Durup v Radegonde Adam & Or
(1998) SLR 200

Kieran SHAH for the plaintiff
Philippe BOULLE for the defendant

Judgment delivered on 30 July 1998, by:

AMERASINGHE J: In the suit before the Court, the plaintiff, who built and occupied a house that cost her substantially on the land owned by the defendants, has sought to assert her alleged legal rights, and to acknowledge the same by registration.

The plaintiff claims in her pleadings that in 1992 she, "with the knowledge and consent of the defendants, erected or made, at her own cost, a house, buildings or works" on the parcel of land H230 situated at Pointe Conan, Mahe, belonging to the defendants.

She prays for the Court to declare and order:-

1. That the plaintiff has a droit de superficie in perpetuity over parcel H 230;

2. That the said house, buildings or works belong to the plaintiff; and

3. The Registrar General to enter the declaration under paragraphs 1 and 2 of the prayer on the Land Register in the relevant file and register concerning Parcel H230.

The statement of defence admits that the defendants inherited parcel H230 from Boris Adam for half share each and that the second defendant is the fiduciary of the co-ownership in respect of parcel of land H230. Although the defendants in their pleadings denied paragraph 4 of the plaint to the effect that the house, buildings or works constructed on the said parcel belongs to the plaintiff, the second defendant, fiduciary of the co-ownership, in his evidence conceded the said fact and admitted the plaintiff's said claim. The first defendant thought fit not to refute the plaintiff's claim before the Court in evidence. In paragraph 4 of the defence, while denying the plaintiffs' claim of a droit de superficie in perpetuity over parcel H230, the defendants aver by an amendment to the answer, in the alternative, if such right exists, it is limited to the duration of the plaintiffs' lifetime. The defendants move for the dismissal of the action with costs.

In her testimony the plaintiff disclosed that the first defendant is her sister and the second defendant is her nephew. She said that when she and her husband returned to Seychelles in 1967 the first defendant and her husband, the late Boris Adam, received them into their house at Pointe Conan, which they shared until they found a house for occupation. According to her evidence, the late Boris Adam, at the time when he

moved out of the house at Point Conan, invited her to buy his house. Her oral evidence in respect of the said purchase was objected to by counsel for the defendants. On the order of the Court of 6 February 1998, oral evidence was admitted on the ground that moral impossibility of obtaining a document in proof of the payment of the purchase price of R35000 caused article 1341 of the Civil Code to be inapplicable. It was revealed under examination-in-chief and in cross-examination that the plaintiff asked the late Boris Adam, the owner, for a deed in acknowledgment of the transfer of the house, but she was unable to obtain it in writing. The second defendant under examination-in-chief admitted by implication that the said house belonged to the plaintiff by his answer in Court as follows:

> ……..she went to stay at Saint Elizabeth Convent for a while and at the same time, she was having the house she used to live in on Mahe was in ruins and so she broke it down and built a new one, on our piece of land,…….. (emphasis added).

It is common ground between the parties that the subject matter of this suit is the house that the plaintiff built, as above referred to by the defendant in his answer. The parties are also in agreement that such construction was made by the plaintiff after the sale of her property at Praslin. The construction of the new house, according to the plaintiff, cost over R600,000, and according to the contractor, Donald Ernesta, over R500,000.

The plaintiff claims a droit de superficie in perpetuity over parcel of land H230. Amos and Walton in the *Introduction to French Law* (second ed, 1963) describe superficie as the right of an owner of the building or plantation on another's land, and it is said to be a form of immovable property.

Counsel for the defendants has submitted that Sauzier J in the case of *Albert v Stravens* (No 1) (1976) SLR 158, 159 described the circumstances under which a party acquires a droit de superficie. To confer such right the learned Judge has held that the parties to the contract should expressly or impliedly intend the creation of such a right. He conceded that "a droit de superficie may be conferred in perpetuity or for a period of time according to the intention of the parties".

Although tacit consent to the building on anothers' land is not sufficient to create a droit de superficie, Sauzier J in the case of *Coelho v Collie* (1975) SLR 78, considers that the consent "must be positive although not necessarily express".

In the proceedings before this Court, the plaintiff never claimed that the two defendants at any time expressed their consent by word of mouth to her building on their land. The second defendant stated in evidence that he did not see any reason why he should not allow the plaintiff to build her house on their land. The evidence of the plaintiff revealed that the construction of the house was discussed by the parties at the relevant time, and not objected to by the two co-owners. It is observed that the defence did not object to the leading of oral evidence to establish consent and intention, although an objection

was taken against the leading of such evidence to establish the purchase of the old house, that was later demolished, from Boris Adam for R35000.

In answer to paragraph 3 of the plaint, the defendants did not specifically deny that "in 1992 the plaintiff, with the knowledge and consent of the defendants, erected or made at her own cost, a house, buildings or works on Parcel H230", but generally denied each and every allegation contained therein. The failure of the defendants to deny material facts 'of knowledge and consent' alleged in the plaint, in accordance with section 75 of the Seychelles Code of Civil Procedure, will lead to the said facts to be considered admitted. In any event both defendants, according to the evidence, have never denied that the plaintiff had their consent to construct on their land. The second defendant's testimony revealed that the parties were on good terms with each other at the time of the construction, and hence the circumstances give no reason to exclude that the defendants not only acquiesced in the construction by the plaintiff but also gave all the encouragement needed to construct her house on their land. In considering the close relationship of the two families going back to the period of the plaintiff's arrival in Seychelles in 1967, and the second defendant's admission that the plaintiff was his bank whenever he required loans, the circumstances could not have been otherwise.

It was the unchallenged evidence of the plaintiff that even after the house was completed and it was being rented out for R8000 per month, that for two years the plaintiff continued to occupy a flat belonging to the defendants at R6000 per month. Even when the plaintiff returned from Praslin to live in Mahe, she exercised her independence and sought lodgings at St Elizabeth's Convent. The said events not only demonstrate that the plaintiff enjoyed her independent rights, but the defendants in turn respected her rights. The plaintiff's conduct has demonstrated that when it came to financial matters she maintained a business-like relationship with the defendants. Therefore the claim of counsel for the plaintiff that the plaintiff would not have spent over R500,000 for the construction of a house, only to give away the house to the defendants in the end was justifiable.

When the plaintiff was receiving a sum of R8000 by way of rent for the construction, the defendants never demanded any return for the land occupied by her house.

A sister of both the plaintiff and the first defendant, Clarisse Jeanne Adam, and a witness, Robert, testified to the fact that the plaintiff has expressed on many occasions that the house should pass on after her lifetime to the second defendant and his heirs. Even if the plaintiff at times may have entertained such an intention, it was never said to be a term of any agreement on which the defendants consented to the construction, or for the renunciation of their rights of accession according to articles 552 and 553 of the Civil Code. The said second defendant expressed that he never entertained a wish to inherit the house from the plaintiff. In my view such an attitude reflects the state of mind of the second defendant at the time when he acquiesced in the construction and as to what should happen to the construction after the lifetime of the plaintiff. No doubt if the first defendant's state of mind was otherwise, she would have testified to the said fact. The defendants, unlike the owners of the land in the case of *Coelho v Collie*

(supra)never protested or complained to the plaintiff, or to any other, that the plaintiff has constructed her house on the land owned by them against their wish. It is my considered opinion that the aforesaid circumstances taken together manifest a positive, although not expressed except by their conduct, their consent and acquiescence, consent to the plaintiff constructing at her expense a house on their property and their renunciation of their rights of accession.

The second defendant was appointed by the Court as the fiduciary of the co-ownership of the said parcel of land by exhibit P3, long after the construction of the house. Counsel for the defendants questioned the validity of the consent of a single co-owner for the said construction similar to the want of capacity of one co-owner to transfer any interest in land without the services of a fiduciary. Once the Court has admitted that the plaintiff possessed the implied positive consent of the defendants to her construction, and to their acquiescence with such act, I accept that the defendants are estopped from benefitting by their failure to comply with the law, of acting through a fiduciary and denying such consent. The reasoning of Sauzier J in the case of *Etheve v Morel* (1977) SLR 252 by analogy supports the above contention of the counsel for the plaintiff.

Lavoipierre JA, with Lalouelle JA concurring, in the case of *Pouponneau v Janish* (1978 to 1982) SCAR 290,300 with reference to the acquisition of 'droit de superficie commented thus:

> "The rebuttal of the presumption of article 553 of the Civil Code is one of the means of acquiring a 'droit de superficie' which gives ownership of the 'dessus' of land to a party, other than the owner of the land, and which can be acquired inter alia, by agreement, waiver of the right of accession or prescription (see Encyclopedie Dalloz-Droit Civil (2nd Edition), Vo. Superficie, notes 1 – 24)" (emphasis added)

In the instant case the presumption arising under article 553 of the Civil Code is rebutted on the contradicted evidence of the plaintiff that the building on parcel of land H230 was constructed by her at her expense and owned by her, and unchallenged by the owners, the two defendants. Sauzier J declared in *Mussard v Mussard* (1975) SLR 170, that:

> Where an owner authorises a construction on his or her land, the owner, in the absence of contrary stipulations, renounces her right to accession derived from the Civil Code, and confers upon the constructor a right of use of that part of her land on which the construction stands, which right comes to an end when the constructor wants to rebuild or is bound to do so.

After carefully weighing the evidence before the Court I find the defendants by their attitude, conduct, and in the absence of any objection to the construction of the plaintiff's house on their land at Pointe Conan have acquiesced to and authorised such construction. In *Tulsi v Tulsi* 1981 MR 493 the learned Judges held that "to establish a

'droit de superficie' against the owner, the defendant must show not merely knowledge, but acquiescence on the part of the owner". Hence in accordance with the aforesaid findings of the last two judgments cited in the absence of anything to the contrary, by the waiver of the defendants of their right of accession the plaintiff has acquired a droit de superficie over parcel of land H230 owned by the defendants.

Such a right was found by Sauzier J to end, in the case of *Mussard v Mussard* (supra), only when the possessor of the right 'wants to rebuild or is bound to do so'.

Counsel for the plaintiff, Mr Shah, submits that when such a right is not limited in time by agreement as in the case of a ground lease, it is perpetual.

The Seychelles Court of Appeal in *Tailapathy v Berlouis* (1978 to 1982) SCAR 335 commenting on the duration of a droit de superficie, tend to agree with the submission of counsel. When the rights of the parties are subject to a lease, the droit de superficie terminates with the determination of the lease. The Court held thus:

> Any building constructed on the land during the lease would remain the property of the lessee for the duration of the lease. At the expiry of the lease such buildings would become the property of the lessor by accession.

As rightly pointed out by the Mr.Shah, the plaintiff's droit de superficie is neither subject to a lease nor to any agreed period of time, hence it has to be perpetual so long as the possessor of the right does not "want to rebuild or is not bound to do so".

The third item of relief prayed for by the plaintiff leads to the examination of the legal capacity of the Land Registrar to enter the declarations in the relevant register that the house on parcel of land H230 belongs to the plaintiff and that the existence of droit de superficie is in perpetuity in favour of the plaintiff over the said land.

The reason and the necessity for the specific relief is better appreciated when the consequence of acquiring a droit de superficie is examined.

The judgment of *Pillay v Camille* 1975 MR 167 decided the consequences as follows:

> In such a case, the former enjoys what is called a 'droit de superficie,' that is to say, a right of ownership of the building independently of and separable from the ground upon which it stands. One consequence of such a situation is that the owner of the building may dispose of this right in it without any restriction resulting from the fact that it is on another's land. A further consequence is that the owner of the building and the owner of the land are not in indivision, so the neither can ask for partition or licitation of the two properties (*Neerpath v Bearjo and ors* 1965 MR 84)

Section 75 of the Land Registration Act (Cap 107) obliges the Land Registrar to register the entitlement of a person to any land, lease or charge by virtue of any judgment, decree, order etc, as the proprietor, and to file the said instrument. I find that the plaintiff's declared rights of a droit de superficie as well as the ownership of the house is a privilege over immovable property, hence amounts to a legal charge, that under section 2 of the said Act qualifies the plaintiff to be a proprietor in respect of the said rights in relation to parcel of land H230. (see the definitions of "legal charge" and "proprietor" in section 2 of the said Act).

I therefore hold that the plaintiff is entitled to the relief prayed for under item 3 of the prayer to the plaint.

I therefore declare and order:

1. That the plaintiff has a droit de superficie in perpetuity over parcel H230.

2. That the house, buildings or works on parcel H230 belongs to the plaintiff; and

3. The Land Registrar is hereby directed to enter the above declarations in the land register, concerning parcel of land H230, and in the relevant files.

Judgment is entered accordingly with costs.

Record Civil Side No 346 of 1997