IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA), M. Twomey (J.A), J. Msoffe (J.A)**]**

Civil Appeal SCA 01/2015

(Appeal from Supreme Court Decision CS 05/2013)

Janine Thyroomooldy	Appellant
Versus	
Michel Nanon	Respondent

Heard: 13 April 2017

Counsel: Mr. Basil Hoarau for the Appellant

Mr. Nichol Gabriel for the Respondent

Delivered: 21 April 2017

JUDGMENT

F. MacGregor (PCA)

[1] The Appellant filed a plaint alleging encroachment by the Respondent onto her property, namely Parcel H6640 at Quincy Village, Mahé. The Respondent raised a plea in *limine litis* submitting that the matter had been adjudicated upon in SCA41/2009 and had concerned the same subject matter, the same cause of action and the same parties. He also found that the filing of the Plaint by the Appellant was an abuse of right.

[2] The learned judge of the Supreme Court, da Silva J, found in favour of the Respondent and dismissed the plaint.

[3] Aggrieved by this decision the Appellant has filed the following three grounds of appeal:

(i) The learned judge erred in holding that the suit was res judicata.

(ii) The learned trial judge erred in law in failing to hold that the judgement of the Court of Appeal in SCA 41/of 2009 effectively non-suited the action on which the appeal in SCA41 of 2009 was based.

(iii) The learned trial judge erred in law in holding that the suit was instituted by the Appellant was an abuse of right.

[4] As regards the first two grounds of appeal we make the following observation: The trial judge seems to have misdirected himself and his ruling appears contradictory. He states in paragraph 21of his ruling:

> "This court cannot sit in judgment on the decisions made by the Court of Appeal. However, if the Court of Appeal has simply set aside the findings of this court, without ascertaining that the plaintiff has not made out a case, maybe as submitted by the learned counsel for the plaintiff, this court may have to decide that the plea of res judicata has no application. But, in my view, the situation is different here. The Court of Appeal has annulled and reversed the judgment of this court for apparent weaknesses and inconsistencies in the plaintiff's case. Therefore, I am not inclined to agree with the submissions of the learned counsel that the plaintiff's action is caught up by res judicata. I refuse to uphold the plea of res judicata" (emphasis added).

[5] However in his conclusion at paragraph 31 he states:

> "On both grounds of the plea in *limine litis* I hold with the defendant. Accordingly, I hold that the plaintiff cannot maintain this action. Hence, I dismiss this action…" (emphasis added).

[6] We are unable to follow the reasoning of the trial judge given these obvious inconsistencies.

[7] Mr. Hoareau, learned Counsel for the Appellant has also relied on Article 1351 of the Civil Code and has submitted that the appeal in SCA 41/of 2009 involving the same parties was not a final judgment in that the Court of Appeal only substantially dealt with

whether the trial judge in that case had erroneously applied the provisions of Article 555 instead of Article 545. In the circumstances the factual issue of encroachment was not considered by the Court and remained at large.

[8] He also submitted there has been further and extended encroachment since the first case and that issue had not been adjudicated upon.

[9] He further relied on the case of *Chez Deenu Pty Ltd v Seychelles Breweries Limited* (unreported) SCA 22/2011 in which it was held that when a finding is made that the action is untenable in law it may be appropriate to further find that the matter should not be dismissed but to declare it non-suited. In the words of Domah J:

> *"The appropriate order to make in a case where the court gives the option to a litigant to bring a proper case because the decision is based only in law and the evidence has not been heard on the merits of the case is to non-suit the action. This enables the litigant unsuccessful in law but with a possible success in another cause of action to bring a proper fresh action."*

[10] We agree with these submissions and do not find it necessary therefore to deliberate on the third ground of appeal in regards to abuse of right or process as the same could not in the circumstances have arisen given our findings.

[11] We also make the following observation after perusing the proceedings and plans submitted in this case: In the plan entitled Plan showing Encroachment on Parcel H.6440 it is clear that the encroachment onto the Appellant's property appears to be from land identified as Parcel H 1798. This land does not belong to the Respondent although it would appear that the building is owned by him. We are informed by Counsel that the land is owned by the Respondent's Counsel. This matter will have to be decided by the trial court as it would appear it may have confused the issue.

[12] Learned Counsel for the Respondent, Mr. Gabriel raised a preliminary point of law at the hearing of this appeal submitting that as this appeal was from an interlocutory order of the Court, special leave would have to be sought from this Court before the appeal could proceed.

[13] We cannot agree with this submission as the ruling on the plea in the court below clearly resulted in the dismissal of the whole suit.

[14] In the circumstances, this appeal is allowed with costs and the matter is remitted to the Supreme Court for the hearing on the merits.

F. MacGregor (PCA)

I concur:. **…….** M. Twomey (J.A)

I concur:. **…….** J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 April 2017