IN THE SEYCHELLES COURT OF APPEAL

MARTHA MORIN
NEVILLE ADELINE **Appellants**

VERSUS

MRS DOROTHY WESTERGREEN **Respondent**

Civil Appeal No: 25 of 1999

[Before: Ayoola, P., Pillay & Matadeen, JJ.A]

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Mr. P. Pardiwalla for the Appellants
Mr. R. Valabhji for the Respondent

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JUDGMENT OF THE COURT

(Delivered by Pillay, J.)

This is an appeal against a judgment of the Supreme Court which granted an injunction ordering the appellants, then the defendants not to interfere with –

(a) the plaintiff's, now the respondent's, right to the use, quiet enjoyment and possession of the right of way over the motorable driveway traversing B125 belonging to the first appellant and leading to the upper part of parcel B55, belonging to the respondent; and

(b) the respondent's right to clean the pipes through which the respondent draws water from a small reservoir on parcel B126 which itself draws its supply of water from a main reservoir erected on parcel B130 belonging to the second appellant.

The Court also awarded damages of SR500/- to the respondent for the damage she had suffered when her right of way had been blocked by the appellants.

The appellant is appealing against the judgment essentially on the grounds that –

(a) the respondent had on the evidence on record no right of way over the motorable driveway since such a right had not been established by a document of title; and

(b) the evidence on record does not support the appellants' interference or threat of interference with the respondent's clear right to clean the pipes.

It is not disputed by the parties that –

(1) parcel B55 belonging to the respondent and parcels B125, B127 and B129 belonging to the first appellant and parcel B130 belonging to the second appellant are all subdivisions of an original plot of land B27 belonging to the deceased, one H. Savy, who was the father of the respondent;

(2) deceased H. Savy sold parcels B55 and B125 to B130 to his children, three of whom sold their plots, i.e. B125, B127 and B129 to the first appellant and another one sold B130 to the second appellant;

(3) the title deed of deceased H. Savy has no reference to easements of right of way but mentions the servitude of water and the right to traverse land to check those water rights.

There is also evidence led on behalf of the respondent and accepted by the learned Judge as follows –

(a) deceased H. Savy put up roads when he subdivided his plot of land B27 into various subplots, including the motorable driveway traversing B125 belonging to the first appellant and leading to the upper part of B55 belonging to the respondent. The driveway was seen by the learned Judge on a visit to the locus and it was, according to the respondent, erected in 1965.

(b) The motorable driveway was used by the respondent ever since she bought plot B55 in 1972 until 1994 when it was blocked by the appellants who bought their respective plots in 1988.

(c) The title deed of the respondent makes mention of the fact that the land was sold "together with all rights, privileges, easements, servitudes and appurtenances thereto."

We may turn now to the grounds of appeal. We shall deal with ground (b) first. There was no warrant for the trial Court making such an order for the following reasons –

(1) the appellants categorically denied ever damaging or cutting any pipes leading to parcel B55 belonging to the respondent. Indeed there was no evidence on record to establish that the appellants did damage or cut such pipes. Exhibit D3 refers to the water pipe being cut in June 1994 on the land occupied by Mr. Erickson, i.e. plot B126, by persons unknown;

(2) In any event, the learned Judge himself rightly stated, in our opinion, that neither the water right of the respondent nor its interference, actual or threatened, was an issue or a problem at the relevant time

and if a problem were to occur in the future, then the respondent would be free to seek redress from the court.

The first order made by the trial Court in that connection is consequently quashed.

Before examining the first ground of appeal, we must state at the outset that the applicable law at the time the respondent bought her plot of land B55 from her father i.e 1972 is French law as derived from the French Civil Code since the Seychelles Civil Code came into operation only on 1st January 1976.

With regard to the first ground of appeal, it is true that under the Civil Code of Seychelles, as rightly pointed out by learned Counsel for the appellants, a right of way is a «discontinuous easement» and must, by virtue of article 691 of the Seychelles Civil Code, be created by a document of title – vide also **L. Tall v P. Lefevre** (1980) SLR 75. Consequently, even if deceased H. Savy had wanted to create an easement or right of way in respect of all the subdivisions of his original property, by virtue of article 686, he had to do so by the document of title which created it.

However, there is authority for the proposition that under French law «a servitude discontinue» i.e. a right of way may be established by means of witnesses or presumptions if there exists a beginning of proof in writing – vide note 9 of **Dalloz, Codes Annotés**, article 691, which is in almost identical terms with article 691 of the Seychelles Civil Code. This proposition is reaffirmed in note 5 of article 690 in **Dalloz**, cited already.

Moreover, in note 7, we read the following –

> «7. Jugé, à ce point de vue, que la mention, dans l'acte de vente d'un immeuble, qu'il est vendu avec

> ses servitudes actives et passives, ne vaut pas titre au profit de ceux qui n'ont point été parties à cet acte, mais constitue pour eux un commencement de preuve par écrit qui leur permet d'établir, à la charge du fonds vendu, l'existence de servitudes par de simple présomptions, telles que celles puisées dans des signes apparents suffisants pour la faire connaître a l'acheteur» (the underlining is ours).

Consequently, the title deed of the respondent which refers to the right of way is a beginning of proof in writing. As such, it opened the door for the testimony of witnesses, including that of the respondent, which abundantly established the respondent's right of way to the motorable driveway traversing B125 belonging to the first appellant and leading to the upper part of parcel B55 belonging to the respondent.

We hold, therefore, that the trial Judge was right, for the reasons we have given, to have granted the injunctive relief and the damages that he did. The judgment of the trial Court is affirmed in this regard. We order that the two boulders be forthwith removed, if they have not yet been removed, by the appellants.

E. O AYOOLA	**A. G. PILLAY**	**K. P. MATADEEN**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 17 day of December 1999.