

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2020] SCCA 18 December 2020

SCA 29/2018

(Appeal from CS 74/2013)

NOELLA BANANE

NIDGE BANANE

JOVANIE BANANE

GUY BANANE

(rep. by Mr. Clifford Andre)

Appellants

and

JOSEPH BANANE

(rep. by Ms. Alexandra Benoiton)

Respondent

Neutral Citation: *Banane v Banane* (SCA 29/2018) [2020] SCCA - (18 December 2020).

Before: Robinson JA, Tibatemwa-Ekirikubinza JA, Dingake JA

Summary: Rectification of the Land Registry; Powers of the Land Registrar; Powers of the Court.

Heard: 2 December 2020

Delivered: 18 December 2020

ORDER

The appeal is dismissed with costs.

JUDGMENT

DINGAKE JA

Introduction

[1] The maxim that a party who asserts must prove (*ei incumbit probatio qui dicit, non qui negat*) is dispositive of this appeal, as it shall be clear in the course of this judgment.

- [2] The above maxim or principle of law is followed in both the common law and civil law jurisdictions and is routinely applied in Seychelles (Gopal and Another v Barclays Bank (Seychelles) (SCA No.51 of 2011) [2013] SCCA 23 (06 December 2013), Felix Amelie v Marc Margueritte (2017) SCSC, Zatte v Joubert (1993) SLR 132, Elfrida Vel v Selwyn Knowles Civil Appeal No 41 and 44 of 1988.
- [3] The burden of proof lies with he who asserts the existence of certain facts.
- [4] In the case of Suleman v Joubert SCA 272010, this Court quoted with approval the famous case of Re B (Children) [2008] UKHL 35 whereby Lord Hoffman using a mathematical analogy in explaining the burden of proof, stated that:
- “If a legal rule requires a fact to be proved (a ‘fact in issue’), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened”.*
- [5] In elaboration of the above principle, it is indicated in the Halsbury’s Laws of England (4th ed), at paragraph 19 that:
- “To succeed on any issue the party bearing the legal burden of proof must (1) satisfy a judge or jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and (2) adduce evidence sufficient to satisfy them to the required standard or degree of proof”.*
- [6] It is trite learning that in civil cases such as this matter, the standard of proof is satisfied on a balance of probabilities. This indeed is elementary, so elementary that no citation of authority is required. It is also trite learning that courts only make findings of fact and or

conclusions based on credible and cogent evidence – and by parity of reasoning they are also precluded from formulating a case of a party after listening to the evidence at a trial. Where the standard of proof has not been met that is the end of the road for a party whose version is not supported by the evidence.

- [7] As a corollary to the burden of proof it is also worth pointing out that not all facts matter, but only those that are relevant do. Relevance can only be gleaned by reference to the issues implicated in the trial. Evidence that is relevant in a trial, is evidence that if it were accepted, could rationally affect, whether directly, or indirectly, the assessment of the probability of the existence of a fact in issue, in the trial. The range of facts which may be relevant, when the court is considering a matter, differ from case to case.
- [8] The facts of this case and the necessary background information that provides the context of this dispute is correctly set out by the learned Chief Justice (as she then was) in her judgment and it is not necessary to repeat same, save to say that at the heart of this dispute is the issue of the appropriate shareholding amongst the parties herein in a piece of land registered as Parcel V 5152.
- [9] In a trial that ensued in the Supreme Court the learned Chief Justice after considering all the evidence before her ordered the Land Registrar to rectify the Land register to enter the share of the deceased, David Banane in Parcel V 5152 as 54.289% and to adjust the shares of the other owners accordingly.
- [10] The above decision is the very essence of the discontent of the appellants as manifested in this appeal.

Grounds of Appeal

- [11] Aggrieved by the decision of the Supreme Court the Appellants have appealed to this court on the following grounds:

1. The learned Judge erred in apportioning the property as she did and in giving more shares to the Respondent than what he is due.
2. The learned Judge was wrong in law and fact in considering the submission made by the 5th Defendant in the main case CS 74/2013 as such submission was wrongly made and did not reflect the true situation.
3. The learned Judge erred in both law and fact in not considering that at the time of the initial sale the property was on the minor and not on the parents.

Issues for determination

[12] The main question before this Court is whether the Supreme Court was correct in its findings to conclude that in 1987, David Banane had 49.99%, Josephine Ismael 2.777% and Isabelle Banane 47, 21% shares in Parcel V5152. This share was in addition to inheriting the 1/11 undivided share from the estate of the late Isabelle Banane. The effect of the Supreme Court findings was that the Court ordered the Land Registrar to adjust the shares, in the Land Register to reflect the above.

[13] I turn now to consider the grounds of appeal that have been advanced by the appellants.

[14] Ground one of the notice of appeal complains that the learned judge failed to consider the relevant information and documents which showed that the appellants were entitled to more than what they were allocated and that this was as per the law and the evidence before the court.

[15] Having gone through the evidence tendered in the Supreme Court with a very fine comb, it is clear to me that this ground is completely without merit. It is common cause that at the trial the appellants adduced no evidence. At the hearing of this appeal they failed to point to us any credible evidence that would sustain their complaint that the learned Chief Justice, faced with the evidence she had before her erred in apportioning the property as she did.

[16] We have seen no document and information and none was pointed to us suggesting that the appellants were entitled to more than what they were allocated. A court of law makes

determinations based on the evidence and the law; and where a party fails to establish his or her assertions, a court of law cannot act arbitrarily and award her or him that which has not been proved.

- [17] It is trite law that he who asserts must prove. The appellants have simply failed to prove that they were entitled to more than what they got. In the result this ground has no merit and it is accordingly dismissed.
- [18] Ground two alleges that the learned Judge was wrong in law and in fact in considering the submission made by the 5th defendant in the main case, as such submission was wrongly made and did not reflect the true situation. It is alleged further that the said document was on the wrong basis and could not be taken into consideration in apportioning the said shares in the property.
- [19] Ground two is self - evidently vague and does not deal with any specifics. It essentially invites the court to speculate about the submission being attacked and what document is being referred to. During oral hearing before us this submission was not explained in any credible manner or in a manner that illuminated this ground of appeal. In any event if the evidence sought to be attacked is the evidence of the 5th defendant, the appellants have not succeeded to persuade this court that such argument has merit when the record shows they chose to rely on such evidence and or submission. In any event on the evidence on record the learned Chief Justice cannot be faulted for having apportioned the shares in the property in the manner she did.
- [20] Ground three avers that the learned Judge erred in both law and fact in not considering that at the time of initial sale the property was on the minor and not on the parents. I do not find that there is merit on this ground, more particularly because the issue of the purchasers/beneficiaries and seller were all available to the parties in the Supreme Court but it was not considered or raised as a live issue and the Appellants, in particular, never addressed the Court on the matter.

[21] In addition, and as Counsel for the Respondent has correctly pointed out, the Appellants have failed to demonstrate what the implications or alternative outcome, if any, would arise out of the sales made to minors and not on parents in general and more specifically, in this case.

[22] With regard to the issue of the sale being made to minors rather than adults, same was adequately and satisfactorily addressed by the learned Chief Justice as can be seen in paragraph 22 of her ruling. Nothing more needs to be said on the matter.

[23] In summation having read the record with extreme care, I find that none of the assertions of the Appellants were proven by cogent evidence. The Appellants just made assertions without proof. They failed to discharge the burden that lay with them with respect to that which they claimed to be factual. Submissions of entitlement are not evidence. They are simply what they are: submissions.

[24] On the totality of the evidence adduced in court including the evidence submitted by the Registrar of Lands, it has been proven, on a balance of probabilities, that the late David Banane had a share in his own right in parcel 5152. On the 5th of July 1963, the Transcription Volume 47 No 354 shows the transfer of land to David Banane. In addition to that, he also inherited 1/11 from his mother. I find that the apportionment made by the learned Chief Justice was consistent with the evidence before her and should not be disturbed.

[25] In the result this appeal is without merit and it is dismissed with costs.

Signed, dated and delivered at Palais de Justice, Ile du Port on 18 December 2020

Dingake JA

I concur

Robinson JA

I concur

Tibatemwa

Tibatemwa-Ekirikubinza JA