IN THE SEYCHELLES COURT OF APPEAL

Raymonde Herminie **Appellant**

V

Roy Francois **Respondent**

SCA 21 of 2009

[Before : MacGregor, PA, Fernando and Twomey, JJA]

A. Amesbury, Attorney-at-law for the Appellant

F. Bonté, Attorney-at-law for the Respondent

Date of hearing: 4rd April 2012.

Date of judgment: 13th April 2012.

JUDGMENT

Twomey, JA

1. This is an appeal against a judgment of the Supreme Court in which the learned judge Bernadin Renaud found that the Appellant had encroached on the land of the Respondent. He ordered her to pay the Respondent SR 30,000 damages for trespass to the land and for moral damage and to remove all the constructions which had encroached onto the land of the Respondent.

2. The Appellant has filed four grounds of Appeal:

    i. "Having correctly set out the law governing the acquisition of prescription under the Civil Code of Seychelles, the learned Ag. Chief Justice misapplied the law to the facts of the Appellant's case.
    ii. The learned Ag. Chief Justice was wrong to find that the Appellant was in illicit possession of part of parcel T2400

when the Respondent was not in possession or occupation of that part of the land in 1977, having not yet been born.

iii. The learned Ag. Chief Justice was wrong to hold that there was no evidence on record to prove that the Appellant did not extend the house on parcel T2400, when there was overwhelming evidence in the form of the survey plan itself, the testimony of the Appellant and the lack of planning permission to prove on the balance of probabilities that there was no extension. This evidence was unchallenged by the Respondent who applied for a locus in quo to specifically point out the extension allegedly built by the Appellant but later on abandoned in his application.

iv. The learned Ag. Chief Justice was wrong to award damages in favour of the Respondent in the sum of R30,000, when no harm or prejudice was caused to the Respondent.

3. When this matter was first set down for appeal parties were asked to explore the possibility of an amicable settlement as this matter concerned nephew and aunt who would inevitably continue to live in close proximity despite the outcome of the case. The court is now informed that although solutions were explored no agreement between the parties was reached. It was in those circumstances that we proceeded with the hearing of the appeal.

Title Deeds

4. We note from the record and exhibits that the Appellant and the Respondent own land, Parcel T164 and Parcel T2400 respectively, which have a common boundary. Parcel T2400 is a sub-division of Parcel T365. The Respondent had claimed that the house occupied by the Appellant encroached on his land, Parcel T2400. The Appellant produced her title deed to show that she had bought the land in 1977 which at the time was still on the “Old Register” and not surveyed. The survey was carried out by Yvon Savy, approved by the Chief Land Surveyor and transferred to the “New Register” on 7th January 1985.

5. The Respondent did not acquire co-ownership of T365 to his land until the death of his father, the date of which event is not in

evidence. It was only in 2002 that the land he co-owned with his father's heirs was partitioned and he acquired Title 2400.

Prescription

6. Mrs. Amesbury, relying on Article 2229 and 2262 of the Seychelles Civil Code argued that the action of the Respondent was prescribed as the Appellant had been in continuous, uninterrupted, peaceful, public and unequivocal possession of the portion of land for well over 20 years. At trial the Appellant produced her title deeds which confirmed her testimony that she had bought the land from Madame Veuve Greslo Desabin who had ownership of the l'usufruit et jouissance (usufruct) and one Madame Tessie Desaubin who had la nue-proprieté (the bare ownership) on the 12th April 1977. She testified that the house she continues to occupy had been there when she bought the land. Registration according to the title deed was to be done "suivant l'arpentage de Monsieur Yvon Savy, arpenteur."

7. Despite the pleadings that repeated requests had been made to the Appellant to remove the structures from the land there is no proof of any mise en demeure until 8th May 2003. This action however was begun on the 25th August 2003, over 26 years after the Appellant had purchased the land and occupied the house. In fact as was adduced in evidence, the Respondent was not born until the 13th June 1978. He accepts that the house existed as far back as he can remember, vide his cross-examination:

"Q. You have always known that there was a house on Mrs. Herminie's plot of land?

A. "When I was growing up, I saw a house. I do not know when it was constructed. I can simply tell the truth about what I know."

...

Q. You know Aleti Francoise your grandmother..?

A. My grandmother has passed away, I cannot tell you when she passed away but she lived there.

8. Mr. Bonté in his Heads of Argument contended that the Appellant had been in “illicit occupation” and to acquire prescriptive rights to the property her “servitude” (?) had to be continuous and apparent. In fact these arguments were accepted and relied by the trial judge in his decision. A reading of the provisions of the Civil Code would have put all those irrelevant arguments to rest.

9. I cannot emphasise strongly enough what a gross misdirection and misstatement of the law this is. It is unfortunate how inaccurate and statements and quotations taken out of context from Dalloz are used to support submissions and relied on by both Counsel and the Court. It is incumbent on all as officers of the court to state and interpret the law correctly. It is my fear that this continuous slide into French sound bites without their meaning being understood in Kreol or English is eroding the rich jurisprudence of this land.

10. Mrs. Amesbury obviously also confused with the line of reasoning of Mr. Bonté and the learned judge relies in her appeal on the case of **Beynon v Attorney General 1969 3 SLR**. It has no bearing on this case. Beynon concerns an article 640 case – the natural flow of water from higher lands to lower land and culverts built to accommodate this water. Mrs. Herminie’s case was to do with an alleged encroachment, a possible Article 555 case. She has lived legally on the land she bought at Takamaka for over 25 years when the Respondent brought his case. The house she occupied was an old “kaz” which she occupied and later renovated. That to me is without doubt obvious from reading the record and the telling re-examination of the Respondent by his Counsel:

Q. Mr. Francoise we are not talking about the whole house here. We are talking about that bit of the house that is protruding on your land. Did that bit moving out onto your and exist when the survey plan was made?

A. Yes.

...

Q...Do you remember when the extension was being built?

A. No, I do not remember.

Ms. Pool : (then Counsel for the Appellant) My learned friend is talking about extension, there is no extension.

Mr. Bonté: Your lordship in the beginning we all lived in a hut, "lakaz en pay" then we have built our houses which incorporate the kitchen which used to be outside. The toilet which used to be outside..."

11. Hence, it is accepted by the Respondent that the Appellant's house was there in his living memory well over the prescriptive term and according to the documents produced both by the Appellant and the Respondent even before that. Mr. Bonté's quote from Dalloz which seemed to have dazzled and persuaded the trial judge certainly cuts no ice with this Court. He had quoted "les actes de pure faculté...ne peuvent fonder ni possession ni prescription." These are the original french provisions of **Article 2232** of our Civil Code and refer to "actes de simple tolerance" (e.g. where for example A allows neighbour B to cross his land to get to the main road; the fact that A tolerates it does not create a right of way for B) and "actes de pure faculté"(e.g. where neighbour B builds a house below A which obstructs A's view; A cannot complain!). Such acts do not give rise to possession or prescription. We cannot understand the relevance they have to this case.

12. The relevant provisions of the Civil Code were not referred to. The facts and the law are quite simple. Mrs. Herminie has acquired by prescription ownership of that part of T2400 on which her house stands, Vide **Article 2262.**

13. We therefore set aside the decision of the Supreme Court and allow this Appeal with costs in both this Court and the Court below. We further order that a copy of this judgment be served on the Registrar of Land so that the Register is amended to reflect ownership by the Appellant, Mrs. Raymonde Herminie, acquired by prescription of that part of Parcel T2400 on which part of her house extends.

_____ _____ _____

M. Twomey	F. MacGregor	A. Fernando
Justice of Appeal	President, Court of Appeal	Justice of Appeal

Delivered at Victoria, Mahé, Seychelles, this 13th day of April 2012.