

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** A. Fernando (J.A), F. Robinson (J.A), S. Andre (J.A)]

## **Civil Appeal SCA22/2017**

**(Appeal from Supreme Court Decision CS 184/2011)**

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Dorothy Hall

Appellant

Versus

Maria Amina Morel

1<sup>st</sup> Respondent

Sonny Sophola

2<sup>nd</sup> Respondent

Charlemagne Mellon

3<sup>rd</sup> Respondent

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Heard: 13 August 2019

Counsel: Mr. F. Elizabeth for the Appellant

1<sup>st</sup> Respondent absent and unrepresented

Mr. D. Sabino for the 2<sup>nd</sup> Respondent

Mr. N. Gabriel for the 3<sup>rd</sup> Respondent

Delivered: 23 August 2019

## **JUDGMENT**

### **A. Fernando (J.A)**

1. The Appellant (Plaintiff, before the Supreme Court), has appealed against the judgment of the Supreme Court dismissing her claim. This was because the Learned Trial Judge had not been satisfied on a balance of probabilities that the Appellant has made out and substantiated her claim against the Defendants before the Supreme Court (Respondents herein). The Trial Judge had after dismissal of the claim, ordered and stated, that the inhibition order made in respect of title V12077, (*after the filing of the claim*) be discharged; that the Land Registrar is at liberty to register the transfer deed in relation to

land parcel V12077, the subject matter of this case, between the Appellant and the 2<sup>nd</sup> Respondent and his wife; and that the Land Registrar is at liberty to register title V11933 in the name of the 1<sup>st</sup> Respondent as Executrix of the estate of the deceased France Morel.

2. I have set down below the averments in the plaint that has a bearing on the appeal. The Appellant, according to her plaint, is a child of the 1<sup>st</sup> Respondent (1<sup>st</sup> Defendant before the Supreme Court) and the late Mr. France Morel. She is a legal heir and ayant droit of late Mr. France Morel who passed away intestate on the 18<sup>th</sup> of September 1984. The 1<sup>st</sup> Respondent is the wife of Mr. France Morel and mother of the Appellant. Mr. F. Morel had five children, three sons and two daughters, one of whom is the Appellant. According to the plaint, the 1<sup>st</sup> Respondent was appointed Executrix to the estate of the deceased, Mr. F. Morel. The 1<sup>st</sup> Respondent had sold parcel no. V 12077, which was part of the immovable property belonging to the estate of Mr. F. Morel, to the 2<sup>nd</sup> Respondent (2<sup>nd</sup> Defendant before the Supreme Court). It had been the contention of the Appellant that the 1<sup>st</sup> Respondent did not have the consent of all the heirs of the late F. Morel to dispose of the said property. According to the plaint, the consideration for the said sale was an exchange between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent, whereby the 2<sup>nd</sup> Respondent and his wife H. Sophola allegedly transferred title V 11933 situated at Plaisance, Mahe to the 1<sup>st</sup> Respondent and agreed to pay the 1<sup>st</sup> Respondent a sum of Rs. 150,000.00. The Appellant had stated that she had been duly informed that this sum was “never paid to the 1<sup>st</sup> Respondent”. The Appellant had then gone on to state that she had been informed that part of the said consideration of SR 150,000.00, the exact sum of which is not known, was paid to the 3<sup>rd</sup> Respondent, (3<sup>rd</sup> Defendant before the Supreme Court) by the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> Respondent was living together with Pamela Morel a daughter of the late F. Morel and a legal heir and ayant droit of late Mr. France Morel. It had been the Appellant’s claim that the 1<sup>st</sup> Respondent did not have the legal capacity to transfer good title to the 2<sup>nd</sup> Respondent of the said parcel V 12077, although the 1<sup>st</sup> Respondent mistakenly believed so. Further, since no consideration was paid the sale was void ab initio. The Appellant had made several requests to the 2<sup>nd</sup> Respondent to transfer back the property but the 2<sup>nd</sup> Respondent had failed to do so. The Appellant in

her plaint had prayed by way of relief for orders to declare the sale null and void for lack of consent of all the heirs or in the alternative for lack of consideration; to order the Land Registrar to rectify the land register by registering parcel V 12077 in the name of the estate of late Mr. F. Morel or in the alternative to order rescission of the sale and for an order that the 3<sup>rd</sup> Respondent refund the 2<sup>nd</sup> Defendant the sum paid if any.

3. On a reading of this plaint I am at a loss to understand whether the Appellant had been espousing her cause or that of the 1<sup>st</sup> Respondent as against the 2<sup>nd</sup> Respondent or the 2<sup>nd</sup> Respondent vis-a vis the 3<sup>rd</sup> Respondent. The transaction in this case according to the Deed of Transfer was between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent and his wife Hugette Fabiola Sophola. In my view the Appellant has no stake in this matter in view of the principle of Privity of Contract. Further since the wife of the 2<sup>nd</sup> Respondent is a co-purchaser of Title V 12077 and co-seller of Title V 11933, to pray for rescission without joining her as a party to the suit, violates the fair hearing principle, as rightly decided by the Learned Trial Judge.
4. The 1<sup>st</sup> Respondent's alleged defence, if it can be called as such, before the Supreme Court had been an admission of all the averments of the plaint. She had prayed for a declaration of the sale of land parcel V 12077 as null and void as no consideration was paid and to have the said land parcel registered in the name of the estate of late F. Morel. This militates against the Appellant's averment in the Plaint that she had been informed that part of the said consideration of Rs 150,000.00 was paid to the 3<sup>rd</sup> Respondent, (3<sup>rd</sup> Defendant before the Supreme Court) by the 2<sup>nd</sup> Respondent and her prayer by way of relief seeking an order that the 3<sup>rd</sup> Respondent refund the 2<sup>nd</sup> Defendant the sum paid if any. Even in the penultimate sentence of the Skeleton Heads of Arguments filed on behalf of the Appellant, before this Court, it is prayed for from this Court: "That any money paid by the 2<sup>nd</sup> Respondent either to Pamela Morel, Charlemagne Mellon or the 1<sup>st</sup> Respondent, should be paid back to the 2<sup>nd</sup> Respondent"

5. In my view the 1<sup>st</sup> Respondent's defence before the Supreme Court should have been struck out in accordance with **section 92 of the Seychelles Code of Civil Procedure** which states:

*“ 92. The court may order any pleading to be struck out, on the ground that it discloses no reasonable...answer, and in such case, or in case 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.”*

It is not a defence to the plaint in accordance with section 75 of the Seychelles Code of Civil Procedure but a mere confirmation of all the averments in the plaint and therefore frivolous or vexatious. **Section 75 of the Seychelles Code of Civil Procedure** states:

*“The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted.”* (emphasis added)

An admission of all the averments in the plaint is not a defence, to meet the claim, made in the plaint.

6. A defence as per the definition in **Black's law Dictionary** is “*A defendant's stated reason why the plaintiff...has no valid case...*” **Edwin E. Byrant in the The Law of Pleading Under the Codes of Civil Procedure 240 (2nd ed 1899)** states: “*Defence is defined to be that which is alleged by a party proceeded against in an action or suit, as a reason why the plaintiff should not recover or establish that which he seeks by his complaint or petition.*” The pleadings of the Appellant and the 1<sup>st</sup> Respondent show that there has been collusion between the Appellant and the 1<sup>st</sup> Respondent in filing action against the 2<sup>nd</sup> Respondent. This in my view amounts to an abuse of legal process. The

abuse is because the 1<sup>st</sup> Respondent then becomes a party, along with the Appellant, in the guise of a defendant, to fight the case against the 2<sup>nd</sup> Respondent.

7. Further according to **section 109 of the Seychelles Code of Civil Procedure:**

*“All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative...”* (emphasis added)

There is no right to relief alleged nor has any relief been sought by the Appellant as against the 1<sup>st</sup> Respondent.

8. What surprised me most was at the hearing of this appeal, the conspicuous absence without any explanation, of the 1<sup>st</sup> Respondent and her Attorney-At-Law, Mr. F. Bonte. In fact Counsel for the 3<sup>rd</sup> Respondent, informed Court that when he forwarded his Skeleton Heads of Arguments to the Attorney-At-Law of the 1<sup>st</sup> Respondent, he had refused to accept them. It is clear that the 1<sup>st</sup> Respondent does not want to stand with the Appellant in pursuing this appeal, which was against the judgment that dismissed the claim made by the Appellant in her plaint and with which, the 1<sup>st</sup> Respondent had agreed. The 1<sup>st</sup> Respondent has not appealed against the judgment that went against the position taken up by her, which also means the complete rejection of her evidence by the Trial Judge as referred to later in the judgment. Thus, the version of the Appellant remains unsupported and also contradicted by the 2<sup>nd</sup> Respondent.

9. The 3<sup>rd</sup> Respondent’s defence before the Supreme Court to the plaint had been a denial of all the averments in the plaint. He had stated that he is not aware that he owes the Appellant any money. The Appellant in her plaint had not averred that the 3<sup>rd</sup> Respondent owed any money to her and her prayer had been for an order that the 3<sup>rd</sup> Respondent refunds the 2<sup>nd</sup> Respondent the sum paid to him.

10. The 2<sup>nd</sup> Respondent in his defence filed before the Supreme Court had admitted that the Appellant is the legal heir and ayant droit of the late F. Morel and that the 1<sup>st</sup> Respondent was the Executrix of the estate of the late F. Morel. It had been his position that the transfer of parcel V 12077 was effected by way of a notarial deed by the 1<sup>st</sup> Respondent in her capacity as Executrix and wherein she represented that all the heirs had consented to the said transfer and that he entered into the transfer agreement in all good faith. The 2<sup>nd</sup> Respondent had stated that he was not aware that the 1<sup>st</sup> Respondent did not have the consent of all the heirs of the late F. Morel to dispose of the said property and had argued that lack of consent of any of the heirs shall not vitiate the transfer to him or any other third party purchaser. The 2<sup>nd</sup> Respondent had stated that the consideration for the transfer of land parcel V 12077 was as stated in the plaint. He had specifically stated that the 1<sup>st</sup> Respondent had instructed him to pay the entire agreed sum of SR 150,000.00 to Pamela Morel, a daughter of the late F. Morel and the 1<sup>st</sup> Respondent or Charlemagne Mellon, the 3<sup>rd</sup> Respondent. Charlemagne Mellon was living together with Pamela Morel, at that time. The 2<sup>nd</sup> Respondent had claimed that he had paid the total sum as per her instructions. It had been the 2<sup>nd</sup> Respondent's contention that the 1<sup>st</sup> Respondent had legal capacity as Executrix to transfer the title. The 2<sup>nd</sup> Respondent had denied that he had been requested to transfer back the property purchased of the late F. Morel by the 1<sup>st</sup> Respondent or anybody and that as a third party purchaser in good faith, he is not required to return the property. It had been position of the 2<sup>nd</sup> Respondent, that the Appellant's rights, if any, are in the value of the property (i.e. in personam against the 1<sup>st</sup> Respondent) and not in the property (in rem) as against him or other third party purchasers for good faith.

11. On a perusal of the pleadings and evidence in this case, I wish to make note of the following matters. The action against the 2<sup>nd</sup> Respondent should have been brought if at all by the 1<sup>st</sup> Respondent and not the Appellant as she was not a party to the transaction pertaining to the sale of land parcel V 12077. The Appellant probably brought the action, because the 1<sup>st</sup> Respondent could not have claimed that she did not have the consent of the heirs having made out to the 2<sup>nd</sup> Respondent that she did have such consent and stating so in the Transfer Deed. The Appellant's claim for a declaration of the sale as

being null and void for the reason that the 1<sup>st</sup> Respondent did not have the consent of all the heirs of the late France Morel should have been brought only against the 1<sup>st</sup> Respondent. There is absolutely no evidence from the 1<sup>st</sup> Respondent, and the only person who could have testified to that effect, that she mistakenly believed at the time of the sale that she could pass on good title to the said property to the 2<sup>nd</sup> Respondent in law, as alleged in the Appellant's plaint. It is also apparent from this case that it is only the Appellant, one of the heirs proved to be a child of the late France Morel, out of five of his children, who were all of age, as per the executor appointment document P6, who had brought this action. Pamela Morel, an heir of the late France Morel, who testified before the Trial Court and stated that she knew about the ongoing transactions for the sale of parcel V 12077, had not been questioned about or stated, that she did not consent to the sale.

12. The only issues that had to be determined by the Supreme Court in this case as per the pleadings and the Appellant's prayer in the plaint, were:

- i. Did the 1st Respondent have the legal capacity as Executrix of the estate of late France Morel, to transfer good title to the 2<sup>nd</sup> Respondent of parcel V 12077 in view of the fact that the 1<sup>st</sup> Respondent did not have the consent of all the heirs, (namely the consent of the Appellant) of the late F. Morel to dispose of the said property?
- ii. Was the monetary consideration of Rs 150,000.00 paid for the sale of parcel V 12077 and if not, did it make the sale void ab initio?
- iii. Was the transfer executed by the parties in good faith?

13. The first issue is a legal issue, the second a factual issue and the third both a legal and factual issue. I am not prepared to entertain any other issues that had been brought in through the grounds of appeal and the Skeleton Heads, despite the fact some of them had

been determined by the Supreme Court. This is because a trial has to be necessarily confined to the pleadings. One cannot go on a voyage of discovery raising issues not pleaded, save for a constitutional or legal issue, after the pleadings have been settled, and the trial begins. Even a constitutional or legal issue can be raised only if it necessarily arises from the pleaded facts.

14. In regard to the first issue the Learned Trial Judge had stated: “Article 830 of the Civil Code of Seychelles Act states that any act by a fiduciary shall be deemed to have been done with the consent of all the co-owners (the heirs with respect to an executor)...if the heirs believed that the Executrix did not discharge her functions properly, their recourse would be to sue the Executrix in her personal capacity.” Further on: “...this Court holds that the 1<sup>st</sup> Defendant as the Executrix transferred the property by virtue of the fiduciary power and authority vested in her by law. Obtaining the written consent of all the heirs before selling the co-owned property to the 2<sup>nd</sup> Defendant would be ideal but is not fatal to the performance of her functions as Executrix in transferring the property in the circumstances. This Court finds that the 1<sup>st</sup> Defendant has legal capacity to transfer good title despite not having the consent of all the heirs. The transfer is not in any way vitiated. Moreover, the transfer is not null and void for mistake as to her capacity to transfer good title. The transfer was executed by the parties in good faith. For the reasons set out above this Court finds that the transfer of Title V 12077 to the 2<sup>nd</sup> Defendant by the Executrix Mrs. Marie Amina Morel is valid in law and is not vitiated by lack of consent.” I agree with this finding.

15. In regard to this first issue referred to in paragraph 12 above, I wish to state that there has been no challenge to the appointment of the 1<sup>st</sup> Respondent as the Executor of the estate of the late France Morel, namely P 6. In **P 6** it is stated that all the heirs are agreeable to the appointment of 1<sup>st</sup> Respondent as Executor. The 1<sup>st</sup> Respondent had been appointed under **Article 1026 of the Civil Code of Seychelles Act** by Court. **D 2** the document pertaining to the transfer of land parcel bearing title no: V 12077, to which both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the wife of the 2<sup>nd</sup> Respondent have placed their signatures as Transferor and Transferees respectively, states “The Transferor hereby declares and



certifies that all the heirs have consented to the said transfer.” Having been a signatory to D2, the 1<sup>st</sup> Respondent has represented to the 2<sup>nd</sup> Respondent and his wife that she has the consent of all the heirs to transfer the property and is therefore now estopped, from denying that she did not have the consent of all the heirs to the transfer.

16. At the hearing before us Attorney for the 1<sup>st</sup> Respondent tried to argue that it was incumbent on the part of the Notary who prepared the Transfer document, namely D2, to ensure that the written consent of all the heirs had been obtained by the Executrix before entering into D2 and that the breach of such would render the transfer invalid. He did not cite to us any provision of the law or authority in this regard. The only instance a transfer in such a circumstance would be invalid is, if a law specifically provided that a transfer made by an executor without the written consent would be invalid as against all parties, implying that it will include innocent third party purchasers buying in good faith and for value. If it is only an obligation cast on a Notary to ensure that the written consent of all the heirs needs to be obtained by an Executor before attesting to a transfer deed, then, in my view whatever liability that may arise would be on the Notary attesting to such a transfer. Attorney for the 1<sup>st</sup> Respondent also argued that there was an error in D2 when stating as to who should pay the consideration sum of SR 150,000.00. The Learned Trial Judge had in this regards stated at paragraph 52 of his judgment “I hasten to state that in my view, based on the evidence before Court, there is a typographical error of transposition of the words “Transferor” and “Transferees”. The Learned Trial Judge had ordered a rectification of this in his final Order.

17. **Article 1028 of the Civil Code of Seychelles Act** states:

*“The executor, in his capacity as fiduciary of the succession, shall also be bound by all the rules laid down in this Code under Chapter VI of Title I of Book III relating to the functions and administration of fiduciaries, insofar as they may be applicable”.*  
(emphasis added)

According to **Article 1029 of the said Code**, an Executor is a representative of the estate. An Executor like that of a Fiduciary, under **Article 825 of the said Code**, has the full powers to sell the property, as directed by the heirs. **Article 830 of the said Code** states:

*“Where a fiduciary has given a discharge in respect of any asset, debt or obligation, or sold or otherwise disposed of property or any interest therein or part thereof or done any other act in relation to the property which he holds as fiduciary, in accordance with the terms of the instrument of appointment or with any order of the Court or with the provisions of the law, **such** discharge, **sale, disposal or act shall have the same effect, in all respects, as if it had been given, made or done by all the co-owners whatever their status or capacity.***

*He shall not be personally liable in respect of any act done or obligation incurred in the proper exercise of his functions.”(emphasis added)*

18. It is clear from the second paragraph in Article 830 above that an Executor shall be ‘liable’ only to the heirs and only in respect of acts done or obligations incurred in the ‘improper’ exercise of his functions. This would include article 826 where an Executor is mandated to inform all heirs before proceeding to sell property. Article 826 does not however mention that a sale or any act done by an Executor becomes invalid in respect of acts done or obligations incurred in the ‘improper’ exercise of his functions with an innocent third party, who has entered into transactions with the Executor in good faith.
19. In view of article 1028 referred to above, and in accordance with **Article 818 of the Civil Code of Seychelles Act** the rights of the heirs shall in relation to a co-owned property, be held on their behalf by an Executor through whom only they may act.
20. In the case of **S. Rajasunderam V R. Pillay SCA 09/2013** this court stated:

*“Paragraph 9 - The civil Code of Seychelles introduced the notion of executor to the law of Seychelles for the first time. The French Civil Code vests succession immediately in the*

*heirs whether land is co-owned or not. Given the limited land mass of Seychelles, a continuation of that system would have meant further fragmentation of rights in land, already problematic in 1975 when the code was promulgated. Articles 1025-1026 of the Code therefore provides for the appointment of executors by the testator or failing that by the court. Executors hold the estate on behalf of the heirs where there is co-ownership of property.*

*Paragraph 10 – The Code however does not only provide that the successors’ rights be vested in an executor but makes it clear that an executor is also a fiduciary. This was done most probably because co-ownership most often arises in the context of a succession. Article 724 of the Code thus states: “If any part of the succession consists of immovable property, the property shall not vest as of right in any of his heirs but in an executor who shall act as fiduciary...”*

*Article 1025 of the code also clearly states: “...Any executors appointed shall act as fiduciaries with regard to the rights of the persons entitled under the will, as provided by the Code, and also with regards to the distribution of the inheritance.”*

*At paragraph 11 of the said judgment this court stated: “It is clear to us that the executor is not only a fiduciary but has duties over and above a fiduciary in terms of the distribution of a succession to the heirs.” (emphasis added)*

21. In view of what is stated above, I hold the view that an Executor once appointed with the agreement of all the heirs is like an agent of the heirs with the power to do something for them and in their name. This is reflected in **Article 1984 of the Civil Code of Seychelles Act**. An heir who had agreed to the appointment of the Executor in my view is in the same position of a principal under **Article 1998 of the Civil Code of Seychelles Act**, who:

*“shall be bound to perform the obligations contracted by the agent in accordance with the authority conferred upon him”.*

Thus the heirs will be bound by agreements entered into by the Executor on behalf of them as against third innocent parties who have acted in good faith. A third party entering into a transaction with an Executor who has been duly appointed has reason to believe that the Executor has the authority to act on behalf of the heirs, in view of article 818 referred to above. This I shall call ‘ostensible’ or ‘apparent’ authority of an Executor like that of an agent. I find support for this statement in **Article 2009 of the Civil Code of Seychelles Act**, which states:

*“A third party that has treated with an agent whose authority has been withdrawn shall not be penalised if it was reasonable, in the special circumstances of the case, for such party to assume that the agent had acted with the authority of the principal...”*

In so far as a third party who is acting in good faith is concerned, I am of the view that he is not obliged to ascertain whether the Executor has the consent of the heirs to act in respect of a particular transaction. That a duly appointed executor can be treated as an agent or representative of the heirs had been suggested in the Supreme Court judgment in **J. Kaven Parcou and three others V J. Parcou and two others CS 38 of 1994**.

22. In **Charlemagne Grandcourt and others V Christopher Gill (SCA 7 of 2011), [2012] SCCA 31**, this Court accepted the submission of the Respondent’s Counsel that there is no duty on an innocent purchaser to conduct research on whether the vendor as the Executor of an Estate has the heirs consent. In this case, D2, the document pertaining to the transfer of land parcel bearing title no: V 12077, to which the 1<sup>st</sup> Respondent has placed her signature as Transferor states: “The Transferor hereby declares and certifies that all the heirs have consented to the said transfer”. It is not even alleged in the plaint that the 2<sup>nd</sup> Respondent knew or had reason to believe that the 1<sup>st</sup> Respondent did not have the consent of the Appellant as claimed by her.

23. One of the major issues that arise in this case is that the rest of the 4 heirs have not challenged the sale of parcel V 12077 and asked to have the sale declared null and void

for lack of consent of all the heirs or in the alternative for lack of consideration as stated at paragraph 11 above. In light of the good faith on the part of the 2<sup>nd</sup> Respondent in entering to this transaction with the 1<sup>st</sup> Respondent, it would be totally unfair to give heed to the prayer of the Appellant. I am of the view that it is not possible, in the absence of any legal provision, to declare a sale entered into by the Executor with a third party who has acted in good faith, merely at the request of the Appellant who is only one of five heirs. Such an order by Court will only lead to chaos.

24. **Section 89 of the Land Registration Act** speaks of instances where a court may order cancellation of any registration of land.

*“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.*

*(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”(emphasis added)*

There is absolutely no evidence in this case of fraud or mistake on the part of the 2<sup>nd</sup> Respondent.

25. The second issue referred to in paragraph 12 above is essentially a factual issue, the best Judge of which was the Trial Judge. At paragraph 31 of the judgement the Learned Trial Judge had stated: “Before addressing the issues, this Court places on record its observations as to the credibility of 2 witnesses who testified on behalf of the Plaintiff (*Appellant herein*) in examination-in-chief and their subsequent responses under cross examinations. These are namely, Marie Amina Morel (*1<sup>st</sup> Respondent herein*) and Pamela Constance (nee Morel)” and states that: “their credibility is markedly questionable”. In

respect of the 1<sup>st</sup> Respondent the learned Trial Judge had made the following observations: “She was evasive and defensive when the issues of her signature on various documents and the money transactions came up...This Court finds that she is an intelligent person but who lacked candour and who was deliberately trying to mislead the court. She impressed the Court as someone who knew how to manoeuvre in order to avoid telling the truth.” As regards Pamela Constance (nee Morel), the learned Trial Judge had said: “This court holds the same view with regards to Pamela Constance (nee Morel), in particular with respect to her knowledge of the whole sale transaction prior to the transfer deed being signed; the signature of Marie Amina Morel on the transfer deed; the exchange of the property at Plaisance as part consideration; the money transactions between the 1<sup>st</sup> Defendant (*1<sup>st</sup> Respondent herein*) and the 2<sup>nd</sup> Defendant (*2<sup>nd</sup> Respondent herein*); as well as, money transactions between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant (*3<sup>rd</sup> Respondent herein*) who was her (Pamela Constance’s) partner at the material time”.

26. In regard to the 2<sup>nd</sup> Respondent the Learned Trial Judge had observed that he was candid and truthful. Having gone through the proceedings I find that these observations of the Trial Judge find support in the recorded proceedings. These are strong statements made by the learned Trial Judge concerning the observations he had made, as to the credibility of those who testified before him. An appeal court is reluctant to disturb the findings made by the Trial Judge based on such observations unless they are perverse.

27. In regard to consideration the Learned Trial Judge had said that he is satisfied on a balance of probabilities that there was consideration for the transaction envisaged by the Transfer Deed. According to the 2<sup>nd</sup> Respondent, he had made payments for the purchase of Title V 12077 through his business account – ‘Free Will Design Studio’, from the 17<sup>th</sup> May to the 14<sup>th</sup> of June 2010, as per the instructions of the 1<sup>st</sup> Respondent, in several instalments, totalling to a sum of SR 140,840.00. This was all before the signing of the transfer document D2 on 2<sup>nd</sup> November 2010. RS 6000.00 had been paid to the Notary on the instructions of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent on the 27<sup>th</sup> of January 2011 and the balance of RS 3160.00 had been kept apart for payment of stamp duty. The 3<sup>rd</sup> Respondent who was at that time living in the same house as the 1<sup>st</sup> Respondent had

admitted that payments were made. The learned Trial Judge has listed how the payments had been made at paragraphs 57 to 67 of the judgment and this is borne out by the evidence of the 2<sup>nd</sup> Respondent. The fact that certain payments were made has been corroborated by the evidence of the 3<sup>rd</sup> Respondent, Pamela Morel, Mrs. Lisa Rouillon and certain exhibits produced by the 2<sup>nd</sup> Respondent, although denied by the 1<sup>st</sup> Respondent. The learned Trial Judge had in relation to the 1<sup>st</sup> Respondent specifically stated: “this Court is not convinced that she was a truthful witness when testifying about money payments.”

28. The Learned Trial Judge basing himself on the evidence and the exhibits produced before him, had stated that full consideration was paid for the transfer by the 2<sup>nd</sup> Respondent in accordance with the instructions of the 1<sup>st</sup> Respondent. He had stated at paragraph 73 of his judgment: “For the reasons set out above, this Court concludes and finds that the transfer is not null and void ab initio for lack of consideration.” This is a finding of fact by the Trial Judge, which I have no basis to disturb. Counsel for the Appellant at the hearing before us on being questioned by Court admitted that only a sum of SR 3000.00 out of the consideration of SR 150,000.00 remains to be paid. As per the evidence, the finding of the learned Trial Judge and what was told to us by Counsel for the 2<sup>nd</sup> Respondent at the hearing, this sum as stated at paragraph 27 was to meet partly the stamp duty, which is likely to be more than SR 3000.00.

29. As regards the third issue referred to at paragraph 12, which is both legal and factual, the 1<sup>st</sup> Respondent in his testimony before the Court having pointed out to the place in D2 where it says all the heirs have given their consent, had stated that he had no doubts about the said representation made in D2. He had said: “I believe everything was in order and was doing in good faith.” (verbatim) The Appellant has not alleged in the plaint or placed any evidence in respect of bad faith of the 2<sup>nd</sup> Respondent and thus the presumption of good faith on the part of the 2<sup>nd</sup> Respondent had not been rebutted. The learned Trial Judge had stated: “there is no evidence before this Court to indicate that the 2<sup>nd</sup> Respondent coerced or tricked the 1<sup>st</sup> Respondent in any way. The transaction was done openly before an attorney-at-law. This Court finds and concludes that the 2<sup>nd</sup>

Respondent is indeed a purchaser in good faith of Title V 12077.” In **Parcou V Parcou Civil Appeal No; 14 of 1998** this Court citing Dalloz Code Civil Annote. Article 2265, notes 34 and 35 said “*Good faith on the part of a purchaser is a firm belief on his part that the vendor of a property has the right and the capacity to sell it. (“convaincu que celui qui vous le transmet avait le droit et la capacite de lalienier)”* In **S. J. de St. Jore and four others V N. Stevenson SCA 5 and 6 of 2015** this Court based its decision, on the basis of whether the third party purchasers had acted in good faith or not.

30. I also wish to draw a similarity between the 2<sup>nd</sup> Respondent and a person acquiring any interest in land from a person who had held a power of attorney, without notice of its revocation. Section 71(1) of the Land Registration Act states:

*“A power of attorney which has been registered under section 70, and of which no notice of revocation has been registered under that section, shall be deemed to be subsisting as regards any person acquiring any interest in land affected by the exercise of the power, for valuable consideration and without notice of revocation and in good faith, or any person deriving title under such a person.”*(emphasis added)

In both these instances, the innocent party acts in good faith, without notice of the inability of the vendor to sell.

31. The learned Trial Judge had also set out a possible reason for the institution of this action, basing himself on the evidence of the 2<sup>nd</sup> Respondent which he accepted, that it was as a result of an attempt to put up a political bill board on his property at the instance of the Appellant, to which the 2<sup>nd</sup> Respondent had objected. The letter of demand was made a month after the above-mentioned incident. This finds support from the fact that it was 11 months after occupying the dwelling house in V 12077, and 7 months after signing of the transfer documents that the 2<sup>nd</sup> Respondent had received a letter of demand from the Appellant’s lawyer which led to the commencement of this plaint.

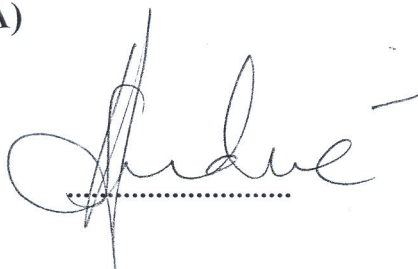


32. For the reasons set out above, I dismiss the appeal and confirm the Judgment of the Supreme Court, with costs to the 2<sup>nd</sup> Respondent.



**A. Fernando (J.A)**

**I concur:**



**S. Andre (J.A)**

Signed, dated and delivered at Palais de Justice, Ile du Port on 23 August 2019