



**CIVIL COURT
FIRST HALL**

**THE HON. MR. JUSTICE
ANTHONY ELLUL**

Sitting of the 22 nd October, 2012

Citation Number. 118/2012

Antonius Kok

Vs

Josephine sive Josette Faure

This judgment concerns the first two pleas of the defendant¹.

On the 6th February 2012 plaintiff filed a sworn application requesting the court to condemn the defendant to transfer in his name apartment 34, Verdala Mansion

¹ Fol. 39.

together with a lock up garage, purchased by contract dated 26th October 2004 published by Notar Remigio Zammit Pace. Plaintiff's request is based on a judgment delivered by this court in the case **Antonius Kok vs Josephine sive Josette Faure** (480/2009) on the 30th June 2011 wherein the court stated:-

“Defendant’s obligation as a front or prestanome is that of holding the property on behalf of plaintiff and, eventually, of transferring it to him, and not that of repaying the money advanced for its purpose, which, after all, was not spent in her interest but in the interest of plaintiff. For this reason plaintiff’s contention that the transaction is to be treated as a money-loan which has to be repaid is not correct, and the same must be said of defendant’s counter-claim that the agreement be treated as a donation.”.

The judgment was not appealed, and therefore it is final².

In her first plea, the defendant claims that the judgment delivered on the 30th June 2011 is not a *res judicata*³. The court does not agree. It is true that the last paragraph of the judgment states:-

“The court therefore dismisses both plaintiff’s claims and defendant’s counter-claims. The costs of the principal action are to be paid by plaintiff; those of the counter-claims are to be paid by defendant.”.

However the court concluded that Faure bought the apartment at Verdala Mansions as a fiduciary of the plaintiff. It is not permissible for this court to delve on this matter any further. The principle of legal certainty must prevail, and therefore this court is precluded from reconsidering the matter. The judgment delivered on the 30th June 2011 is extremely clear. The court declared that there was no loan or donation, but merely a *prestanome* agreement since at the time plaintiff could not purchase

² On the 27th July 2011 the Registrar issued a declaration confirming that no appeal was filed (fol. 34).

³

another property since he was a foreigner and already owned property in Malta⁴. If the court were to reconsider the matter afresh there is a potential risk that a conflicting decision is reached. The scope of the principle of *res judicata* is to avoid such a scenario.

In the case **Cassar Airconditioning Systems Ltd vs Norman Zammit, the Court of Appeal**⁵ highlighted:

“per riconoscere il vero portata di una sentenza, occorre indagare quale fosse stata la questione sulla quale il giudice fu chiamato a pronunciarsi e la discussione che precedette il suo giudizio, ed esaminare il dispositivo nel suo complesso, raffrontandolo, mettendolo in armonia colla motivazione la quale è anche essa parte della sentenza, sebbene dalla stessa non ne sorga il giudicato” (**“Filippo Farrugia Guy et -vs- Sac. Angelo Farrugia”**, Appell Civili, 12 ta’ Novembru 1919). L-istess haga intqal fis-sentenza **“Salvatore Debono -vs- Ernest Royston Matthew et Kopja Informali ta’ Sentenza nomine”**, Appell Civili, 24 ta’ Ottobru 1966, u, cjoe, li *“ddispositiv ma jstax ma jinqarax fid-dawl tal-premessi”*.

Similarly in **Joseph Camilleri vs Lilian Mallia** the Court of Appeal held⁶:

“Jista’ jigri li decizjoni ma tkunx intierament fil-parti dizpozittiva tas-sentenza izda anke fil-parti razzjonali taghha meta fil-motivazzjoni tigi definita u rizoluta xi vera

⁴ The court stated: “21. Plaintiff’s evidence, however, also makes it explicitly clear that the true intention was not that of making an interest-free loan to defendant, repayable in two years in terms of art. 1078(a) of the Civil Code, but, rather, that defendant should be a front, a so-called *prestanome*, so that plaintiff may avail himself of her name to acquire property which he could not acquire in his own name. This is evident also from the terms of the agreement, as plaintiff himself admits when explaining the reason for the inclusion in the agreement of certain clauses such as the obligation to insure the property, the prohibition of letting, and the obligation to maintain the property in a good state of repair.”. The stipulation that, in case the property is sold, any capital gain or loss is to go to plaintiff also shows that the beneficial owner was to be plaintiff. Likewise, the agreement on the transmission of the property in the case of death of defendant, although devoid of legal effect, shows that the parties considered that the property in truth belonged to plaintiff.” (fol. 33).

⁵ 1st March 2006 – Judge P. Sciberras.

⁶ 5th October 1998.

kwistjoni b'mod li dik il-parti tkun il-premessa logika u necessarja mad-dipozittiv u allura dik il-parti tiffirma parti mid-dispozittiv li kollha flimkien jiffurmaw il-gudikat.”.

The defendant claims that she was surprised with the contents of the judgment. The court cannot agree. During the compilation of evidence the plaintiff was very clear in stating that the property was bought in his name for the simple reason that he already owned property in Malta. The court had a right to reach its own conclusions based on the evidence, and had no legal obligation to uphold either party's contention. In any case, the defendant had the opportunity to file an appeal and contest thereby contest the judgment.

As regards to the **second plea**, defendant is claiming that in any case the agreement of *prestanome* is illicit as it is contrary to law. She contends that if plaintiff's request is upheld, the court would be sanctioning an illegality and permitting the defendant to evade the applicable law with regards to acquisition of immovable property by foreigners in Malta. In paragraph 22 of the judgment the court held:-

“22. Defendant's obligation as a front or prestanome is that of holding the property on behalf of plaintiff and, eventually, of transferring it to him, and not that of repaying the money advanced for its purpose, which, after all, was not spent in her interest but in the interest of the plaintiff.”.

According to Article 4 of the *Immovable Property (Acquisition by Non-Residents) Act* (Chapter 246)⁷:-

“4. (1) Save as hereinafter provided, with effect from 30th May, 1974, a non-resident person⁸ may not acquire immovable property by or under any title, and in any manner, whatsoever, whether by act inter vivos or causa mortis, and including prescription, occupancy or accession; and any deed, will or other act purporting to

⁷ Vide also Article 3.

⁸ Vide definition in Article 2 of the Act.

transfer or transmit any immovable property to a non-resident person, and any devolution or other event having the effect of transmitting immovable property and which but for the provisions of this Act would have transmitted such property in favour of a non-resident person, shall be null and void and be without effect for all purposes of law and in regard to all persons; and any transfer, payment or other thing made or done or given as part or in consequence of, or as ancillary to, anything which is prohibited as aforesaid shall likewise be null and without effect and, as and where appropriate, the subject matter thereof shall be returned, restored, refunded, cancelled or otherwise dealt with accordingly.”.

It is not contested that according to Maltese law plaintiff could not at the time of purchase, acquire property in his name. In this respect Notary Remigio Zammit Pace confirmed: *“I am aware that, at the time of the sale of the property, Mr Kok already owned an immovable property in Malta and could not therefore acquire another property in his name.”*⁹. The plaintiff confirmed that he did not purchase the property in his personal name because he had been advised that: *“as Maltese law stood at the time, it was not possible for a foreigner like myself to purchase several properties even though I had the necessary finances to do so.”*¹⁰. The court considered that defendant acted as mandatary for plaintiff so that he could purchase property in Malta since at the time he was precluded from acquiring property in his own name. Therefore, it is not essential for the court to assess whether at the time of the purchase he was a resident or non-resident for the purposes of Chapter 246 and whether he could purchase property in Malta without the need to ask for a permit. It is evident that the court’s reasoning, in the judgment dated 30th June 2011, is based on these facts.

In the judgment delivered on the 30th June 2011 the court confirmed that a *prestanome* relationship existed between the parties, and that defendant’s obligation is to hold the

⁹ Fol. 51 of the case 480/09GCD.

¹⁰ Fol. 52 of the case 480/2009.

property on behalf of the plaintiff and eventually transfer it to him. From a reading of the judgment it is clear that the court did not consider whether or not the prestanome agreement between the parties was legal or not.

Article 987 of the Civil Code states:-

“An obligation without a consideration, or founded on a false or an unlawful consideration, shall have no effect.”

A consideration is unlawful if *“prohibited by law or contrary to morality or to public policy.”* (Article 990 Civil Code).

Although contracts have the force of law between parties (Article 992), they must be “legally” concluded. The so called law made by the parties must give way to the general law. Agreements cannot derogate from laws which concern the public interest. Therefore contracting parties can freely enter into contracts as long as they are not contrary to law, public policy or to morality.

Mandate is a contract whereby *“a person gives to another the power to do something for him.”* (Article 1856 of the Civil Code).

According to Article 1871A of the Civil Code persons who hold property for the benefit of others are regulated by the provisions of the Law of Mandate and those relating to fiduciary obligations.

In terms of Article 1857(1) of the Civil Code:-

*“Every mandate must have for its object **something lawful which the mandator might have done himself.**”*

Based on the judgment delivered on the 30th June 2011, it is evident that the agreement concluded by the parties at the time of the purchase of the property was solely intended to bypass the restriction imposed by Article 4 of Chapter 246. The court commented:

“Plaintiff’s evidence, however, also makes it explicitly clear that the true intention was not that of making an

*interest-free loan to defendant, repayable in two years in terms of art. 1078(a) of the Civil Code, but, rather, that **defendant should be a front, a so-called prestanome, so that plaintiff may avail himself of her name to acquire property which he could not acquire in his own name.***"

An agreement that was eventually transposed in writing between October 2008 and 2009, wherein the parties agreed:-

"Loan Contract

Entered today October 25th 2004.

In order to purchase the apartment in Verdala Mansions known under the name Porta Vilhena number 34 (thirty four) with lock-up garage under number 40 (forty), inclusive AC system and kitchen, Ms. Josette Faure wishes to take a loan of Lm 365,000- (three hundred sixty five thousand Maltese Liri) from Ing. Antonius Maria Jozef Kok, born 25-01-1940), holder... of identity card number 026286A.....

Abovementioned Mr Antonius Kok declares that he will provide the Lm 365,000- to Ms Josette Faure under the following conditions:

- 1. The property will be fully insured against fire, water damages etc.;*
- 2. The property will not be rented out without permission of the Loan provider;*
- 3. The property will be managed and cleaned in a proper way;*
- 4. The loan will be free of interest under the condition that in case of sale the loan and the entire profit will go to Mr Antonius Kok, without any delay; however, the loan can never exceed the selling price of the said apartment;*
- 5. In case Ms Josette Faure dies, the ownership of the abovementioned property will be immediately handed over to Mr Antonius Kok without any delay. The property will not form part of the inheritance of Ms. Josette Faure. Signed for mutual acceptance."*

According to plaintiff:-

“Sometime in October 2008, I asked Ms Josette Faure to sign the loan agreement whose contents I had discussed with her soon after the deed of sale was concluded, and Ms Faure did this..... I did this as I needed to safeguard my investment due to the amount of monies involved.”¹¹.

The agreement which the parties undertook in 2004 prior to the purchase of the premises is illegal and against public policy as its sole purpose was to avoid the general prohibition imposed by law that non-residents cannot acquire property in Malta¹². Parties that take part in illegal contracts are denied the remedies available under contract law to ensure that the other party performs his/her obligation. Therefore the mandate is null. In a judgment delivered in the case **Rev. Sac. Don Vincenzo Borg vs Giuseppe Caruana et** on the 5th October 1950¹³, the court held that once the mandate was illegal, the plaintiff had no right of action for the performance of the obligation by the mandatary; *“In tutti questi casi il mandato non produce verun’azione, ne’ da parte del mandante, ne’ da parte del mandatario. Quegli non e’ ammesso a chiedere conto al mandatario; questi non e’ ammesso in giudizio a farsi indennizzare dal mandante..... (Troplong, loc. Cit., para 31).”¹⁴.*

¹¹ Fol. 52 of the case 480/2009GCD.

¹² Vide judgment delivered on the 3rd December 2004 by the Court of Appeal in the case **Judith Lucchesi nomine vs Rita Sultana proprio et nomine et**.

¹³ (Vol. XXXIV.ii.632). The case concerned the delivery of money to the defendant who had to pass them on to another man. The plaintiff, who was on a boat about to disembark, had been informed that custom officials were going to search him. He therefore passed on the money to the defendant to evade the law.

¹⁴ The court referred to the following referred to Article 1857 (at the time 1959), and confirmed that the law applied the principle that *“Il mandato bisogna che non sia contrario ne alle leggi, ne alla morale. Sebbene non fosse considerato tale in se’ stesso, basterebbe, perche’ divenisse illecito, che lo fosse nelle circostanze particolari del mandato”* (Pothier, *Mandato*, para. 231). *“L’oggetto del mandato deve essere lecito. Quando il fatto e’ illecito, la legge non riconosce alcun effetto alla convenzione; e’ una obbligazione fondata su causa illecita, poiche’ la causa si confonde coll’oggetto dei contratti; e quando la causa e’ illecita, l’obbligazione e’ inesistente e non puo’ avere alcun effetto”* (Laurent, Vol. XXVIII, para. 402). *“Il mandato non puo’ avere per oggetto un fatto illecito”* (Baudry, *Del Mandato*, Vol. XXIV, para. 444). *“E’ d’uopo che la cosa che si assume l’incarico di fare sia lecita; giacche’, se fosse contraria alla legge o al buon costume, l’accettazione di un tale incarico non sarebbe obbligatoria; e percio’ a chi l’avesse dato non*

Both parties knew that the contract was to be performed illegally, and therefore the law should not help the plaintiff in any way in enforcing his rights under the contract.

This notwithstanding the judgment delivered on the 30th June 2011 is a *res judicata*. The court confirmed that:-

1. Defendant signed the contract of purchase as a *prestanome* of the plaintiff.
2. Defendant's obligation as a *prestanome* is to transfer the property in plaintiff's name.

The purpose of this lawsuit is to enforce the findings of the court in the judgment delivered on the 30th June 2011, so that the defendant, as plaintiff's fiduciary, transfers the premises in his name. It is true that in the first case the court did not deal with the issue on whether the contract of mandate was based on an illicit cause. However, the defendant could have appealed the judgment and claimed that if the court was to confirm the conclusion reached by the first court, this notwithstanding the mandate was based on an illicit cause and therefore null and unenforceable. The court is not of the opinion that at this stage it should delve on this matter, once there is a judgment confirming that the defendant signed the contract of sale as a *prestanome* of the plaintiff and was obliged to transfer the property into his name. As a fiduciary, one of her obligations is:

"to return on demand any property held under fiduciary obligations to the person lawfully entitled thereto or as instructed by him or as otherwise required by applicable law." (Article 1124A(4) of the Civil Code).

competerebbe alcuna azione contro chi l'avesse accettato, per non essersi dal medesimo fatta la cosa di cui era stato incombenzato, e questi dal canto suo, lungi dall'averne una azione contro colui dal quale fosse di cio' incaricato, sarebbe generalmente punibile se vi avesse adempito. Lo stesso mandante potrebbe in generale essere pur anche perseguitato e punito come complice del fatto..... E' mestieri che il mandatario possa fare la cosa di cui viene incaricato, cioe' che non siavi in lui impedimento per natura o per legge a farla." (Duranton, Vol. XVIII. Del Mandato, para. [92.194].").

Informal Copy of Judgement

Obviously defendant's obligation to transfer the apartment into plaintiff's name is subject to the condition that a permit is issued in terms of Chapter 246 of the Laws of Malta or the competent authorities confirm in writing that no such permit is required in this case.

Therefore for these reasons the court:-

- 1. Dismisses the first plea.**
- 2. Dismisses the second plea.**

Costs against the defendant.

< Partial Sentence >

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