

Mancienne v Ah-Time

(2013) SLR 165

Domah, Fernando and Msoffe JJA

3 May 2013

SCA 9/2009

Counsel D Sabino for the appellants
 S Rouillon for the respondents

The judgment was delivered by

DOMAH JA

[1] This appeal is against a decision of the Supreme Court which, in an action where the respondents (the Ah-Times) sued the appellants (the Manciennes) for encroachment and illegal constructions on their land, gave judgment in favour of the respondents. The Judge ordered the appellants to quit, leave and vacate that part of the property which he found the appellants had encroached upon: namely, part of the driveway and dwelling house of Yola Ah-Time comprising also the laundry and the brick wall; part of the dwelling house of Antoine Ah-Time comprising sewage pipe, septic tank, flight of steps, retaining wall and part of the carport with pillars supporting part of the storey of his house. The Court gave the appellants three months from the date of judgment to comply with the removal of the structures at their expense. The Court also ordered the appellants to pay damages to the respondents in the sum of R 150,000 as prejudice suffered by the latter in the circumstances.

[2] The appellants had also, in a counter-claim against the respondents, moved for the specific performance of two agreements they had entered into as regards the sale of the respective subdivisions of the properties which comprised the abovementioned structures which the respondents had agreed to sell and the appellants had agreed to buy from the respondents. The Judge had found the counter-claim based on a promise to sell the respective properties proved, the breach of which entitled appellants to R 50,000 damages which he ordered the respondents to pay.

[3] The Manciennes have appealed against the judgment on the following 8 grounds:

- 1) The Judge erred in failing to recognize evidence from the respondents which proves that the structures of the appellants were constructed prior to the purchase of Title V8279 by the respondents. This would show that the respondents had notice of the structures and are not bona fide purchasers of the title.
- 2) The Judge failed to recognize evidence from the respondents themselves that illustrate that they gave the appellants consent to build. This is further proved by the respondents admitting to entering into a promise for sale agreement with the second appellant, which the Judge found was a valid agreement; and negotiations to enter into a promise for sale agreement with the first appellant, which although the Judge found this was not a valid agreement, he found that negotiations did take place, which prove consent to build.

- 3) The Judge erred in awarding damages to the second appellant against the respondents for breach of the promise for sale agreement. As specific performance is still possible, he should have ordered for such.
- 4) The Judge erred in awarding moral damages to the respondents. The Judge stated that the respondents were inconvenienced by being unable to construct a building project due to the encroachments, but the first respondent admitted in court that her planned project was made only after this suit was filed before the Supreme Court and that the project had not been granted planning permission.
- 5) The Judge erred in stating that the appellants should pay for the demolition costs. If such structures have to be demolished it is the respondents who should pay given that they had allowed the appellants to build on the land.
- 6) The Judge erred in failing to consider the appellants defence of promissory estoppel in his judgment.
- 7) The Judge erred in ignoring the evidence of the respondents' land surveyor who stated that the road to the second defendant's land is a road reserve. As such, it cannot be an unlawful encroachment.
- 8) The Judge erred in failing to recognize that the road leading to the first defendant's land has been in use by the inhabitants of the area for over 20 years and as

such, the respondents are prescribed from praying for its demolition.

[4] The Ah-Times have cross-appealed against the judgment on the following 5 grounds:

The Judge erred in accepting the counter-claim of the appellants –

- a) in finding that the cross-appellants had breached the agreement with the “first defendant” then finding that the “second defendant” was entitled to be repaid Seychelles Rupees Twenty Five Thousand and moral damages.
- b) in not taking into account that the respondents had used the deposit as agreed to have a survey of the property carried out to have it subdivided and the evidence that the survey could not be completed purely because of the illegal encroachments by the appellants.
- c) in not accepting that the second appellant was the one who breached the parties’ agreement by approaching the Ministry to have land taken away from the respondents rather than putting the respondents on notice to perform the parties’ agreement.
- d) in not taking into consideration the fact that the second appellant made no attempt whatsoever to complete the sale and the evidence and the pleadings reveal (especially the very late attempted counter-claim) that he had no intention of going ahead with the parties agreement.

e) in not having the agreement of the parties registered under the Land Registration Act CAP 107 and failing to finalize the sale when he knew exactly the portion of the land he was to purchase from the survey carried out for that purpose the second appellant clearly showed he had no intention of going ahead with the parties' agreement or to attempt to obtain any interest in the land of the respondents.

[5] The respondents, therefore, move that the order made for payment by the respondents of damages in the sum of R 50,000 to the appellant or the appellants (we address this discrepancy later) be set aside and that the order for costs be amended to read "costs in favour of the plaintiffs."

[6] Parties were given time to resolve their differences amiably, to no avail. It is our sincere hope that the proposed law relating to mediation will provide the conditions, incentive and logistics necessary so that parties in a civil action make good use of this alternative dispute resolution system to settle their dispute swiftly, cheaply and to the satisfaction of all the stake holders involved. We would wish to sound a note of caution, though. It is our considered view that the system will deliver effectively only if the legal profession is properly trained in mediation practice. The Bar Council should ensure that this is so because the concepts, the rules, the methods, the approach and the skills required are way apart from those in litigation. Litigation practitioners are ill-formed and equipped, unless properly exposed, to undertake mediation. The new learning in this specialist legal discipline now widely used in commercial practice may be acquired easily within a day by the legal fraternity.

[7] We shall now proceed to deal with the issues that this appeal raises. As we see the grounds of appeal (grounds 1, 2, 3, 4 and 5) and those of cross-appeal (grounds a, b, c, d, and e) have to do with facts. We have gone through the proceedings, in the light of the pleadings and the submissions of counsel both before the court below and in the skeleton arguments before us. Subject to what we say in the cross-appeal, we are unable to say that the conclusions reached by the Judge on the facts are flawed. Indeed, the Judge made it a point to effect a “descente de lieu” for a real life appreciation of the facts as presented in evidence before he made his findings and his orders. He heard the witnesses. We did not. He observed their demeanour. We can only read the transcript in a dispute where the parties are mutually blaming one another for their contentions: *Captain and others of Various Fishing Vessels, Moscow Narodny Bank (Intervenor)* SCA 23/1997; *Akbar v R* SCA 5/1998.

- a) We, accordingly, endorse the following findings of fact by the Judge: that there is encroachment:
- b) by the first appellant who has built part of his driveway, part of his dwelling house, a laundry and raised a brick wall on the property of the respondents;
- c) by the second appellant who has constructed part of his dwelling house, laid the sewage pipe and the septic tank on the property of the respondents;
- d) by the second appellant who has constructed a flight of steps, part of a retaining wall and part of a car port with pillars supporting part of the storey of his house, on the property of the respondents.

[8] Counsel for the appellants main contentions in this appeal are two: That the order of demolition should be reversed and specific performance should be ordered for the purpose of giving effect to the promise of sale which the Court found had been breached. While the respondents blame the appellants for the project of subdivision and sale that aborted, the appellants are blaming the respondents. The crucial issue before this Court is whether there may be exceptions to the principle enshrined in art 545 of the Seychelles Civil Code that demolitions should be ordered for boundary encroachments.

[9] In fact, this Court dealt at some length with this aspect of the question in the case of *Nanon v Thyroomooldy* SCA 41/2009. We hardly find any need to add to what Hodoul JA, stated there, except perhaps by way of further elaboration. The Court of Appeal gave judicial endorsement to the authoritative pronouncement of ex-Judge Sauzier, reputed jurist of long experience on Seychelles law, more particularly civil law, in an address to the Bar Council.

[10] We reproduce the position of our law post-*Nanon* on encroachments, more particularly boundary encroachments as between neighbours:

- 1) If one builds on someone else's property a structure which *entirely* stands within the boundaries of that property, it will be art 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, art 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 fact that the encroachment was done in good faith or brought about by mistake as to the correctness of the boundary would have no effect on the Court's duty to order demolition: see Cour de Cassation, D1970.426 (Civ 3^o, 21 no. 1969); "Grands Arrêts de la Jurisprudence Civile" by Henri Capitant for French law; *Tulsidas & Cie v Cheekhooree* 1976 MR 121; *Boodhna v Mrs R R Ramdewar* 2001 MR 116; *Lowtun v Lowtun* 2001 Int Court 1; *Thumiah Naraindass v Thumiah Avinash Chandra* 2009 Int Court 82, for Mauritian law; article 992 of the Civil Code of Quebec and *Micheline Pinsonnault v Maurice Labrechque* [1999] R.D.1 113 (C.S.) cited in *Boodhna v Mrs R R Ramdewar* [supra] for the law of Quebec.
- 5) But where grave injustice may result in certain exceptional cases: for instance, 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, the justice of the demolition will have to be tempered with mercy.
- 6) In such a case, the encroacher would need to show additionally that he acted in good faith, within the rules of construction, did not otherwise break any law and the demolition would cause great hardship.

- 7) In such a case, the Court would not order demolition and would allow damages and compensation commensurate with the extent of the encroachment.
- 8) Where the owner of the land insists on a demolition order in such a case of grave injustice, the encroacher may plead *abus de droit* as against the owner and insist on compensating him in compensatory damages for the encroachment.

[11] The decision of *Nanong* goes on to explain the reason why demolition is the rule. Any lesser sanction would fly in the face of art 545 of the Civil Code which provides:

No one may be forced to part with his property except for a public purpose and in return for fair compensation.

[12] The adoption of a rule awarding damages in place of ordering demolition for boundary encroachments would at once be contrary to the provision of art 545 of the Civil Code and violate the constitutional principle of private ownership of property in a democratic society. It would also set in motion a law of unintended consequences. Article 545 would become a charter of mischief in the hands of persons who may be tempted to make an abuse of it. For then, an adjoining land owner by design would be able to force his unwilling next-door neighbour to part with a strip of land along the boundary line against the payment of mere damages. The only limitation to the right of private ownership of property is that it can be compulsorily acquired by a specific law, through a specific procedure and for a public purpose. That is the rationale behind a rule that demolition should be the order of the day. Not even good faith or

mistake on the correctness of the boundary would constitute a bar to the law's diktat to require demolition in boundary encroachments and the Court's duty to order same.

[13] However, if pushed to the extreme, there may be cases where for a small area of land encroached upon, part of a high rise would have to be demolished with consequences out of proportion to the value of the land encroached upon, if such an encroachment has come about in good faith and the encroacher is otherwise compliant with the law. It was to mitigate the rigours of an indiscriminate application of the rule that a number of foreign jurisdictions have developed the concept of *abus de droit*. Some have done it by judicial creation and some by legislative intervention.

[14] The doctrine of *abus de droit* in Mauritius is not of judicial creation as in some other jurisdictions but based on arts 16 and 17 of its Civil Code, imported from the "Projet de Code Civil du Québec.". 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.

[15] In Seychelles, the serious need to temper justice with mercy in this area of the law was long felt. The dire need arises out of grass root realities in the exiguity of its land mass as an island and its antiquated and historical system of land use, ownership and occupation. While it is true that a lot of effort is being deployed to demarcate properties properly, a lot is yet to be done with respect to families who have lived in communities and bothered little about land demarcations any more than they had hitherto bothered about their social and family demarcations. When official documents are drawn

up ex post facto and from offices to excise and demarcate properties, they pay scant regard to historical realities on site which only family and community memories can vouch for. As Hodoul JA, stated in *Nanon v Thyroomoldy* many land surveys are carried out without reference to established base lines. He repeated the example given by ex-Judge Sauzier: namely, if art 545 were applied in all its rigour, it is not inconceivable that one side of Victoria House may have to be pulled down on account of a few inches of encroachment on the boundary of Temooljee's complex. The only consolation we may have in this matter is that, after 20 years, any action will be time-barred by acquisitive prescription. But there are many lesser examples in day-to-day life, not less dramatic, which comes to court and which have bedevilled owners and practitioners alike as in *Herminie v Francois* SCA 21/2009.

[16] This Court in *Nanon* has attempted to bridge a gap in our law so as to bring our jurisprudence in line with what obtains in this area in comparable jurisdictions. It has done so by developing further - to art 545 of the Civil Code - a doctrine of abus de droit which already exists in our law: namely, art 1382-3 of the Seychelles Civil Code and art 54 of the Commercial Code, labour law etc, largely influenced by the dire need of the particularities of our social and historical set up and the insight of Sauzier, ex-Judge.

[17] Post-*Nanon*, the exception to the rule that demolition should be ordered in all neighbour boundary encroachments may be stated to be as follows:

where the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, account taken of the negligible extent of the encroachment compared to the

gravity of the hardship to the encroacher, the Court should, as an exception mitigate the consequences by an award of damages instead of a demolition. Nothing short of that would suffice. For the encroacher to escape the guillotine of article 545, he should show that, in refusing a compensation for the negligible encroachment and insisting on a demolition order in all the circumstances of the case, the owner is making an *abus de droit*.

[18] Now that we have formulated the law, we may look at the facts of this case. The extent of the encroachments is not negligible in either case. Most of the constructions may be conveniently deconstructed and restored to the position of *status quo ante*. Counsel for the appellants argue that there is a column which if removed, the whole structure of the house would collapse. As a lawyer, he is entitled to assume so. But it takes a civil engineer to prove the contrary in this small structure of a building which is not a big complex. It is possible to move, replace and substitute columns today more easily than before. There would be a lot of inconvenience, admittedly. But no hardship to the appellants would ensue other than that which they have brought upon themselves. Above all, there is evidence that the authorities have not given their green light for the proposed subdivisions on account of the encroachments. Their compliance with the law is in serious issue. For these reasons, therefore, art 545 is applicable and a demolition order is justified. Accordingly, Grounds 1-5 in the action brought by appellants against the respondents should only relate to the question of damages.

Grounds of appeal on the claim of the appellants v the respondents

Ground 1

[19] On ground 1, the appellants claim that the structures existed before the respondents purchased title V8279 and that the respondents had notice of the structures. That may be true but the Judge visited the site and found the constructions to be new. We have looked at the photographs as well. We take the view that the appellants failed to ensure that whatever new works were undertaken with respect to their building did not extend beyond the boundaries of their properties. This is not a case of an ex post facto discovery that property A encroaches on property B. That the respondents only came later is not an answer to the rule laid in art 545 of the Civil Code. When owners are carrying new works along or near the boundary line of their properties, they are under a duty to ensure that they comply with building regulations and with boundary lines.

Ground 2

[20] Under Ground 2, the appellants claim that they had the consent to build. They argue that this can be inferred from the promise of the sale agreement and the fact that a number of concrete steps had been taken by the respondents in favour of the transfer of the property. That did not stop the appellants from obtaining a written consent to build beyond the boundary line. As rightly remarked by the Judge, negotiation for the sale of the property did not include a consent to construct. Whatever the appellants did, they did at their risk and peril.

Ground 3

[21] On Ground 3, the question is whether the Judge was ultra petita in awarding damages which had not been claimed in the counter-claim. The appellants in their cross-petition had moved for

specific performance of the contractual obligations entered into. The Judge awarded the sum of R 25,000 for breach of contract instead.

[22] It is the case of the appellants that they did not ask for damages and the Court did state that the agreement was a valid agreement so that they should have been entitled to specific performance. The appellants contest this argument. We sought the finding of the Court on this particular aspect of the case.

[23] The question we asked was:

Whether this Court would conclude that, in the absence of a claim for damages by the Manciennes, which remedy was granted *ultra petita*, it would or it would not have granted specific performance of the contract as a remedy in the light of the fact that he found as a fact that there was a breach of the promise of sale.

The answer we obtained has been that:

I would under no circumstances have granted, as a remedy, specific performance of the promise of sale even though I had found as a fact that there was a breach of that promise of sale.

[24] We agree with him for the reasons he gave, based on the facts of which he was the sovereign Judge. As regards the law, a breach of contract, in certain circumstances, may be remedied by a specific performance. But the rule with regard to a breach of promise of sale is damages.

[25] Besides as rightly pointed out by counsel for the respondents, specific performance is a discretionary remedy in equity. Anybody who seeks equity should do equity. The facts show that the appellants took reckless risks in carrying out their constructions, without properly ascertaining their boundary line before raising the new structures. The activity of the appellants was not one of staying put on an existing encroachment but of raising new constructions without basic precautions of fact and law. The duty to ascertain the boundaries of one's property before one raises new constructions of the nature they have embarked upon is a minimum precaution.

[26] It was also argued by the respondents that the appellants were not entitled to damages. We disagree. The damages were granted for an act independent of the illegal construction. It was for a breach of promise of sale as the Judge explains. In the circumstances, it is our view that the damages were justified and R 50,000 is an adequate sum.

Ground 4

[27] This ground questions the award of moral damages. Whether the first respondent had plans or did not have plans for the construction is of no consequence. The fact remains that there was an encroachment by new constructions. The mere fact of a neighbour beginning new constructions extending beyond the boundary line of his property is inherently prejudicial. It saps the morale of the adjoining owner who suffers the physical interference on a continuing basis until demolition. He is entitled to moral damages.

Ground 5

[28] We have addressed the issue of who bears the brunt of the illegality above. We need not add more. The appellants had proceeded with the constructions at their risk and peril. The party on whom the burden of demolition lies is the author of the illegality and not the victim of the illegality.

Ground 6

[29] Once again, we have stated the law with respect to art 545 of our Civil Code. The issue of promissory estoppel which is an equitable remedy would not apply for the same reasons that specific performance may not be ordered.

Grounds 7 and 8

[30] If it is the contention of the appellants that the encroachment is on a road reserve and for that reason it cannot be an encroachment, that is a contradiction in terms. It may not be an encroachment on the respondents' property, but it remains an encroachment nonetheless. And if it is the appellants who have done so, they have to remove the same. As regards whether the road has been in use for over 20 years by the inhabitants of the locality, that is a matter which only the authorities concerned may look into. It is not for the appellants to be concerned with this issue which concerns others.

The appeal on the counter-claim of the appellants v the respondents

Ground (a)

[31] In the award of damages to the appellants, the decision of the Judge was as follows:

I find that the 1st Defendant had an agreement with the plaintiffs, which agreement I also find breached by the

plaintiffs, and the 2nd defendant/counterclaimant is therefore entitled to judgment for the sum paid, that is SR25,000.00 and moral damages which I assess at SR25,000.00. I hereby award the 2nd defendant/counterclaimant the total sum of SR50,000.00 as against the plaintiffs jointly and severally.

I award half of the taxed cost to the Plaintiffs against the 1st Defendant and a quarter of the taxed costs against the 2nd Defendant. The plaintiff shall forfeit a quarter of the taxed costs to the 2nd Defendant/Counter claimant.

[32] It is the contention of the cross-appellants that the Judge erred in accepting the counter-claim of the appellants in finding that the cross-appellants had breached the agreement with the “1st defendant” then finding that the “2nd Defendant” was entitled to be repaid R 25,000 and moral damages.

[33] Indeed, the Judge does not expatiate on the reasons for an order which, on the face of it, looks discrepant. But his mind can be read from the state of evidence and his earlier findings. We attempted to reconcile the tenor of the judgment and his reasoning with the facts of the case. Our reading is that in the first sentence he was referring to the second appellant when he erroneously mentioned “1st defendant.” The mention of the first defendant is to us clearly a typing mistake. We, on appeal, are entitled to correct that: *Seychelles Housing Development Corp v Vadivello* SCA 13/1999. In any case, our own conclusion is that the first appellant was not entitled to any award in damages inasmuch as he had not deposited any sum, unlike the second appellant who had made a deposit of R 25,000. The first

appellant had himself walked out of the agreement seemingly awaiting the second appellant's negotiation with government for a better deal. Accordingly, he was not entitled either to the return of any deposit or to moral damages, unlike the second appellant.

[34] In view of the above, we amend the judgment to bring it in line with the evidence as found by the Judge as follows. We order the respondents jointly and *in solido* to pay to appellant no 2 the sum of R 50,000 comprising R 25,000 as the sum paid and R 25,000 as moral damages.

Grounds (b), (c), (d) and (e)

[35] Grounds b, c, d and e are primarily an appreciation of fact by the Judge. Our reading of the judgment is that the Judge did take into account the many factors which were to influence his decision. It was in evidence that the promise of sale was aborted because of the conduct of the appellant no 2 who began to negotiate on his own with government. If his argument is that the price he had agreed to pay was extortionate, he should have in good faith broached the matter with the respondents rather than sought a deal behind their back. The law is well settled that the appellate court will interfere with a lower court's decision on facts if the Judge of first instance (a) misdirected himself on matters of principles; or (b) failed to take into account important matters, or look into matters that he should not have; or (c) made a decision that was plainly wrong or wholly unreasonable: see *Captain and others of Various Fishing Vessels, Moscow Narodny Bank (Intervenor) SCA* (supra); *Akbar v R* (supra).

[36] The other grounds of challenge of the findings of the Judge are that the appellants were more credible, more honest and more truthful. We have looked at the instances identified in the written

submissions. For example, the dispute on the cadastral plan whether it was P10 or D4. This was a collateral matter. The real issue was what caused the respondents to put an end to the project of subdivision and sale.

[37] As correctly surmised by the respondents, the appellants could have shown their seriousness by putting the respondents on notice to perform the parties' agreement. The evidence does seem to suggest that the appellant no 2 made no attempt whatsoever to complete the sale. The evidence and the pleadings reveal (especially the very late attempted counter-claim) that he had no intention of going ahead with the parties' agreement. The submission of counsel for the respondents also makes sense that the appellants could have shown their seriousness by a timely registration of the agreement under the Land Registration Act.

[38] We are unable to say that the conclusion reached by the Judge on the real issue was not justified. The real issue was whether the appellants had authority to encroach. His finding was as follows:

the Defendants did not have and do not have legal authority from the plaintiffs to carry any constructions on the property of the latter. There is no evidence, be it oral or in writing, impliedly or tacitly, that the Plaintiffs at any time authorized the Defendants to carry out any construction works, as they did, on their property.

[39] As regards the issue whether the encroachment was prior to the material date or after, the Court had this to say:

I am satisfied on the basis of evidence before me, that none of the material works so carried out by the defendant were in existence before the Plaintiffs purchased their property.

[40] On this matter, it would be good to state that the encroachment the Court is referring to is not whatever previous encroachment might have occurred prior to the respondents' acquisition of the property but the recent encroachment by the "material works ... carried out" on site.

[41] For the reasons given above, we hold that the respondents are entitled to their remedy when the Court ordered them to remove all buildings and constructions from the land title V8279, these being:

With respect to the first appellant, to the extent of the encroachment:

- a) part of his driveway;
- b) part of his dwelling house;
- c) his laundry and the brick wall.

With respect to the second appellant, to the extent of the encroachment:

- a) part of his dwelling house;
- b) the sewage pipe, the septic tank, the flight of steps;
- c) part of the retaining wall; and
- d) part of his carport with pillars supporting part of the storey of his house.

[42] We allow three months from the present judgment for the appellants to comply with the above orders at their own expense.

[43] Account taken of the hassles that the respondents have undergone as found by the Judge, we do not find the award of damages for the fault committed excessive. He gave R 150,000 for same. We confirm this amount.

[45] We order the respondents to pay to respondent no 2 the sum of R 50,000 comprising R 25,000 as deposit and R 25,000 as moral damages. As regards, appellant no 1, we note that the Court made no finding on the breach of the agreement of sale as between the respondents and appellant no 1. In fact the evidence reveals that appellant no 1 had walked out of the agreement allowing appellant no 2 to negotiate with government. We make no order for damages in his case.

[46] We maintain the order as to costs in the circumstances, given the decision which is, in the main confirmed.