NANON v THYROOMOOLDY

(2011) SLR 92

N Gabriel for the appellant
F Ally for the respondant

Judgment delivered on 29 April 2011

Before Hodoul, Domah, Fernando JJ

Janine Thyroomooldy, plaintiff in the Court below and now respondent in this appeal, instituted proceedings (CS No 60/2008) against Michel Nanon, appellant above-named. The plaintiff and the defendant were at all material times registered owners of adjoining land parcels, respectively title H6440 and title H5355, situated at Pointe Conan.

> In paragraph 4 of her plaint, the plaintiff alleges that: "On a date unknown to the plaintiff in or around the year 2004/2005, the defendant without permission and consent of the plaintiff unlawfully entered unto the plaintiff's land comprised in title H6440 and unlawfully built or caused to be built two buildings which encroach unto the plaintiff's said land." She further alleges that, despite repeated requests from her, both verbally and in writing, the defendant failed and refused to put an end to the said encroachment and trespass. She prays for relief as follows:

(i) Declare that the defendant has encroached and trespassed onto the plaintiff's property;
(ii) Order that the defendant removes the encroachment forthwith;
(iii) Issue an injunction requesting that the defendant refrains from any further encroachment on the plaintiff's property;
(iv) Order the payment of the sum of R50,000 with interest;
(v) Costs of the suit.

We note that transfer documents pertaining to titles H6440 and H5355 were produced as exhibits in the Court below. They show that the plaintiff and the defendant purchased H6440 and H5355 from Remy Nanon, a brother of the defendant, in November 2002 and December 2002 respectively. We also note that the plaintiff situates the approximate date of the alleged encroachment within a time span of two years! An approximation which is almost unacceptable! The case was heard in the Supreme Court, presided over by Judge, FMS Egonda-Ntende CJ. He heard the parties and land surveyor, Michel Leong witness for the then plaintiff, who produced a report and a plan attached herewith (Exbts P1 and P2).

The Chief Justice gave judgment dated 9 November 2009 in favour of the plaintiff, granting her the totality of the relief she prayed for:

> In conclusion, I grant the declaration sought by the plaintiff to the effect that the defendant unlawfully encroached on the plaintiff's land comprised in Parcel H6440. The defendant is ordered to remove the buildings that he has

> built on the Parcel H6440. An injunction shall issue to restrain the defendant from further encroachment on the Parcel H6440. Damages are awarded as above with interest and costs of the suit.

It would seem that the Chief Justice made the awards and granted the remedies regardless of whether they were available under the pertinent article of the CCS.

The defendant was aggrieved and has appealed to this Court, originally on four grounds:

(a) The trial judge misdirected himself in applying the wrong article of the Civil Code in support of the judgment that he entered in favour of the respondent.
(b) The trial judge erred and was unjustified in entering judgment in favour of the respondent before hearing the evidence of the witness of the appellant.
(c) The trial Judge was unjustified in not calling for a locus in quo in the matter, especially as the case involves an alleged encroachment in a land boundary dispute.
(d) Counsel for the appellant, during the course of the hearing in the Supreme Court conceded to the respondent's claim of encroachment without first seeking further instructions from the appellant.

The defendant did not pursue all four grounds; he retained only two, such is his right. However, some confusion arose regarding which grounds were kept. In his heads of argument dated 26 July 2010, advocate for the appellant cleared any doubt which could have subsisted, and wrote: "Grounds 2) and 4) are hereby abandoned". Good practice requires that leave to abandon any ground should be applied for, normally *viva voce;* there is no record of any such application. We are of the opinion that the confusion arose as a result of the advocate for the appellant switching from "lettering" the grounds in the notice of appeal to "numbering" them in his skeleton heads of argument. Those grounds lettered a) and c) have been kept.

In his ruling on an application for an adjournment to file the defence out of time and, strangely, to amend the said defence, the Chief Justice rightly refused to condone evident laches, which would result as he put it, in "an endless cycle of no progress". We commend him for that and would appreciate if, henceforth, he would not hesitate to take such decisive action under the Legal Practitioners Act whenever warranted and justified.

After giving an account of the time-wasting digression, we return to the substantive issues and propose to consider the first ground of appeal. We will have to answer the following question: Did the Chief Justice apply the correct article of the CCS in coming to and in support of his judgment in favour of the appellant?

The plaintiff below considers the constructions and/or encroachments to be unlawful and prays for remedies to which he claims to be entitled under the law. But the crucial question is which article of the CCS does the Chief Justice find applicable? In paragraph 12 of his judgment, he states as follows: "... the plaintiff has proved encroachment by the defendant. In which case article 555 of the Civil Code of Seychelles is applicable…"

Thus, he makes a finding of fact and a pronouncement pertaining to the law. With due respect, both are erroneous and so we find.

The instant case is complex and raises a number of issues which require careful consideration. Besides "construction on the land of another", the issues raised pertain to encroachment, the applicability of any article of the CCS and the rights and liabilities of the parties. The Bar Association of Seychelles was well inspired to ask Sauzier J (former Judge of Appeal and of the Supreme Court) to state the law relevant to the said issues and provisions. The scholar complied and we are grateful to him for having stated the law succinctly and with clarity in a document we reproduced in extenso. We confirm that the law stated therein was and is still good law;

Consequences of encroaching on the neighbour's land by André Sauzier:

1. If one builds on someone else's property a structure which entirely stands within the boundaries of that property, it will be article 555 of the Civil Code of Seychelles under which the fate of the structure and the indemnity, if any, to be paid will depend.
2. However if one builds partly on one's property and the structure goes over the neighbour's boundary encroaching on his land, article 555 finds no application.
3. In such a case the neighbour can insist on demolition of that part of the construction which goes over the boundary and the Court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment.
4. The legal basis for such a stand is article 545 which provides: "No one may be forced to part with his property except for a public purpose and in return for fair compensation."
5. If damages and compensation were allowed to be given instead of demolition, the principle of article 545 would be breached as the neighbour would be forced to part with the strip of land encroached upon for a private and not for a public purpose.
6. The fact that the encroachment was done in good faith or brought about by a mistake as to the correctness of the boundary would have no effect on the Court's duty to order demolition.
7. The principle of strict application of article 545 of the Civil Code was laid down in France by the Cour de Cassation in a case reported in D1970.426 (Civ 3°, 21 no 1969). That case is reported and commented upon in the book *Grands Arréts de la Jurisprudence Civile* by Henri Capitant. The commentary at pages 271 to 273 is most interesting.
8. In Mauritius the principle of strict application was followed in the case of *Tulsidas* (1976) MR 121.
9. This state of affairs may cause grave injustice in certain cases. For a small area of land encroached upon, part of a huge building would have to be demolished causing damage out of proportion to the value of the land encroached upon.
10. Naturally the courts have tried to find a way to temper the strictness of the principle with mercy and justice. In Belgium and in Mauritius, in cases where the encroacher has acted in good faith and within the rules of construction without breaking the law, and where demolition would cause great hardship, the insistence of the owner of the land to request demolition and refuse compensation is considered an abus de droit.

11. In such a case the Court would not order demolition and would allow damages and compensation commensurate to the encroachment.
12. In Mauritius abus de droit has been defined in articles 16 and 17 of their Civil Code. Article 17 reads as follows: "Nul ne peut exercer un droit en vue de nuire à autrui ou de manière à causer un prejudice hors de proportion avec l'avantage qu'il peut en retirer."
13. Although Seychelles has no corresponding provisions in its Civil Code, it would appear that our law and jurisprudence have adopted the same principles.
14. Article 1382-3 provides that a person would commit a fault in the exercise of a right if the purpose of so acting was to cause harm to someone else.
15. Under article 54 of the Commercial Code the abuse of legal personality constitutes a fault under article 1382-3 of the Civil Code.
16. The way in which a person is given to quit employment may constitute a fault even if under the contract, employment may be so determined. It amounts to an *abus de droit*.
17. The notion of *abus de droit* is therefore not foreign to our law as the above examples show. However it might be better if our Civil Code were amended to reproduce articles 16 and 17 of the Mauritius Civil Code which were based on a *Projet de Code Civil du Quèbec.*
18. Consideration should also be given to amend article 545 by adding a proviso to deal with cases of abus de droit in cases of encroachments done in good faith or by mistake.
19. This is a real and pressing problem as I understand that survey errors may well arise in future. Nowadays land surveys are carried out without reference to established base lines. We may well see Victoria House being brought down in part for a few inches of error on the boundary with Temooljee's complex. It is comforting to know that after 20 years all these errors are absolved with prescriptive acquisition.
    (NB: The numbering of paragraphs and emphasies are ours).

In paragraph 10 of his judgment the Chief Justice writes: "The defendant is a sea man. In his testimony he admitted that he built the said buildings after he had bought the said land. Part of his house is on her (sic) sister's land. He passes on her (sic) sister's land to get to his house. He built his houses long before the plaintiff built her house;

> With due respect, the finding pertaining to a property owned by a "sister" is misconceived. There is no issue before the Court in respect of any property owned by "his sister".

Proof of encroachment is established according to normal practice and procedure in civil matters. We also remind ourselves that the following points are pertinent: (i) a matter which has not been pleaded, may not be found to have been proved and no evidence should be adduced or admitted in respect thereof; (ii) a party is bound by his/her pleadings; (iii) he/she who avers must prove. We have consulted the Land Register and are satisfied that H1798 is an immovable property registered in the name of one Gizelle Daniela Estrop née Nanon (Notice of First Registration dated 26 October 1992). It is totally irrelevant to this case.

The plan and the survey report produced by Michel Leong Esq both contain errors and are even misleading in some respects. In our reading, the plan shows that the two adjoining properties having a common boundary are H6440 and H5355 and the

common boundary extends from beacons LA94 and NS63. In paragraph 6 of his judgment, the Chief Justice was certainly misled when he stated that "The unchallenged witness (sic) of the land surveyor, Mr. Michel Leong, established that there are 2 buildings straddling the boundary line between Parcel H6440 and H1798."

As pleaded by the parties, this case concerns parcels H6440 and 115355 and not H6440 and H1798 as stated by the Chief Justice. If the two shaded rectangles show the location of the two "buildings", they are evidently not situated along and astride the common boundary, as indicated in paragraph 4 of the plaint. The report seems to indicate erroneously that the common boundary is not the line joining beacons LA94 and NS63 but is a line joining NS63 and PL237. Moreover, the land surveyor indicates on the plan two properties, H1798 and H2589, which are not in issue.

The Chief Justice finds that encroachment had been proved. In paragraph 15 of his judgment:

> In conclusion, I grant the declaration sought by the plaintiff to the effect that the defendant unlawfully encroached on the plaintiff's land comprised in Parcel H6440. The defendant is ordered to remove the buildings that he has built on the Parcel 116440. An injunction shall issue to restrain the defendant from further encroachment on the Parcel H6440. Damages are awarded as above with interest and costs of the suit.

We make our own the legal position expressed by Sauzier J that article 555 is not applicable in such a situation. We share his view that it is article 545 which is applicable, and this by reason of encroachment. Encroachment takes the case outside the ambit of article 555. Article 545 provides for compensation for a prejudice resulting from faute or delict. We also read from Dalloz: “L'empietement sur la propriété d'autrui suffit caracteriser la faute visée à l'art.” 1382. Dalloz, Annotations, Edition 2000, Art 555 p 501.

As regards encroachment which the Chief Justice found, erroneously, to have been proved, *"L'art. 555 c. civ. ne trouve pas application lorsqu'un constructeur étend une construction au-dela des limites de son heritage et empiete ainsi sur la parcelle voisine."* (Dalloz, ibid). In other words, article 555 finds no application in the case of a constructor who extends a construction beyond the boundary of his land and encroaches on the neighbouring parcel. (Interpretation is ours).

As regards proof of encroachment, the Chief Justice appears to find an admission "conceded by Ms Lucie Pool", acting on behalf of the defendant. But the property in respect of which the alleged admission was made is referred to as "his sister's land"; it is a red herring, nowhere pleaded and not in issue in this case. In our view, even if the admission were genuine, it would not inculpate the appellant for the reason that it concerns a property which is referred to as "his sister's land". An admission pertaining to a property which is not in issue amounts to a mere *fait materiel* (material fact) as opposed to a *fait juridique* (juridical fact) and is of no legal effect. We find accordingly.

At page 34 of the record, the Chief Justice tells Ms Pool: "Actually his (Michel Nanon's) property seems to be free; it is his sister's property that he has encroached

upon and the other (sic)." Surprisingly, it is the Chief Justice himself who states unambiguously that it is the defendant who has encroached on "his sister's property". This is irrelevant; his sister's property is not in issue. Further, at page 28, the Chief Justice poses another rhetorical question: "Therefore HI798 belongs to your sister?" Michel Nanon replies, "Yes". No evidence should have been adduced and/or admitted "in support" of a matter which has not been pleaded. Regrettably for Michel Nanon, he did not benefit from the assistance of his attorney who should have drawn the attention of the Chief Justice to the procedural issue.

That opinion of the Chief Justice was expressed at the close of the case, after he had heard all or most of the evidence. Hence, there may be some mistake which has so far been undetected. Such mistake may be at the root of all the mischief. In this regard, the comments of the scholar Sauzier J at para 19 are pertinent, particularly, when he writes "... I understand that survey errors may well arise in future. Nowadays many land surveys are carried out without reference to established base lines." We wish to draw the attention of the Attorney-General to this problem which must be tackled urgently.

We concur with the following submission of the advocate for the appellant:

> This article (555) finds no application in this present case ... The correct provision to be applied is article 545 of the Civil Code. This is in relation to cases where a neighbour builds partly on another's property and the structure goes over the neighbour's property encroaching on his land. This article (545) states: 'No one may be forced to part with his property except for a public purpose and in return for fair compensation'.

As regards the strict applicability of article 545, we wish to refer to a decision of the *Cour de Cassation Chambre Civile du 21 novembre 1969* (D 1970.426 Civ 3). It is easily available in the Supreme Court library. The decision makes a clear distinction on the applicability of articles 545 and 555 of the Civil Code. It appears that this distinction was not taken into account by the Chief Justice who, apart from making an order for demolition, further made an award for damages against the appellant. The Chief Justice granted all prayers and relief prayed for, irrespective of which article of the CCS he considered applicable.

In the result, we have no alternative than to allow the appeal, *inter alia,* on ground (1) or a).

Locus in quo (Ground c): We know of no provision in law which makes a *locus in quo* "mandatory" as alleged by the appellant. According to normal practice, the parties consult each other and make a joint request to the trial judge. The latter has a discretion which must be exercised judiciously. There is no merit in this ground which is hereby dismissed.

Abus de droit: Before concluding, we wish to consider the issue of *abus de droit,* a matter which has been raised in the course of proceedings. In a judgment of Alleear CJ which has been brought to our attention, we read: "It is a sad state of affairs that in our system of law the principle of *abus de droll* is not recognized."

We do not subscribe to that statement of the law. However, we agree that there is a serious problem and that consideration must be given to interpret article 545 by adding the concept of *ahus de droit,* in cases of encroachment perpetrated in good faith or by mistake. We accordingly decide that where a person makes the wrong use of his rights under the civil law, he may be liable for an abuse of right. We adopt the jurisprudence of the continental law in this respect.

Our answer to the question posed in paragraph [8] is as follows: The Chief Justice erroneously applied article 555 instead of article 545 which is the correct article of the CCS applicable in this case. Such an error in respect of such a fundamental question is fatal; it has vitiated *ab initio* all the findings resulting from the application of the incorrect article.

Having already allowed the appeal, we now award costs to the appellant in this Court and in the Court below. All the awards made and prayers granted by the Chief Justice are hereby annulled and reversed.

Finally, we wish to express our thanks to the advocates for a cogent presentation of their case pertaining to an area of our Civil Code where uncertainties in our jurisprudence needed clarification.