



THE COURT OF MAGISTRATES (MALTA)

MAGISTRATE

DR. CAROLINE FARRUGIA FRENDO

*B.A. (Legal and Humanistic Studies), LL.D.,
M.Juris (International Law), Dip. Trib. Eccl. Melit.*

Application number: 158/2016 CFF

Stuart Alexander Cuschieri

Vs

Francesco Draghi

Today 12th January, 2017

The Court:

Having seen the **application** filed by the plaintiff whereby he is requesting the Court to condemn defendant to pay the amount of seven thousand five hundred and twelve Euros and ninety four cents (€7,512.94) representing damages suffered by the applicant in order to repair structural and other damages caused by the percolation of water from his flat, 36, Floral Flats, Flat 4, Triq Monsinjur Dandria, Msida, into the flat of the applicant namely, Floral Flats, Flat 3, Triq Monsinjur Dandria, Msida; and in a short and peremptory period effect all the necessary works to ensure that water no longer capable of percolating and this under the supervision of a court-appointed architect

With expenses, comprising those of the judicial protest of the 25th June, 2015 (Document A) as well as of the judicial letter of the 16 May 2016 (Document B), together with interests as accumulated until the date of effective payment.

Having seen the **reply** by Francesco Draghi where he respectfully sheweth:

1. Preliminary, defendant humbly pleads the incompetence of this Honourable Court *ratione materiae* in terms of subarticle (3) of article 47 of Chapter XII, and for such reason defendant is to be freed from the suit.
2. Preliminary, and without prejudice to the other pleas, defendant humbly pleads the incompetence of this Honourable Court *ratione valoris* in terms of subarticle (1) of Article 47 of Chapter XII.
3. Preliminary, and without prejudice to the other pleas, defendant humbly pleads that the plaintiff's claims are time-barred in terms of Article 2153 of Chapter XVI.
4. Without prejudice to the other pleas, defendant humbly pleads that in all cases plaintiff is to give proof of his ownership of the premises 36, Floral Flats, Flat 3, Triq Monsinjur Dandria, Msida.
5. Without prejudice to the other pleas, defendant humbly pleads that plaintiff's claims are unfounded in fact and in law.

For such reasons, plaintiff's claims are to be dismissed with costs.

Saving the right to file further pleas if and when necessary.

After having seen that the first and second pleas are of a preliminary nature and should be decided first, and after having given the parties sufficient time to file their notes of submissions.

After having also seen the note of submissions filed by the defendant on the 1st of November 2016 and the note of submissions filed by the plaintiff filed on the 23rd of November 2016 and another note filed by the plaintiff on the 23rd of November 2016 indicating that the amounts claimed in his application do not exceed the amount of fifteen thousand Euros (€15,000).

Considers:

In these proceedings the plaintiff is requesting the Court to condemn defendant to (a) pay the amount of seven thousand five hundred and twelve Euros and ninety four cents (€7,512.94) representing damages suffered by the applicant in order to repair structural and other damages caused by the percolation of water from his flat, 36, Floral Flats, Flat 4, Triq Monsinjur Dandria, Msida, into the flat of the applicant namely, Floral Flats, Flat 3, Triq Monsinjur Dandria, Msida; and (b) in a short and peremptory period effect all the necessary works to ensure that water no longer percolates and this under the supervision of a court-appointed architect.

The defendant is contesting the plaintiff's claims on the preliminary grounds that this Court is not competent *rationae materiae* because defendant says that this action was filed in terms of article 539 of Chapter 16 of the Laws of Malta and so this court is not competent to decide this case in terms of Article 47 (3) of Chapter 12 of the Laws of Malta.

The defendant has filed also a second preliminary plea on the grounds that this Court is not competent *rationae valoris* to determine this case in terms of Article 47(1) of Chapter 12 of the Laws of Malta.

It is these first and second preliminary please which are being dealt with and will be determined in this judgement.

The defendant says that this court is incompetent to determine this case *rationae materiae* on the ground that this Court is being asked to determine an issue relating to Article 539 of the Civil Code which in terms of Article 47(3) of Chapter 12 of the Laws of Malta does not fall within its competence. The plaintiff contrasts this plea by arguing that the suit against him is aimed at the liquidation and consequent payment of damages caused by him and this suit is not intended to safeguard or establish any real rights over his property or the property of the defendant. He further stated that suits for the liquidation and consequent payment of damages are regularly filed before the Court of Magistrates and therefore this Court is competent to hear and determine his claims against the defendant.

The court in these situations has to determine whether the plaintiff wanted to propose an action other than another one.

Article 47(3) of Chapter 12 of the Laws of Malta states the following:

“(3) Nevertheless, causes involving questions of ownership of immovable property, or relating to easements, burdens or other rights annexed to such property, including any claim for the ejectment or eviction from immovable property, whether urban or rural, tenanted or occupied by persons residing or having their ordinary abode within the limits of the jurisdiction of such court, shall not fall within the jurisdiction of the Court of Magistrates (Malta) independently of the value of the claim.”

This is the only limitation imposed on the Court of Magistrates in its civil jurisdiction, by the law independently from the value of the action.

The defendant says that this action is based on Article 539 of Chapter 16 of the Laws of Malta which is found under Sub Title III entitled, “Of Rights of the Possessor in Case of Molestation” which states the following:

“Where any person has reasonable cause to apprehend any serious and impending damage to a tenement or other thing possessed by him, from any building, tree or other thing, he may bring an action demanding, according to circumstances, either that the necessary steps be taken to obviate the danger, or that the neighbour be ordered to give security for any damage the plaintiff may suffer therefrom.”

This action which is called the *action damno temuto* which in the case ***Karl Calleja vs Brian Engerer et decided on the 5th of October 2010 by Magistrate C. Scerri Herrera***, is described as the following,

“Illi l-Qorti tibda l-konsiderazzjonijiet ta’ dritt li jirrigwardaw dan il-kaz billi tghid li l-azzjoni attrici hija wahda millerba’(4) azzjonijiet pussessorji mahsuba li jharsu lil min

ghandu l-pussess ta' xi gid milli jigi b'xi mod imfixkel milli jibqa' jgawdih. L-azzjoni hija maghrufa bhala actio damno temuto, u l-ligi tahseb fiha fl-artikolu 539 tal-Kodici Civili fuq imsemmi."

However, in contrast to the quoted case, this action is a different one and not similar to it as defendant tried to argue in his note of submissions. Here the court is in agreement with the plaintiff in that this action is not an action intended to safeguard or establish any real rights over his property or the property of the defendant, by one for compensation in tort as a result of damages which occurred on the property of the plaintiff.

The quoted case dealt with a real action, whereas this action is a personal action where the individual is personally obliged to do something or to fulfill an obligation. A real action does not arise from personal obligation on the part of the defendant but from a right that the plaintiff has on either a movable or an immovable independently from any personal obligation that the defendant might have.

The action in this case is an action for the liquidation or compensation of damages which the plaintiff has suffered after the percolation of water from the property of the defendant to that of the plaintiff. In fact, this action is being aimed solely at the liquidation and consequent payment of damages allegedly caused to the property of the plaintiff by the defendant.

The action as is, falls completely within the competence of this court as established by Article 47(3) of Chapter 12 of the Laws of Malta, and this because this action is a personal action, and is not an action which involves a question of ownership of immovable property or relating to any easements or burdens.

Regarding the second preliminary plea on the grounds that this Court is not competent *rationae valoris* to determine this case in terms of Article 47(1) of Chapter 12 of the Laws of Malta.

This court according to Article 47(1) of Chapter 12 of the Laws of Malta can hear and determine all claims of an amount not exceeding fifteen thousand euros (€15,000). The plaintiff's application sets an amount which is that of seven thousand five hundred and twelve Euros and ninety-four cents (€7,512.94), however the second part of the claim states, that the court shall order the defendant *to effect all necessary works to ensure that water is no longer capable of percolating and this under the supervision of a court-appointed architect, which claim has not been given an amount.*

It is true that Article 747(1) of Chapter 12 of the Laws of Malta states that;

"An uncertain or indeterminate value shall always be deemed to be outside the jurisdiction of a court of limited jurisdiction."

However the plaintiff has filed a note on the 23rd of November 2016 which is found a fol 28 of the process where he declares the following,

"...that the amounts claimed in his original application of the 7th of July 2016 does not exceed, either individually or cumulatively, the competence rationae valoris of this Honourable Court in the amount of €15,000 as recently amended by Act IV of 2016 on the 19th January 2016".

The Court, in this regard, again is in agreement with the plaintiff in that, his declaration makes it clear that this action does not exceed this court's competence, and in any case, the court still has to determine the amount which has yet to be liquidated.

Decide:

For these reasons the Court decides and declares that it is competent both *rationae materiae* and *rationae valoris* to deal with and determine the suit put forth by the plaintiff against the defendant and therefore rejects defendant's first and second preliminary pleas brought forward by him, and orders the continuation of the case.

Costs pertinent to the first and second preliminary pleas are to be wholly borne by the defendant.

Dr. Caroline Farrugia Frendo
Magistrate

Nadia Ciappara
Deputy Registrar