



MALTA

COURT OF APPEAL

HIS HONOUR THE CHIEF JUSTICE

SILVIO CAMILLERI

THE HON. MR. JUSTICE

TONIO MALLIA

THE HON. MR. JUSTICE

JOSEPH AZZOPARDI

Sitting of the 27 th March, 2015

Civil Appeal Number. 118/2012/1

Antonius Kok

v.

Josephine sive Josette Faure

The Court:

Considers that this appeal was lodged by Josephine sive Josette Faure on the 10th July, 2014, after a decision delivered by the First Hall of the Civil Court on the 7th July 2014, whereby it acceded to plaintiff's request to produce as witness two persons not declared as such in his original sworn application.

The decision of the first Court is reproduced hereunder for easy reference:

“With reference to the application filed by the plaintiff (7.5.2014), having seen the defendant's reply and after hearing the oral submissions made by defence counsel, considers:-

“i. In the judgment of the 29 the November 2013, the Court of Appeal stated: “.. *and orders the acts of the case to be sent back to the first Court for it to **decide on the merits of the second defence plea** and, if necessary, on defendant's other pleas*”. Defendant's second plea is that the mandate *prestanome* was illicit and if the court upholds plaintiff's claim it would be sanctioning an illegality and permit the plaintiff to evade laws which prohibit the acquisition of immovables by foreigners. The Court of Appeal stated: “... *it is the duty of the Court to examine it and determine whether the mandate was based on an illicit cause, and the effects that flow from its decision.*”. The court's view is prior to deciding on whether the mandate was based on illicit cause, both parties have to be given the opportunity to produce evidence.

“ii. In the case 480/2009 the court concluded that a *prestanome* agreement had been concluded by the parties: “... *so that plaintiff may avail himself of her name to acquire property which he could not acquire in his own name*”. The plaintiff had declared that 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*”. However, it is evident that in the judgment the court did not examine whether according to Maltese law the plaintiff, being a foreigner, could purchase the property in his own name.

“iii. In the present lawsuit plaintiff wants to prove that at the time of purchase Maltese law did not prohibit him from purchasing more than one property, and thereby show that the mandate was not based on an illicit cause. It appears that this is the reason why he has requested the court’s authorization to summon Charles Camilleri and Douglas Salt as witnesses. The court confirms that the plaintiff has a right to prove that although the mandate was concluded with the intention to circumvent a legal provision based on advise he was given, in actual fact he had a right to own more than one property in Malta. Thereby proving that there was nothing illicit in the agreement concluded with the defendant.

“The court therefore upholds the plaintiff’s request. Judicial costs with respect to this decree are at the charge of the defendant.”

Defendant is arguing that once it was decided by this Court in its judgment of the 29th November 2013, that the agreement between the parties is a mandate *prestanome*, it is not lawful to produce new evidence in an attempt to refute what is now a *res judicata*.

However, as the first Court rightly noted, while the legal nature of the agreement has now been determined, this Court did not decide on whether the agreement is tainted with an illicit *causa* or not, and this Court, in fact, had sent back the records of the case to the first Court for it to decide, at first instance, whether the agreement is valid or otherwise. Although plaintiff Kok has already given evidence to the effect that he had entered into the *prestanome* agreement because he was advised that Maltese law did not allow him to own several properties, and thus entered into the agreement with defendant with the intention of circumventing the law, he now wants to prove that the advise he was given was not entirely correct, and that he could after

all, have bought the property in question in his own name. Using criminal law terms, plaintiff wants to show that although he had the *mens rea* to commit an offence, there was no *actus reus*.

What would be the effect if such a point is proven is still to be determined by the first Court, at first instance, but he definitely has a right to bring witnesses to support his argument.

The evidence sought to be produced is not intended to reopen matters determined by this Court in its judgment of the 29th November 2013, but to determine the lawfulness or otherwise of the agreement, a matter which this Court left open to be decided in the future. It follows that the first Court was correct in dismissing the objection as raised by defendant Faure.

Hence, for the above reasons, the appeal of defendant Faure is being dismissed, and the decision given by the First Hall of the Civil Court on the 7th July 2014, is confirmed, with costs to be borne by appellant Josephine sive Josette Faure.

The acts of the case are to be sent back to the first Court for continuation.

< Final Judgement >

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