IN THE COURT OF APPEAL

HOLDEN AT SEYCHELLES

ON .....DAY OF 1992

BEFORE THEIR LORDSHIPS

ABDULLA MUSTAPHA	PRESIDENT
HURILAL GOBURDHUN	JUSTICE, COURT OF APPEAL
EMMANUEL O. AYOOLA	JUSTICE, COURT OF APPEAL

CIVIL APPEAL NO. 5 OF 1992

BETWEEN:

REGINALD ROSE ... ... APPELLANT

AND ALOIS HOAREAU ... ... APPLICANT

This appeal from a decision of the Supreme Court (Perera, J) raises three questions: First, to what extent would Article 555 of the Civil Code apply where the owner of land on which someone else has used his own materials to erect a structure has given consent to the erection. Secondly, would Article 555 apply where the matter relates to the two persons who are primarily involved only, i.e. the owner of the land and the person who erected the structure. Thirdly, assuming that Article 555 applies, would the existence of an easement, in this case a right of way, limit or qualify the rights

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conferred on the owner of the land conferred by that Article.

The background facts as found by the Learned Judge, which have not been challenged on this appeal are as follows:

The Plaintiff, who is now referred to as the appellant, was the owner of a parcel of land situate at Mare Anglaise, Mahe. The defendant, who is now the respondent, is the owner of an adjoining parcel of land. The respondent's land is enclosed on all sides and the respondent's only convenient access to the public road is the access through the appellant's land. The respondent who was thus entitled to a right of way over the appellant's land erected a paving, about four years ago on the said motorable access path to his property. The respondent alleged, and the Supreme Court found as a fact, that the respondent paved the path with the consent and approval of the appellant using materials belonging to him. By his plaint dated 17th January 1991, the appellant commenced this action at the Supreme Court claiming:-

"(a) an order compelling the defendant to remove that part of his drive way which has been erected on the Plaintiff's land at his own costs;

(b) an order that the defendant do pay damages in the sum of R20,000 with costs."

The pith and substance of the appellant's case was that in law, the respondent must be compelled to remove that 'part' of his drive way which had been built on his land. He based his claim on Article 555 of the Civil Code. The respondent who subjoined a counter-claim to his defence, on the other hand, averred that he built the drive way with the permission of the owner of the land, that the course of the drive way was clearly illustrated in the cadastral layout of the Ministry of Community Development and that the property is enclosed and the present driveway is the most appropriate. His counter claim, which was rightly dismissed by the Supreme Court, was for moral damages in the sum of R3000. The main issue at the trial, as well as on this appeal, falls within a narrow compass upon the concession by the Appellant's counsel at the trial and on this appeal that the appellant was not contesting the right of way exercised by the respondent but only wanted the paving on the drive way to be removed.

The learned trial Judge having found the facts earlier stated, held that the concrete paving of a motorable path could be considered "structures" for the trespass of Article 555. He dismissed the appellant's claim on the main grounds

that as the respondent had erected the structure not for its own sake, like constructing a house, but to utilise his right of way in a manner more convenient to him, the appellant could not seek his remedy under article 555 of the Civil Code. He relied on article 697 of the Civil Code which empowers the owner of the dominant tenement to do all that is necessary for the use and preservation of the easement, drawing support from a dictum in Miraveau and Ors. v. Camille and Ors. 1974 SLR 158 that:

> "A person to whom a servitude is due may make construction on the land subject to the servitude so that he may use his right in a manner more convenient to him although such constructions are not absolutely necessary for the exercise of his right provided however that no prejudice is thereby caused to the owner of the land subject to the servitude."

He then observed that the appellant did not state in evidence how the concrete paving caused prejudice to him.

On this appeal, two of the three grounds urged by counsel on behalf of the appellant can be shortly disposed of. They are that the Learned Judge's findings of the respondent's entitlement to a right of way on the appellant's

land is ultra petita and that "the Learned Judge erred in his finding that the Appellant had to give reasons for his demand." It is manifest from the way the case proceeded at the trial that the respondent resisted the appellant's claim on the grounds that he had permission of the owner of the land to erect the structure and that he had a right of way on the land. Both issues were raised by the defence and adverted to by both Counsel in the course of their respective addresses. It was thus incumbent on the Learned Judge to make findings and pronounce on the issues thus raised. A Judge's finding may be erroneous in law and in fact. It may result from a mis-direction or non-direction on facts. It may even not be necessary to the issues in the case. However, when a Judge's finding follows properly from issues which arise for determination on the pleadings and evidence, it is misconceived to describe such finding as ultra petita. Moreover, it seems more appropriate to describe decrees as being "ultra petita" than findings. In this case, both on the pleadings and on the evidence, the consequence of the existence of a right of way was an issue for determination. Indeed, the existence of a right of way having been conceded by the appellant, the limited question was whether its existence qualified the freedom of the appellant to demand that the respondent should remove

the paving he had erected on the motorable access path. It was in the context of there being an easement that the learned Judge commented on the absence of evidence as to prejudice to the appellant. It goes without saying that in the determination of a case, a trial court does not, and should not, confine itself only to a consideration of the elements of the plaintiff's case without also adverting to matters of defence properly raised by the defendant. In this case, the respondent had raised as a matter of defence that he enjoyed a right of way. The issue thus became relevant as to the existence of such right of way and the consequence that flows therefrom in relation to the right of accession claimed by the appellant.

The substantial questions on this appeal turn on a determination of the true ambit of article 555. That article doeals with an aspect of the incident of ownership of property by accession. Article 546 provides:

> "The right of ownership of property, whether movable or unmovable, shall give the right to everything that the property produces and to anything that accede to it either naturally or artificially. This right is called <u>right of cession</u>."

Article 555 provides that:-

"When plants are planted, structures erected and works carried out by a third party with materials belonging to such party the owner of land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them."

Paragraph 4 of Article 555 takes away the right of the owner to elect to demand the removal of such structure and plants where the third party concerned "has been evicted but not condemned owing to his good faith, to the return of the produce."

In my opinion the relevance of the consent of the owner to the planting of plants, erection of structures and execution of works by the third party with his own materials in regard to the application of article 555 is delimited by article 555 itself. Although a thing affixed to land by another party becomes the property of the owner of the land, the owner of the land can by his agreement, in the plenitude of his right of ownership, relinquish his right to retain ownership of the thing or limit his power to compel the third party to remove the thing which has been affixed by his consent. Where there has been no such specific agreement, consent by the owner of the land that

the thing be affixed to the land would in my opinion not affect his right of accession but would limit and qualify his power to demand that the third party remove the thing which had been affixed by his consent. Presumably, he could evict the third party, if the circumstances in which consent was given permits such eviction, but he may not demand the removal of such structure.

In the present case, the nub of the judgment appealed from is that the respondent had erected the "structure", with the approval of the appellant, not for its own sake but to utilise his right of way in a manner more convenient to him. The respondent still utilises that right of way. The question whether the existence of a right of way qualifies the right of an owner conferred by article 555 falls to be considered. The seemingly absolute freedom of an owner of land is qualified in many ways. It is subject to the right others have over such land such as, for instance, a right of way. Where, as in the instant case, the structure erected by the respondent is to utilise his right of way in a manner more convenient to him and, in terms of Article 697 of the Civil Code, is in an effort to do all that is necessary for the use and preservation of the easement, the freedom which the appellant has as owner of the

land, should in my view be qualified by the right of way to the extent that not only would his power to demand the removal of the structure not be exercisable as long as the right of way exists, but also he cannot stop the respondent from enjoying the right of way as long as it subsists.

In my judgment the first and third questions raised by this appeal and set out earlier can be answered in the following propositions:-

(i) Article 555 would apply notwithstanding that the owner of land to which some other person has erected a structure has given his consent, but the power to compel the third party to remove the thing so fixed will be limited and qualified;

(ii) Where such structure has been fixed to land in furtherance of and for better and more convenient use of a right of way, the power of the owner of the land to demand that the structures be removed is not excercisable as long as such right exists.

The reasons given by the learned Judge for dismissing the appellant's claim are in my view valid. However, counsel for the respondent has urged that the claim be dismissed for reasons other than, or perhaps in addition to, those stated by the learned Judge. It was contended by

learned counsel for the respondent that article 555 is not applicable because the respondent is not a "third party". Counsel for the appellant argued that "third party" in article 555 should be interpreted as meaning "any other party." It is thus that the second question raised by this appeal has arisen. It cannot be gainsaid that there were only two parties involved in this matter, thus: the appellant who is the owner of the land and the respondent who has affixed a structure thereon with his own materials. If the contention is correct that article 555 does not apply where there are only the two parties involved in the matter, then the appellant could not on the facts of this case exercise any powers conferred by Article 555. The question, therefore, is how are the words "third party" in article 555 to be understood.

Normally, the phrase "third party" presupposes the existence of parties to an agreement or transaction and of one who is not a party to such an agreement or transaction but who claims a right or interest under the agreement. Such party is usually described as the "third party". Such literal interpretation of "third party" in article 555 will however lead to some difficulties, if not absudity. The right of accession connotes that the ownership of a

thing is altered by the fact of its having been physically united to another. As regards land, the alteration of the ownership of the thing affixed to land arises from the principle of merger of the ownership of things attached to land with the ownership of the land. Thus the owner of the land becomes the owner of the thing attached to it. Right of accession arises notwithstanding that there are only two parties involved. Article 555 does not seek to create any new categories of right of accession but largely does regulate the liberty which the owner of the land has to demand that the thing merged in his land be severed. It also gives him a right to elect to retain ownership of the thing so merged or demand a severance. To limit the operation of article 555 to cases in which there are more than two parties would result in denying the owner of the land such right of election or even a liberty to demand severance. I do not think such consequences are envisaged by article 555 or that it should be promoted, as a literal interpretation of article 555 would entail.

In my opinion, article 555 should be interpreted conceptually rather than literally. The entire concept of article 555 as regards title acquired by accession is to give the owner of the land a right to elect whether to retain

ownership of the thing merged with his land or demand a severance and to further define the rights and liabilities of the parties when an election has been made. Article 555 does not create a new category of rights and liabilities in relation to rights of accession to be known as "third party" rights and liabilities. Viewed conceptually, "third parties" in article 555 means "any other party", that is: other than the owner of the land. Article 555 would apply wotwithstanding that there are only two parties involved viz: the owner of the land and the person who has erected a structure thereon with his own materials. Several cases decided in the Supreme Court over the years have applied article 555 notwithstanding that only "two parties" were involved. A few of such cases are: Samson v Moushe (1977) S.L.R. 158; Cupidon & Anor v Florentine & Ors. (1978) S.L.R. 46. There may, of course, be instances in which there are "third parties" in the strict literal sense. I do not think operation of article 555 should be limited to such instances. As a result, I do not think that there is such other reason for upholding the judgment as contended by Counsel for the respondent.

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I hold that article 555 would apply notwithstanding that two parties are concerned in the matter.

In conclusion, I would dismiss this appeal with costs to the respondent.

(E. O. AYOOLA)
JUSTICE
COURT OF APPEAL

Judgment delivered in the presence of counsel for the Appellant and Respondent

31/3/93