IN THE SEYCHELLES COURT OF APPEAL

REGIS AH-KON APPELLANT

Versus

YVON SAVY RESPONDENT

Civil Appeal No:24 of 1997

[Before: Goburdhun, Silungwe & Adam, JJ.A]

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Mr. C. Lucas for the Appellant
Mr. P. Boulle for the Respondent

JUDGMENT OF THE COURT

(Delivered by Adam, JA)

In the Amended Plaint the respondent alleged (instead of 1991 in the Plaint) that during the period 1985 to 1991 the appellant carried out certain works at the back of his house so as a result of this he trespassed and encroached on the respondent's land and damaged a terrace thereon. As a result of the acts of the appellant the respondent suffered loss and damage as follows: Cost of retaining wall SR348,310, cost of backfill SR20000 and moral damages SR5000 making a total of SR373310. In addition he claimed SR2400 as the appellant's share of repairs to the access road. In his defence the appellant admitted that some time in 1986 that certain works were carried out to level an area behind his house and he also admitted that in 1991 some work was done but in a different portion of his property and that on 12 January 1992 due to heavy storm which heavily affected his house damaged the respondent's terrace. He also denied that the respondent suffered loss and damage claimed by him.

In his judgment Bwana J, indicated that having seen the demeanour of the respondent while giving evidence that he was satisfied that he was telling the truth. Bwana J accepted that initial terracing in 1986 may have been carried out near the appellant's

house in accordance with Planning Division instructions at 45 inclination. But he went on that subsequent to that the respondent's evidence left no doubt that some terracing may have been done cutting the terrace into a vertical inclination. He indicated that the exhibits tendered by the appellant concerned the initial works carried out in the 1980's but they did not cover the material period of 1991-1992 and therefore anything could have happened during that material time. He took note that the permit granted to the appellant on 25th November 1991 was to cut another area on his land for agricultural purposes. He said that it was James Mangroo, called by the appellant who cut the original terrace between 1985 and 1991. He asserted that it was unbelievable that the storm on 2nd January 1992 would have cut 45 metres of common boundary that smoothly let alone the many JCB "teeth" seen on that terrace. There was no evidence about JCB "teeth" on the terrace. He maintained that the locus in quo visit along with the photographs taken by the respondent on 8 January 1992 all confirmed this. It should be mentioned at this stage that the question of the visit of the locus in quo will be referred to later in this Judgment.

In his evidence the respondent said in examination in chief that as far as he could remember that the respondent bought his land in about 1987, that the terracing work by the appellant proceeded for over a period of 4 and 5 years, on and off, that on the day he gave evidence (12 June 1995) the embankment had been cut almost in a vertical direction, that the photographs were taken on 8 January 1992 represented the amount of earth that came down following the storm, that before the storm the terracing was vertical, that he informed the appellant of this situation in 1992. Under cross-examination he said that the work was carried out between 1982 and 1991-1992; that buldozers were used on this project 6 times; that the work was done in stages during the period whatever it was 1983-1991-2; that the work done in the period resulted in the damage to the terrace, that he went to see where the work that was being done but he could not remember the year; that he could not remember if it was, 1986, or 1987 or 1988 that he visited and checked this; that he went specifically on one occasion when his friend asked for rock and that was only 1985 or 1987. It was put to him in specific terms that

terrace cutting at the back of the appellant's house was done in one operation in 1986 and his answer was that he did not know the dates. Also, it was suggested to him that the photograph taken by him tendered as an exhibit showed a limited amount of damage done to the terrace and he replied that it showed the damage as far as he could see and that it was true that the appellant had to clear his property before he could take the picture. It was after this that the respondent amended his plaint to the period 1985 to 1991.

In his evidence for the appellant James Mangroo said that he carried out work for the appellant on two occasions in 1986 and again in 1992. In 1986 he said he left the terrace as it was after he completed his work. In 1992 he cleared the debris. In re-examination he indicated the place where earth had fallen as shown in the photograph was only part of the place where the earth had fallen.

The record presented to this Court as the official record of proceedings disclosed that on 14th June 1995 counsel for the respondent requested for an inspection locus in quo and that the surveyor, Mr. Leong, be there to provide explanation. Thereafter, the case was adjourned to 4th July 1995 by Bwana J for a visit locus in quo at La Misere and that Mr. Leong was to be notified. The next date given in the record of proceedings is for 11th July 1995 which set the date for the continuation of the trial. Suffice to say the only reference to the visit locus in quo was in the judgment of Bwana J. There was nothing in the official record of proceedings in the form of a note accepted by all concerned that such an inspection was carried out and Mr. Leong was present. It should be noted that Mr. Leong was not listed as one of the witnesses called and there is no evidence recorded from him. It is not clear whether he went for the inspection locus in quo or gave evidence under oath. The foregoing has left this Court with misgivings as to what may have happened on this. It is the duty of the presiding Judge to ascertain that the notes prepared after an inspection locus in quo reflect with absolute accuracy what was observed and agreed to by all concerned and to certify those prepared notes accordingly. It is true that Rule 61 of the Seychelles Court of Appeal Rules states that the preparation of the record must be undertaken by the Registrar of the Supreme Court upon payment of

the prescribed charges but it in specific terms states "and shall be subject to the supervision of the Supreme Court." In the normal course this Court has no alternative but to accept that the official record of proceedings placed before it is regular in that it was done in accordance with Rule 61. Perhaps it may be advisable that the judge of the Supreme Court concerned certify the official record of proceedings before it is presented to this Court.

In the Memorandum of Appeal the appellant's grounds of appeal included that the trial judge's finding that the vertical cutting of the terrace could have happened in the material in 1991-1992 because anything could have happened during that material period was wrong in that it was never pleaded that the alleged encroachment occurred in 1992 and so ultra petita and that he did not at all consider or sufficiently consider the evidence called for the respondent and appellant before finding for the respondent.

At the hearing it was submitted on behalf of the appellant that there was no evidence before Bwana J that there was any work being done in the disputed area during the material period of 1991-1992 except the respondent's assertion that terracing works were carried out for 4 or 5 years which he altered under cross-examination between 1982 and 1991-1992, that he could not remember if it was 1986, 1987 or 1988 and that it was done in stages and that the work done in that period resulted in the damage caused to him.

In his judgment Bwana J seemed to exclude the works carried out in the 1980's because he regarded the material period as 1991-1992. He said that James Mangroo was the person who cut the original terrace between 1985 and 1991. But James Mangroo denied cutting the terrace in question in 1991 but testified about the work he did for the appellant at another place not connected to the damage for agricultural purposes. Bwana J accepted this. By placing reliance on his wrong conclusion that James Mangroo was the person who cut the original terrace up to 1991 when James Mangroo said that the first time he did work for the appellant was in 1986 and the second time in 1992 Bwana J erred. There was no evidence from any other person that contradicted this and it was not challenged by counsel for the

respondent. In the light of this the only basis on which Bwana J found that it was the conduct of the appellant during the material period 1991-1992 was that it could not have been *force majeur* that caused the damage so it must have been the appellant. This seemed to us as if Bwana J was relying on *res ipsa loquitur* on which to find fault when this was not pleaded by the respondent.

There was no evidence led by the respondent or by the appellant from which Bwana J could have found that it was the conduct of the appellant in the material period in 1991 as far as Bwana J was concerned (for purposes of the Amended Plaint) that caused the damage to the respondent's property.

Accordingly, the appeal is allowed with costs and the judgment is set aside.

Dated at Victoria, Mahe this 9th day of ***April*** 1998.

H. GOBURDHUN	**A. M. SILUNGWE**	**M. A. ADAM**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Handed down
Adam JA