

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , M. Twomey (J.A) , J. Msoffe (J.A) **]**

Civil Appeal SCA 07/2013

(Appeal from Supreme Court Decision 36/2008)

Marie-Ange Waye-Hive	Appellant
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Versus

Paule Gitanne Welch	Respondent
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And

Cross-Appeal

Marie-Ange Waye-Hive	Appellant
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Versus

Paule Gitanne Welch	Respondent
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Heard: 09 April 2015

Counsel: Mr. Charles Lucas for Appellant

Mr. Francis Chang Sam for Respondent

Delivered: 17 April 2015

JUDGMENT

J. Msoffe (J.A)

- [1] The Respondent was executor of the estate of the late Boris Gervais Adam and Marie Raymond Adam over Title Nos.H2107 and H573. The late Gervais Adam and Marie Raymond Adam died on 23/10/1999 and 24/2/2002, respectively.

- [2] The Appellant was at all the material times the owner of the land comprised in Title No. H225. Each of the Title in H2107 and H573 has a common boundary with the Appellant's property. The boundary runs between beacons MA 490 and MA 489 in the case of Title No. H2107 while the common boundary runs between MA 490 and MA 491 in the case of Title No. H573.
- [3] At the trial it was alleged that the Appellant without consent of the owners from time to time entered into the Respondent's property, grew bananas and other trees, and built structures thereon as if the property belonged to her. It was also alleged that the Appellant, her employees, agents and other persons residing with her or acting under her instructions dumped rubbish and burnt used motor vehicle tyres on the property thereby inconveniencing the Respondent and her family.
- [4] On 1/3/2013 the Supreme Court gave Judgment in favour of the Respondent ordering the Appellant to demolish the structures built on the Appellant's property, to reinstate the Respondent's property to the state it was before the trespass and encroachment, an injunction restraining the Appellant, her agents etc. from remaining, trespassing and encroaching on the Respondent's property in H2107, and damages to the tune of SR30,000. The Respondent was also awarded 60% of the costs as she had won partly on the counter claim.
- [5] Aggrieved, the Appellant has lodged this appeal. The grounds of appeal read:-
1. The learned trial judge erred by failing to analyse the evidence of the Plaintiff, her witnesses and documentary evidence of harassment by the

Defendant and her agents which were overwhelming and he ought to have awarded her damages instead of dismissing her Counter claim.

2. Having made the finding at page 12 that the Defendant had acquired prescriptive rights on the driveway behind her house on Title H573, the learned judge was wrong to make a blanket injunction order of trespass against her and her agents and servants over Title H2107 which is contiguous to H573, continuous, apparent in public view that both plots are the property of the same owner and he ought not to have been excepted in his analysis and reasoning that the Defendant had no prescriptive rights thus coming to a different conclusion with regard to each Title.
3. The learned trial judge was wrong to order the Defendant to pay SR30,000 damages as the Plaintiff did not suffer any moral damage as per her own testimony.”

[6] At the same time the Respondent is cross-appealing and her grounds of appeal read as follows:-

1. The Learned Trial Judge having found that the right of way on the upper part of parcel H573 “is not covered by the right granted in the original Sale Agreement” erred in law in finding that the Appellant (then Defendant) “had acquired a prescriptive right over that part of parcel H573 where the drive way is situated...” through continuous use.
2. The learned trial judge erred in granting the Respondent only R30,000 in damages on the ground that the Respondent “has not set out the basis as to how she reached that figure” (contrary to paragraph 10 of the

Respondent's Plaintiff and his own finding immediately after the above quotation from his judgment).

3. In the result the learned trial judge erred in awarding the Plaintiff (now Respondent) only 60% of the costs of the action.

[7] In disposing of the appeal and the cross-appeal we propose to do so generally. We think in doing so we will dispense justice to both parties.

[8] Much was said at the trial by the respective parties. Much has also been said by learned counsel in their respective Heads of Argument and in their oral submissions before us. It seems, however, that the issue falling for consideration and decision is a very narrow one. The Appellant's case is essentially that having acquired the easement by way of possession and use of the road access for a period of over 20 years she satisfies the rights imposed by Articles 687, 688, 689, 690, 694, 2228 and 2229 of the Civil Code. In the alternative, she is of the view that having erected structures on the property she is covered by the provisions of Article 555.

[9] On the other hand, the Respondent thinks otherwise. The issue therefore is whether or not the Appellant is correct in law in her assertion that she has acquired the right of way in terms of Article 690 by virtue of her continued possession over it for a period of over 20 years.

[10] Under the Civil Code there are various kinds of easements which can be created over property. Article 688 makes a distinction between continuous and discontinuous easements. Discontinuous easements are those which need human intervention for their use, such as rights of way, draining water,

etc. In this case the parties are agreed that the right of way in controversy is a discontinuous easement.

[11] The question is whether the right of way in issue can be acquired by prescription as contended by the Appellant. In other words, the issue is whether she has acquisitive prescription over the property after possessing it for a period of over 20 years.

[12] With respect, the answer to the above issue is simple and it is in the negative. Article 691 is very clear on this. It states:-

*Non-apparent continuous easements and **discontinuous easements**, apparent or non-apparent, **may not be created except by a document of title.***

Possession, even from time immemorial, is not sufficient for their creation.

[Emphasis added.]

[13] So, a right of way is a real right. But it requires a document of title under Article 691. Therefore, it can never be created by possession even if the possession was from time immemorial — See **Payet v Labrosse and Another** [1978] SLR 222, **Delorie v Alcindor and Another** [1978] – 1982] SCAR 28 and **Sinon v Dine** [2001] SLR 88.

[14] Under the French law of property, from which the Seychellois law of property originates, it must be remembered that the guiding principle is the concept of the absolute and inviolable property rights of the owner. This is

expressed in Article 545 of the Civil Code of Seychelles which provides that:

No one may be forced to part with his property except for a public purpose and in return for fair compensation. The purposes of acquisition and the manner of compensation shall be determined by such laws as may from time to time be enacted.

The Court de Cassation has in a recent case reaffirmed the strict application of this rule (Cour de Cassation arrêt of 10 novembre 2009. Civ. 3 ème 10 novembre 2009 Pourvoi n° 08-17526).

It is for this reason that the provisions relating to rights of way and encroachments are expressly provided for with strict limitations. Insofar as rights of way are concerned, the guiding provisions of the Civil Code expressly refuse to allow acquisitive prescription. As we have stated rights of way can only be created by a title deed. (Article 691 Civil Code of Seychelles.) (*supra*).

- [15] The other impediment in the case militating against a claim for prescription is the fact that the Appellant obtained permission to use the driveway. Permission negates acquisitive prescription as a matter of law: See Seychelles Development Corporation v Peter Morel, SCA 8 of 2002.
- [16] Mr. Lucas for the Appellant conceded at the hearing of the appeal that there could be no acquisitive prescription over a right of way since possession does not create such a right. He has submitted in the alternative that the right of way should be considered as a structure under Article 555. This is a

novel idea but in terms of statutory interpretation it cannot be accepted. When there is an express provision in a statute the rule of *generalis specialibus non derogant* applies. In other words a general provision must yield to an express provision. Rights of way classified as a discontinuous easement in the Civil Code are expressly provided for and they are the provisions that apply to the instant case. Moreover the application of Article 555 would not yield much of a fruitful outcome for the Appellant as her only option would have been to remove the structure in any case, given the fact that the Respondent demands its removal.

- [17] This brings us to the cross-appeal. In view of the position we have taken on the appeal the first ground in the cross-appeal has been covered.
- [18] Under ground 2 the Respondent is of the view that she provided the particulars of moral damages. In the circumstances, according to her, the Judge was not justified to cut down by half the amount claimed.
- [19] As correctly submitted by the Respondent's counsel, ground 3 on the issue of awarding 60% of costs is intrinsically linked to ground 2 in that it stands or falls depending on the finding of the Court on ground 2.
- [20] In Seychelles damages are derived from Article 1382(1) that: "*Every act whatsoever of man that causes damage to another obliges him by whose fault it occurs to repair it.*"
- [21] Further to the above principle, it is trite law, as propounded by Lord Blackburn in **Livingstone v Rawyards Coal Co.** [1850] 5 APP. Case 25 at page 35 that damages are the sum of money which will put the injured party in the same position as he would have been if he had not sustained the

wrong for which he is being compensated for. In other words, as stated per Asquith, C.J. in **Victoria Laundry v Newman** [1949] 2 LB 528 at page 539, damages are intended to put the Plaintiff in the same position as far as money can do as if his rights had been observed. In some jurisdictions this principle is referred to as *restitutio in integrum* (reinstatement of the initial situation).

[22] However, in assessing damages the principle has always been that it is at the discretion of the trial Court. In other words, the Appellate Court is not justified to substitute the figure simply because it would have awarded a different figure if it had tried the case unless the lower court applied a wrong principle of law or the damages awarded are inordinately high or too low that it is, in the Judgment of the Appeal Court, an entirely erroneous estimate of the damages to which the Plaintiff was entitled — See, for instance, **Davies v Powell** [1942] 1 All ER 657 which was approved by the Privy Council in **Nance v British Columbia Electric Raily Co. Ltd** [1951] AC 601 at page 613.

[23] The finding of the trial Judge on damages is found at pages 251 – 252 of the record where he stated:

“..... it is true that she morally suffered upon her finding that the Defendant had built on the property under her tutelage. She confirmed that after engaging the services of a Surveyor and eventually that of a Lawyer in order to redress those anomalies from November, 2007 culminating with the instant case in Court until 2010. She had to handle all these in addition to her normal responsibilities in life as a wife, mother and employee. The Plaintiff has won a

substantial part of the case she will be awarded costs. The Defendant has also won part of her claim. Taking all these factors into consideration I assess the moral damage at SR30,000.00.”

[24] We have given careful thought to the above finding. It was a finding given at the discretion of the trial Judge. We find no compelling or aggravating circumstances to interfere with the Judge’s discretion. There is nothing in the finding to suggest that the Judge applied a wrong principle or that the amount awarded is inordinately high or too low.

[25] For the above reasons, we dismiss the appeal and further order the Appellant to desist from further use of the right of way on the upper part of parcel H573. We also dismiss the cross-appeal which, as stated above, is mainly based on the aspect of damages. Each party shall bear its own costs.

J. Msoffe (J.A)

I concur:.

S. Domah (J.A)

I concur:.

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 April 2015