

**Andre v Andre
(2002) SLR 156**

Charles LUCAS for the Plaintiff
Frank ELIZABETH for the Defendant

Judgment delivered on 23 September 2002 by:

PERERA ACJ: This is an action for a declaration that an oral promise to sell an immovable property has been frustrated due to a breach of condition.

The Plaintiff is the mother of the Defendant. She was the sole owner of a land Parcel C. 2149 by right of purchase upon a deed dated second November 1992 (exhibit P1). It is not disputed that the Plaintiff verbally agreed with the Defendant to sell a part of that Parcel C. 2149 which was later subdivided into three Parcels, bearing nos C.4142, 4143, 4144. The Defendant was to receive Parcel C. 4142. It is also not in dispute that in consideration of the proposed sale, the Defendant paid the Plaintiff R25,000 as the full purchase price. The Plaintiff however avers that this promise to sell was subject to three other conditions, namely:

- (1) The Defendant pays the cost of sub-division of Parcel C. 2129.
- (2) The Defendant would not occupy the promises with his ex-concubine Modeste Thelemaque with whom he had severed relationship at that material time and who at all times verbally abused the Plaintiff.
- (3) The Defendant builds his residential home on that property.

The Plaintiff admits that the Defendant paid R3000 as the survey fees for the sub-division. The Defendant has however produced a receipt from G & M Surveys for R3600 (exhibit D1). Defendant denies the condition set out at Clause (2) above, and seeks a declaration that there has been a valid sale of Parcel C 4142, in law.

The Plaintiff testified that the Defendant and his concubine were living at Anse Boileau at her parent's house. He was having problems with that family as well as the concubine. One day he came to her crying and asked her to sell a portion of land and gave her R25,000. Then she said "yes my son, I will take this R25,000, but I do not want this woman at my place." Thereupon, he spent on the subdivision of the land and put up a shed thereon. The Plaintiff further testified that despite her condition that the concubine should not be brought to the land, the Defendant came to live on the land with her. The Plaintiff in her evidence also stated that this daughter in law created problems and abused her. She also quarrel with the Defendant, and that was the reason why she did not want her on the land. The Defendant did not raise any objection under Article 1341 of the Civil Code to the adduction of oral evidence on the matter that exceeded R5000. He however testified that he came to reside on Parcel C.4142 with

his concubine and two children in 1997. Denying that there was any condition that he should not bring her on the land, he stated that the only reason why the Plaintiff wants to return the money and get vacant possession of the land is for her to sell the whole property. He however admitted that his concubine whom he married in 1998 has now been given a flat by the S.H.D.C at a monthly rental of R1000 and that the whole family would be going into occupation shortly. However, he maintained that as by operation of law, he has become the owner of Parcel C.4142, he wanted the land to build a suitable house later on.

In terms of Article 1583(1) of the Civil Code:

A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid.

In the present case, the price had been agreed and paid and the thing had been delivered.

Article 1589 is as follows:

A promise to sell is equivalent to a sale if the two parties have mutually agreed upon the thing and the price. However, the acceptance of a promise to sell or the exercise of an option to purchase property subject to registration shall only have effect as between the parties or in respect of third parties as from the date of registration.

It is now settled in the case of *Hoareau v Gilleaux* (1978-1982) SCAR 158 that the requirement of registration is only applicable to third parties, and that where there has been agreement on the thing and the price by the parties, the promise to sell is equivalent to a sale.

In law, therefore, there has been a valid sale of Parcel 4142 to the Defendant. Mr Lucas, Learned Counsel for the Plaintiff however contends that in the present case there was a condition attached to the promise and hence the promise to sell would not be equivalent to a sale despite there being agreement on the thing and the price if that condition had been breached. Paragraph 3(iii) refers to Modeste Telemaque as the Defendant's "ex-concubine with whom he had severed relationship at the material time." But according to the Plaintiff's testimony, the father in law of the Defendant had injured him with a hoe, and the Probation Officer who investigated asked her to remove the Defendant from the house of Modeste Telemaque at Anse Boileau. Later she met the Defendant and he too wanted her to remove him from that place at that time. Then he came with R25,000 as the purchase price for the portion of land. Neither Francis Hiller, the Plaintiff's son, nor Florence Flore, her daughter testified that they heard the Plaintiff promising to sell the land subject to a condition. They only heard their mother subsequently refusing to effect the transfer as the Defendant had brought Modeste to the land after building a shed thereon. Such a condition would have had the effect of

breaking up of a family, and hence would have been contrary to Public Policy, especially in view of the protection given to families by Article 32(1) of the Constitution. Accordingly even if there was an agreement, it would have been unlawful under Article 1133 of the Civil Code. The concept of Public Order is invoked to protect the State and its institutions, and on the other hand, the family. In any event if the condition was as stated in paragraph 3(iii) of the plaint, then there was no necessity to stipulate a condition that the promise to sell was subject to Modeste not being brought to live with him on that land, as it is averred in that paragraph that Modeste was the Defendant's ex-concubine with whom he had severed relationship at the time the promise to sell was allegedly made.

Although there may have been some disputes and unpleasantness between the Plaintiff and Modeste Thelemaque, the Court is not satisfied that at the time the "thing and the price" were agreed upon there was a condition as averred. Hence the promise to sell was equivalent to a sale.

In the circumstances, the Plaintiff cannot maintain the present action and accordingly the plaint is dismissed. The Court holds that there has been a valid sale of Parcel B. 4142 to the Defendant by virtue of Article 1583 of the Civil Code. Hence the Plaintiff is granted two months from the date hereof to transfer Parcel B 4142 to the Defendant by a notarial deed, failing which, the land Registrar is authorised to register, by virtue of Section 75 of the Land Registration Act, the Defendant as the proprietor of the said Parcel B. 4142.

There will be no order as to costs.

Record: Civil Side No 385 of 1998