

IRIS DENI -v- IMAW YOU

High Court of Solomon Islands

(Muria, CJ.)

Civil case No. 59 of 1993

Hearing: 26 September 1994

Judgment: 28 December 1994

A. Radclyffe for the Plaintiff

F. Walelia for the Defendant

MURIA CJ: This is a claim by the plaintiff for specific performance of a contract for the purchase of the leasehold property being Parcel No. 191-033-12 or damages. The defendant has denied the claimed.

The brief facts of the case are that the plaintiff and defendant met in 1986 and lived together in a house at Panatina. As result of their association, a child was born to them in 1990. The father of that child had been adjudged by the Magistrate Court to be the defendant.

In the mid part of 1992, the parties moved to MBua Valley into the house in Parcel No. 191-033-12 now under dispute. The house was purchased from one Reuben Lauvota for the sum of \$45,000.00 It was in August 1992 that the defendant left the plaintiff and child in the house and went to live with his wife who had arrived from Taiwan. The plaintiff and child have been living in the said house until the present time.

In January 1993, the defendant gave notice to the plaintiff to move out of the house. The plaintiff and the child are still living in the house at the present.

The plaintiff's case is that the defendant had agreed that the house was bought specifically for the plaintiff's child as he had some family problems at the time. The plaintiff claimed that the defendant went later and registered the property under his own name after their argument over the defenant's failure to pay maintenance for the child.

The defendant's case is that the house was his and the plaintiff has no enforceable claim over the property. Further it was contended on behalf of the defendant that the house was purchased not for the plaintiff but to provide shelter for the child with the ownership of the house to remain in the defendant.

There was much argument about the issue as to who was the real father of the child. That question had already been dealt with by the Magistrate Court and an appeal had been made against the Magistrate Court's decision on issue and must now be accepted. However I agree with Mr. Waleilia that the matters raised by the defendant and his witnesses and which were put to the plaintiff and her witnesses are relevant, if only, for the purpose of ascertaining the real intention of the defendant at the time he bought the house.

The question here must be whether at the time of the sale of the house by Mr. Lauvota to the defendant there was in existence an agreement between the plaintiff and defendant that the house would be purchased and held in trust for the plaintiff's child. It is not a question of specific performance of a contract of sale of land, for that had actually been done.

Since we are concerned with registered land, the starting point must be the provisions of the Land and Titles Act. Section 193 of the Act deals with trusts which may have some effect on an interest in a registered land. It provides as follows:

- "193 (1) *The owner of an interest may own it for his own use and benefit or as a trustee.*
- (2) *The Registrar shall not enter any trust on the land register.*
- (3) *An instrument which declares, or is deemed to declare, any trust, or a certified copy thereof, may be deposited with the Registrar for safe custody and reference; but such instrument or copy shall not form part of the land register or be deemed to be registered.*
- 4) *Wherever the Registrar becomes aware that any registered interest is affected by a trust, he may, but shall not be bound to, protect in such manner as he thinks fit the rights of any person beneficially interested under the trust or thereby required to give any consent.*

It is clear that an interest in a registered land can be held in trust for others. However such trust is not entered on the land register nor is any instrument creating such trust to be registered. A trust instrument or deed is therefore in terms of the Act, an unregistered instrument.

The effect of unregistered instrument on registered interest in land is dealt with under section 107 of the Land & Titles Act. That section essentially reiterates the position held under the Statute of Frauds 1677 and re-enacted in section 40 of the English Law of Property Act, 1925 which requires that there must be written evidence of the agreement for the disposition of land or interest in land signed by the party to be charged or by some other person lawfully authorised to do so. Section 107 is in the following term:

"107 (1) *No registered interest in land shall be capable of being created or disposed of except in accordance with this Act and every attempt to create or dispose of such interest otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any such interest.*

(2) *Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunder by him lawfully authorised:*

Provided that such an action shall not be prevented by reason only on the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract -

(i) *has in part performance of the contract taken possession of the property or any part thereof; or*

(ii) *being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.*

(3) *Every instrument when registered shall have the same effect for all purposes of and incidental to this Act as if it had been made under seal; but nothing in this subsection shall be construed to prevent a party to such an instrument affixing his seal thereto, or giving to the instrument any additional form of solemnity not inconsistent with the provisions of this Act."*

It will be observed that section 193 speaks of an "instrument" declaring a trust or a certified copy of such instrument. Section 2 of the Act defines "instrument" as:

"includes any deed, judgement, decree, order, declaration or other document"

Thus the principle embodied in the Act in relation to trust, is that a declaration or creation of trust which affects a registered interest in land must be by instrument though the instrument itself is not registrable. Nevertheless it must be by some form of written document.

In the present case, the plaintiff's claim is clearly one of trusts, which is strongly denied by the defendant. The burden of proving the existence of such a trust relationship is upon the plaintiff. She bears the burden of proving that the registered interest in Parcel No. 191-033-12 had been disposed of under a contract or a trust agreement between the defendant and herself in accordance with the provisions of the Land and Titles Act. This is so because section 107 of the Act specifically pointed out that any attempt to create or dispose of a registered interest in land otherwise than in accordance with the provisions of the Act is ineffectual.

The plaintiff did not deny that the alleged agreement she relied on was not in writing. She nevertheless insisted that the sale of the property by Mr. Lauvota to the Defendant was done so in trust for her child. This is the crux of her claim.

In a claim such as this, the guiding principle must be that effect should be given to the intention of the settlor, no matter how it had been indicated by him. However this guiding principle must be looked at in the context of the modern law on trusts. The old law on trusts was that spoken words were as effectual as written instruments and that bare signs and gestures were sufficient. That gave rise to disputes and the Statutes of Frauds, 1677, (section 7), required that in relation to land, a trust of land must be in writing signed by the settlor. The Law of Property Act 1925 re-enacted that provision in section 53 (1)(b) which is as follows:

"A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will"

Mr. Waleilia submitted that the Law of Property Act 1925 applies here particularly in relation to trusts such as the one we are here concerned with. Mr. Radclyffe argued that the 1925 Act is not part of the Law of Solomon Islands. I do not think it is necessary that I should rule on this aspect of the argument based on circumstances and argument raised by Counsel in the present case. The evidence adduced before the Court together with the provisions of the Land and Titles Act referred to earlier are quite sufficient for the Court to dispose of the present matter now before the Court.

Mr. Waleilia referred the Court to the case of *Maddison -v- Alderson* (1883) 8 App. Cas. 467. That case was about part performance of an oral agreement over land. The House of Lords basically held that there was no contract and that even if there was it could not be enforced as it was not in writing.

The present case is caught by the principle enunciated in *Maddison -v- Alderson* (above). The same principle is also conveyed, in my judgement, by sections 107 and 193 of the Land and Titles Act. That principle is that any contract for the disposition of any registered interest in land must be in writing signed by the party to be charged or someone lawfully authorised by him.

In the light of the principle as stated and the evidence before the Court, there could not be said to be a contract in this case that the property was bought by the defendant to be held in trust for the plaintiff's child. The requisite for a valid disposition of an interest in land had not been done and "the law cannot be strained for the purpose of relieving her from the consequences of that misfortune" to quote the words of Lord Chancellor, The Earl of Selborne's words in *Maddison -v- Alderson*.

The consequence that must naturally follow from that misfortune is that the plaintiff's claim cannot be maintained.

I accept there was some discussion between the Defendant and plaintiff and possibly with Mr. Lauvota about the way the house should be used or occupied. But that can hardly satisfy the requirements of principle expounded in *Maddison -v- Alderson* (above) and sections 107 and 193 of the Act. The conduct of the defendant might well, and I accept, have led the plaintiff to continue to occupy the house even after the notice to vacate had been served on her. Although that did not justify the existence of an enforceable contract between the parties, it is in my view sufficiently enough to counter the defendant's claim for mesne profits against the plaintiff. The defendant clearly allowed the plaintiff and her child to

use the house and only wanted them out of the premises after he heard rumours that the child was not his but of somebody else.

In those circumstances, I do not think it would be proper to allow the defendant his counter-claim for mesne profits. The counter-claim is dismissed.

The result therefore is that the plaintiff's claim is dismissed and the defendant shall have possession of the premises. The defendant's counter-claim for mesne profits of \$500.00 per month from 9th January 1993 until possession is delivered up is also dismissed.

I shall give reasonable time for the plaintiff and other occupants to vacate the premises. The court understands that the plaintiff had already formed a relationship with another man who has a house and lives at Ranadi. I feel in the circumstances a period of 30 days would give sufficient time for the plaintiff to find an alternative accommodation.

In the circumstances, I consider the parties should bear their own costs.

(G.J.B. Muria)
CHIEF JUSTICE