**SUPREME COURT OF SEYCHELLES**

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**Reportable**
[2020] SCSC **668**
CS 137/2019

**In the matter between**

**PATRICK ANGELO** **Applicant**
*(rep. by Somasundaram. Rajasundaram)*

and

**1. SYLVESTER MARC DA CAMBRA**
*(rep.iby Brian Julie)*

**2. THE REGISTRAR OF LANDS AND DEEDS** **Respondents**
*(rep. by Luthina Monthy, States Counsel )*

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**Neutral Citation:** *Angelo v Da Cambra & Anor* (CS 137/2019) [2020] SCSC **668** (18 September 2020).
**Before:** Twomey CJ
**Summary:** transfer of undivided share in co-owned land- duty to consult co-owners- fiduciary's duties
**Heard:** 24 July 2020
**Delivered:** 18 September 2020

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**JUDGMENT**

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**TWOMEY CJ**

**The Pleadings**

[1] The Plaintiff and First Defendant are brothers and the Second Defendant, the Land Registrar. In a plaint filed on 11 October 2019, the Plaintiff averred that he, the First Defendant, and their other siblings were the co-owners of Parcel V5711.

[2] He further averred that on 16 July 2016, part of Parcel V5711 was sold by the First Defendant with the caption “Transfer of house and rights and interest in house and area that house covers” to one Georgina Dhillon without the consent of the heirs, which transfer the Second Defendant registered.

[3] The Plaintiff prayed for the transfer to be declared null and void and for payment of damages in the sum of SR 83,624.42 being his share in the house and for the further payment of SR50, 000 moral damages.

[4] In his Statement of Defence, the First Defendant has put the Plaintiff to strict proof of his averments and has stated that the Plaintiff has misled the Court in that he is still the co-owner in 1/12 share of Title V5711. He also denies the debt of SR 83,624.42 owing to the Plaintiff.

[5] The Second Defendant raised a plea in limine litis that the Court should not entertain the Plaintiff’s action in that it did not disclose any cause of action and that ex-facie the pleadings, there was no reasonable cause of action disclosed against the Second Defendant and that she should therefore be disjoined from the suit.

[6] This plea was dismissed on 17 June 2020, with the court finding that the alleged cause of action in the suit is a delict or breach of official duty, which could only be decided after hearing the evidence.

[7] On the merits of the suit, the Second Defendant put the Plaintiff to strict proof of his averments and averred that the transfer was only in relation to a one-bedroom house on Parcel V5711 as explained in the transfer document. She further averred that Title V5711 is still registered under the name of the co-owners including the Plaintiff.

[8] She also avers that the instrument of transfer in question related to the personal right of the First Defendant in the property and only pertained to the one-bedroom house, which she had permission to build. In addition, she states that the instrument of transfer had no effect on the rights and interests of the co-owners as their rights and interests in Parcel V5711 remained untouched and that she had not erred in not consulting the other co-owners before registering the instrument of transfer.

**The Evidence**

[9] The Plaintiff testified that he was the first born out of twelve siblings and that the second oldest sibling is Georgina Dhillon, the purchaser of the property in dispute. He was not aware of the transfer of the house and rights in Title V5711 at Hangard Street registered on 28 July 2016 until he carried out a search at the Land Registry. The document of transfer is signed by the Defendant and Georgina Dhillon and in which it is stated that the former had transferred a dwelling house "[he] had built on the land comprised in Title V5711" to the latter.

[10] He had not been contacted prior to the sale and he could not accept the transaction. Title V5711 had been first registered on 26 September 1988 in all their names. He reiterated that the sale in issue to his sister took place without his consent.

[11] The Defendant had been in charge of sorting out the property at Hangard Street on which there were two houses. He had sent money over to the Defendant as they were all building the houses as a family unit as their mother was still alive at the time. The house sold therefore is not his brother's, it was an inheritance from their mother in which they now all have an undivided share. He produced an acknowledgement by his brother of the SR25, 000 loaned, dated 24 October 2007. He stated that he had sent the Defendant more money when he was stuck in Mauritius and that over the years he had sent his brother over SR 100,000 altogether. The house in issue had been derelict and had needed repair. After his brother obtained government housing he moved out of the house.

[12] He had also not been contacted by his sister, Georgina Dhillon before she purchased the property. He claimed a share not only in the land but also in the house. He maintained that the transfer was not valid and should not have been registered. He had the property valued in 2016 and it was valued at SR325, 000. He was however claiming SR 83,624.42 from his brother and was claiming moral damages in the sum of SR 50,000 from the Second Defendant who should not have registered the transfer.

[13] In cross-examination, he stated that apart from the Defendant transferring his share to Georgina Dhillon, another brother Phillip had done the same. He had no objection to the

transfer by Phillip as he had only transferred his undivided share in the property, which he was legally allowed to do.

[14] The Defendant testified that he presently lived at Perseverance 1, but had been living at Hangard Street. He had built the small house at Hangard Street from money he had saved from his wages at Seybrew. His mother who was alive at the time had given him permission to build the house. He admitted that his brother had 'contributed a little bit' to the construction. He recalled signing the acknowledgement of SR 25,000 in 2007 with the Plaintiff. He could not remember if it was towards both houses.

[15] He sold his sister his share in the property for SR325,000. No one had told him it was not legal to do so. He had left everything in the hands of his lawyer for the transfer. He had gone to the lawyer with his sister to sign the document.

[16] He had been helped to build the one-bedroom house at Hangard Street with materials he himself purchased. It took him a number of years to complete the house. He did not think the Plaintiff should be entitled to part of the purchase price he had received from his sister for the house. He denied that his brother had contributed more than SR 25,000 towards the house, and which he was willing to refund.

**Closing submissions**

[17] No closing submissions have been filed by the First Defendant. The Second Defendant in closing submissions has conceded that no documents were produced by the First Defendant to indicate that he is the sole owner of the house referred to in the transfer document. It is Counsel's submission that since the loan was given by the Plaintiff to the First Defendant to construct the house, this implies the house belongs to the First Defendant.

[18] It is also Counsel's submission that the Land Registrar did not consult the other co-owners before registering the transfer as the First Defendant was only transferring his "personal right in the property and not the property as a whole". She submits that the instrument of transfer had no effect on the rights and interests of the co-owners of Parcel

V5711 as their rights are untouched and no claim arises from the Land Registrar for the registration of the transfer.

[19] She relies on the authority of *Chetty & Ors v Chetty* (2003) SLR 133 for the proposition that individual co-owners do not need to act through a fiduciary if they wish to act solely in respect of their individual shares in co-owned property.

[20] She has made other submissions relating to the fact that the constitutional right of the Plaintiff to property has not been breached and that therefore the Second Defendant is not liable for any violation of this right.

[21] The Plaintiff for his part has submitted that the First Defendant expressly supressed the fact of the sale of the property from the Plaintiff. He has relied on Article 818 of the Civil Code and also the cases of *Chetty* (supra) and *Legras & anor v Legras* (1983-1987) 3 SCAR for the proposition that the rights of co-ownership held by a fiduciary may only be exercised by the co-owners through the fiduciary.

[22] Further, with regard to the superstructure, that is the house allegedly transferred to Georgina Dhillon, the Plaintiff submits, that the owner of land is presumed to be the owner of a house erected on it unless and until the same is otherwise proved (See Article 553 of the Civil Code and *Morin v Monnaie* (1979) SLR 75). The First Defendant, it is submitted, has produced no evidence that the house transferred belonged to him.

**Discussion**

*The sale of co-owned property*

[23] The main issue raised in this case is whether a co-owner of land can transfer his rights therein to another without the intercession of a fiduciary.

[24] The relevant law provide as follows:

> *Article 817*
> *1. When property, whether movable or immovable, is transferred to two or more persons, the right of co-ownership shall be converted into a claim to a like share in the proceeds of sale of any such property.*

*2. Paragraph 1 of this article regulates the exercise of the right of co-ownership. It does not affect the rights of co-ownership itself.*

*Article 818*
*If the property subject to co-ownership is immovable, the rights of the co-owners shall be held on their behalf by a fiduciary through whom only they may act.*

*Article 819*
*In the case of immovable property held in co-ownership, unless all the co-owners agree to postpone the sale, such property shall be sold. If the co-owners do not agree to a private sale… the property shall be sold at a public auction. In this respect, articles 1686, 1687 and 1688 of this Code relating to licitation shall have application.*

*…*
*Article 825: The functions of the fiduciary shall be to hold, manage and administer the property, honestly, diligently and in a business-like manner as if he were the sole owner of the property. He shall be bound to follow such instructions, directions and guidelines as are given to him in the document of appointment by the unanimous agreement, duly authenticated, of all the co-owners or by the Court. He shall have full powers to sell the property as directed by all the co-owners, and if he receives no such directions, to sell in accordance with the provisions contained in articles 819, 1686 and 1687 of this Code and also in accordance with the Immovable Property (Judicial Sales) Act, Cap. 94 as amended from time to time.*

*Article 826: Where a fiduciary wishes to proceed to the sale of property, he shall communicate to all those entitled a formal notice of the intended sale. The sale shall not take place until six months after such notice has been issued. However, the Court, upon application by a party may, on reasonable grounds, grant permission to sell the property earlier or later than the period of six months or without notice."*

[25] It must be noted that when an executor to the estate of a deceased is appointed, he has the same powers as a fiduciary (Article 1028) with regard to co-owned land. The tension between Articles 817, 818 and 834 of the Civil Code has been raised a number of times but it has been resolved by accepting that a fiduciary is the only medium through which 'real' rights in co-owned property may be transferred or partitioned. Hence, whenever there is an alienation of co-owned property, the alienation must happen through a

fiduciary and he does so after taking certain precautions, least of all to seek the consent of the co-owners.

[26] In *Jorre de St. Jorre & Ors v Stevenson, (Civil Appeal SCA 5 and 6 /2015 (Consolidated)) [2017] SCCA 39 (07 December 2017),* the Court of Appeal endorsed the decision in *Parcou v Parcou* SCA 32/1994 (unreported) that written consent of heirs be sought before an executor sells co-owned land. The Court also stated:

> *"In Rajasundaram [& Ors v Pillay (SCA 09/2013) [2015] SCCA 12 (17 April 2015)], the court interpreted the law to mean that fiduciaries had powers to sell or alienate property. That is subject of course to the caveats in the provisions of the Civil Code [] including the fact that the consent of the heirs must be obtained and failing that an order of the court must be sought."*

[27] In *Dorothy Hall v Maria Amina Morel & Ors* (Civil Appeal SCA22/2017) [2019] SCCA 24 (23 August 2019), Robinson JA concluded that written consent of the co-owners was imperative:

> *"…after having also considered the weight of Article 826 of the Civil Code which expressly provides that where a fiduciary wishes to proceed to the sale of property, he shall communicate to all those entitled a formal notice of the intended sale."*

[28] There is a qualification to this rule however, and it is that where a right sought to be vindicated or to be protected by the action is the individual right or interest of a co-owner in a co-owned property, that co-owner does not need to sue through a fiduciary (*Thailapathy v Tirant* 1995 (SCAR) 179, *Mathiot v Julienne* (1992) SLR135, *Michel v Vidot* (No. 2) 1977 SLR 214). Equally, as in the present case where an undivided share in co-owned property is sold to another co-owner there is no need to be represented by a fiduciary. This is because the provisions of the Civil Code cited above indicate that a co-owner of land has no 'real' right over the property but just a claim in the proceeds of the sale of the property (*Jumeau v Anacoura* (1978) SLR 180 and *Chetty* (supra).

[29] In the circumstances, the First Defendant did not breach any legal provision by transferring his undivided share in Title V5711.

*The presumption under Article 553 of the Civil Code*

[30] With regard to the house on the land, as rightly pointed out by learned counsel for the Plaintiff, the inference under our law is that whatever is erected on land is presumed to have been made by the owner. The relevant provisions of the Civil Code are as follows:

> *"Article 552: Ownership of the soil carries with it the ownership of what is above and what is below it….*
>
> *Article 553: All buildings, plantations and works on land or under the ground shall be presumed to have been made by the owner at his own cost and to belong to him unless there is evidence to the contrary…"*

[31] It must be noted that the First Defendant has not counterclaimed. He has only filed a simple denial of the plaint. In the circumstances he cannot be permitted to adduce any evidence of any exclusive right in the house or a claim under Article 555 to rebut the presumption under Article 553. The presumption is that all the co-owners have subsisting rights in the buildings on Parcel V5711. Until and unless there is a partition in kind or a licitation none of the co-owners have a specific or exclusive right to any part of Parcel V5711.

[32] I am aware that the other co-owners were not joined in this suit and may have competing rights in the houses on the property as it was made clear that the houses were improved and not built by anyone exclusively. In the circumstances I am not in a position to establish the specific share of the Plaintiff in the house in issue without them being heard. The other co-owners of the property should in the circumstances have been joined to the suit. I do however find that the First Defendant has accepted that he owes the Plaintiff SCR25,000 which he will have to repay.

*The Liability of the Land Registrar in registering the transfer*

[33] With regard to the Second Defendant, the registration of the transfer dated 16 July 2016 from the First Defendant to Georgina Dhillon with the caption "Transfer of house and rights and interest in house and area that house covers" was clearly improper and a *faute* in law given my findings above. The submissions of Counsel for the Second Defendant on this issue is misguided given the provisions of the Civil Code relating to co-

ownership. Accordingly, I find liability against the Second Defendant to be established on a balance of probabilities. The Plaintiff has claimed SR50,000 as moral damages in this respect. However, section 4 of the Public Officers (Protection) Act (as amended) makes payable only nominal damages where a public officer has acted in the execution of their office and in good faith. I find that the sum of SR 5,000 would be adequate in the circumstances.

**Decision and Orders**

[34] In the circumstances, the First Defendant is ordered to pay the Plaintiff the sum of SR25,000 with interests, which he borrowed and acknowledged owing to him, the Second Defendant is ordered to pay the sum of SCR 5,000 as nominal moral damages and the whole with costs.

[35] The registration of the transfer of Title V5711 dated 16 July 2016 to the extent that the specific house and specific part of the land is mentioned is rescinded, cancelled, annulled and/or revoked. The Land Registrar is ordered to amend the register of Title V5711 to indicate the transfer of the 1/12 share of the First Defendant in Title V5711 to Georgina Dhillon.

Signed, dated and delivered at Ile du Port on 18 September 2020.

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M. Twomey
Chief Justice