of Title V9598 on the Land Register.
 - (2) [t]he Land Registrar shall enter the names of the 2nd and 3rd Plaintiffs as co-proprietors of Title V9598 of the Land Register.
 - (3) [t]he first and second Defendants shall jointly pay the second and third

Plaintiffs the sum of SCR50,000 at the legal rate.

- (4) [c]osts of this suit are awarded to the Plaintiffs."

THE APPEAL

26. The Appellant has challenged the judgment on the following grounds —

- "(1) The Learned Judge failed to appreciate that the Appellant was unrepresented by Legal Counsel in a matter that revolved on technical points of law, prejudicing the Appellant in the process.
- (2) Proceedings were unfair as against the Appellant in light of her being unrepresented.
- (3) The Learned Judge erred in concluding that the Appellant and/or 4th Respondent committed a fraud in light of the evidence.
- (4) the Learned Judge erred in awarding SR50,000 against the Appellant. The award should ought not to have been given and/or is excessive".

Analysis of the contentions of the parties

Grounds 1 and 2 of the grounds of appeal

- 27. We have considered the record of appeal and the argument presented on behalf of the Appellant and Respondents with care.
- 28. Concerning grounds one and two, the Appellant, a self-represented litigant in the trial Court, claimed in her skeleton heads of argument that the trial Court proceedings were unfair. She argued that due to the technical complexities of the case, she should have been allowed to obtain legal representation. Additionally, the skeleton heads of argument contended that the learned Judge should have put it to the Appellant that she should seek to find new representation after her Counsel, Mr. Gabriel, had his licence suspended.
- 29. At the hearing of the appeal, we informed Counsel for the Appellant that we could not adequately consider these two grounds of appeal based on the very limited argument that was submitted with respect to these two grounds of appeal. We informed Counsel for the

Appellant that it was essential for the argument to be supported with reference to the law and authorities.

30. Counsel for the Appellant was given an opportunity to provide the Court with additional submissions regarding these two grounds of appeal, and time was given for this purpose.
31. We were dismayed to find that the "ADDITIONAL MATERIAL OF THE APPELLANT" submitted to the Court on the 11 December 2023 was very limited. For these reasons, we decided not to discuss grounds one and two.
32. We also did not discuss grounds one and two because we were concerned regarding the framing of the cause of action. It appeared that this was an action of fraud, which was dealt with accordingly by the trial Court.

Ground 3 of the grounds of appeal

33. Concerning ground three, Counsel for the Appellant disputed the trial Judge's finding at paragraph [33] of the judgment that the Appellant acted fraudulently, arguing that the evidence presented did not support such a conclusion.
34. The contention raised by this ground of appeal and the argument presented by both Counsel will only be considered if we were to conclude that the Respondents' plaint meets the requirements of section 71 (d) of the Seychelles Code of Civil Procedure, which stipulates —

"71 The plaint must contain the following particulars: [...] (d) a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action".

35. At the hearing of the appeal, we raised the issue of whether or not the Appellant's plaint specifically pleaded fraud. We are permitted to do so under rule 18 (9) of The Seychelles Court of Appeal Rules, 2005, as amended, which stipulates —

"(9) Notwithstanding the foregoing provisions, the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant:

Provided that the Court shall not, if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."

36. In *Finesse v Cesar SCA 47/2019* (15 April 2022), the Court of Appeal stated at paragraph [20] of the judgment that, "[a]t the trial stage where the plaintiff does not disclose viable causes of action, the court may order it to be struck out, give judgment or allow the parties to rectify the pleadings." Section 92 of the Seychelles Code of Civil Procedure stipulates
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"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." [Underlining is mine]

37. The Appellant submitted that this was an action of fraud, and that the cause of action of fraud was contained in paragraph [6] of the plaintiff to the effect that the Appellant and her sister, Ayesha Rosalind Benoiton, the Second Defendant, resisted the cancellation of the affidavit on transmission by death.
38. In **Odgers on High Court Pleading and Practice Twenty-Third Edition D. B. Casson**, it is stated, at pp. 135, 137, 138, that —

"(ii) Every Pleading must state Material Facts only

What facts are material?

"The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad" (per Scott L.J. in *Bruce v Odhams Press Ltd* [1936] 1 K.B. at p. 712). The same principle applies to defences.

[...].

Fraud

Any allegation of fraud must be expressly pleaded together with the facts, matters and circumstances relied on to support the allegation (Order 18, r. 12(1)). In practice the facts alleged to be fraudulent should be set out and then it should be stated that those acts were done fraudulently. See *Re Rica Gold Washing Co.* (1879) 11 Ch.D. 36 [...]."

39. The following English authorities are also to the effect that the acts alleged to be fraudulent must be set out, and then it must be stated that these acts were done fraudulently, otherwise no evidence in support of them will be received : *Redgrave v Hurd*, 20 Ch. D. 1; *Smith v Chadwick*, 9 App. Cas. 187; *Riding v Hawkins*, 14 P. D. 56; *Lawrance Norreys*, 15 App. Cas. p. 221.
40. In *Wallingford v Mutual Society*, 5 App. Cas. p. 697, it is stated that, "[g]eneral allegations, however strong may be the words in which they are stated are insufficient to amount to an averment of fraud of which any Court ought to take notice".
41. In *Labonte and Anor v Bason Civil Appeal No. 13 of 1996* (21 May 1997), the Court of Appeal (Goburdhun President, Ayoola, Adam, JJA) stated that fraud must be pleaded with particularity and cannot be presumed. We reproduce the following excerpt from the judgment —
- "[i]t is trite that fraud must be specifically alleged and proved. The standard of proof in a civil case of an allegation of fraud though not as high as that in criminal proceedings is of a higher standard than that of other allegations of fact. It is evident from the averments in the plaint that there was no specific allegation of fraudulent intent. It must be acknowledged that this is a borderline case in which on a reading of paragraphs 9, 10 and 11 of the plaint it may be surmised that the plaint contained an allegation that the defendants conspired (collaborated) to deprive the plaintiff of his rights in the property by means of a false (sham) transfer. However, as far as the allegation of fraud is concerned this is insufficient pleading. Fraud cannot be presumed and the requirement that fraud must be pleaded with particularity means that the acts of the alleged fraudsters relied on must be pleaded. In this case it cannot be said that sufficient facts have been pleaded to justify the conclusion that fraud has been alleged." [Underlining is line]
42. In the light of the above, we now determine whether or not the plaint specifically pleaded fraud. After carefully reviewing the allegation of fraud, we found it to be general and vague. It is unclear what specifically is being alleged as fraudulent. In the light of the authorities, if the Respondents are imputing fraud to the Appellant, they must state the facts with especial particularity and care. Merely stating that the Appellant resisted the cancellation of the affidavit on transmission by death is insufficient as fraud cannot be presumed. In view of our finding we conclude that the Respondents' plaint does not meet the

requirements of section 71 (d) of the Seychelles Code of Civil Procedure — the plaintiff does not disclose a reasonable cause of action.

43. For these reasons, we find that the Supreme Court was wrong to conclude that the issue of fraud has arisen in this case and to receive evidence on the basis of the plaintiff, which does not disclose a reasonable cause of action.

44. This is enough to dispose of the appeal.

DECISION

45. The appeal is allowed for the reason that the plaintiff does not disclose a reasonable cause of action.

46. We make orders striking out the plaintiff and setting aside the judgment of the Supreme Court.

47. Consequently, the following orders of the learned Judge are quashed —

"(1) [t]he Registrar of Lands shall cancel the registration of the Defendant's Affidavit of Transmission by death and remove the joint names of the Defendants as co-proprietors of Title V9598 on the Land Register.

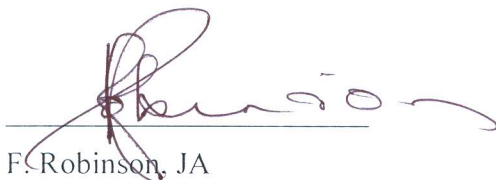
(2) [t]he Land Registrar shall enter the names of the 2nd and 3rd Plaintiffs as co-proprietors of Title V9598 of the Land Register.

(3) [t]he first and second Defendants shall jointly pay the second and third Plaintiffs the sum of SCR50,000 at the legal rate.

(4) [c]osts of this suit are awarded to the Plaintiffs."

48. We make no order as to costs.

49. A certified copy of this judgment is to be served on the Registrar of Lands.



F. Robinson, JA

I concur



Dr. M. Twomey-Woods, JA

I concur



Dr. L. Tibatemwa-Ekirikubinza, JA

Signed, dated and delivered at Ile du Port on 18 December 2023