IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , M. Twomey (J.A), B. Renaud JA]

Civil Appeal SCA 18/2015

(Appeal from Supreme Court Decision 196/2009)

Desire Fred — Appellant

Versus

[1] Denise Fred

[2] Heirs Eugene Fred — Respondents

Heard: 22 August 2018

Counsel: Mr. N. Gabriel for the Appellant

Mr. S. Rajasundaram for the Respondents

Delivered: 31 August 2018

JUDGMENT

M. Twomey (J.A)

Background

[1] The Respondents in the court a quo were husband and wife (Mr. Eugene Fred was the First Plaintiff and has since passed away and his heirs are the Second Respondent in the present appeal). They are co-owners of Parcel S 6928 at Petit Paris, Mahé and brought a plaint against the Appellant, the First Plaintiff's brother (the Appellant in the present suit), and owner of adjacent land, namely Parcel S1852 claiming a right of way across his land.

[2] The court in favour of the Respondents and granted them a two metre motorable right of way over the Appellant's land as demarcated in a site layout plan by land surveyor R.B. Ekanayake and further granted a permanent injunction against the Appellant forbidding him from obstructing the Respondent's right of way.

[3] It is from this decision that the Respondent has appealed.

The Grounds of Appeal

[4] Six grounds of appeal have been filed namely:

1. The learned trial judge erred in law in failing to uphold that the Respondents had not pleaded all the material particulars to bring the suit within the ambit of Article 682 and 683 of the Civil Code

2. The learned trial judge erred in law and on the evidence in failing to hold that the suit in respect of the right of way could only have been instituted and prosecuted by the fiduciaries of land Parcel S6928.

3. The learned trial judge erred in law and on the evidence in failing to hold that the Plaint and the evidence did not disclose that the Respondents were the fiduciaries of land parcel S6928.

4. The learned trial judge erred in law and on the evidence in failing to hold that land Parcel S6922 or land parcel S1424 could provide an access road to Parcel S6928.

5. The learned trial judge erred on the evidence in holding that land parcel S6928 adjoins or is adjacent to land Parcel S1852 in that the evidence establish that land Parcels S6928 and S1852 are separated by land Parcel S1854.

6. The learned trial judge erred in law and on the evidence in granting a motorable two metre wide access road on land Parcel S1852 for the benefit of land parcel S6928 especially that such a finding is ultra petita and there was no prayer to request such a right of way on land Parcel S1852 for the benefit of land Parcel S6928.

We intend to treat the procedural issues raised by the appeal first.

Grounds 2 and 3 – claim of right of way by co-owners

[5] It is submitted by learned Counsel for the Appellant, relying on Article 818 of the Civil Code that since the suit in the court a quo was not prosecuted by a fiduciary appointed to represent the co-owners of indivision of Parcel S6928, it should not have been entertained at all. Counsel has relied on the authorities of *Jean & Ors v Jean* (CS 63/2015) [2017] SCSC 389, *Michel v Vidot* No. 2 (1977) SLR 214 and *Matthiot v Julienne* (1992) SLR 135 for the proposition that co-owners can only bring actions in relation to property without representation by a fiduciary if those actions relate to the protection of their individual rights of occupation of the property and that a fiduciary was necessary in respect of actions which affected rights to the common property.

[6] Learned Counsel for the Respondents has submitted that the lack of a fiduciary appointment was not canvassed in either the statement of defence or at trial but was only raised for the first time in the Appellant's closing submission. In any case, he further submits, the lack of a fiduciary appointment does not invalidate the exercise of the rights of all the co-owners when they act jointly to obtain a right to benefit the co-owned property and not as concerns the transfer or the alienation of a right in the co-owned property.

[7] The tension between Articles 817, 818 and 834 of the Civil Code has been raised a number of times and we agree that it has been resolved by accepting that a fiduciary is the only medium through which co-owned property can be transferred or partitioned.

[8] The suit in the court a quo did not concern any alienation of rights in the co-owned land. Rather it concerned the co-owners obtaining a right in property belonging to a third party to befit their co-owned property. There is certainly no need for the appointment of a fiduciary when one is obtaining a right of way in favour of co-owned land. Rather, a fiduciary necessarily has to be appointed to defend a claim for a right of way in co-owned land.

[9] On this basis, we have no difficulty in dismissing these grounds of appeal. We also concur with learned Counsel for the Respondents that the submission should not in any

case have been entertained given the fact that it was never canvassed in the suit. Material facts have to be pleaded as required by 71 – 76 (see *Leon v Volare* (2004-2005) SLR 153 and *Leveillé v Pascal* (unreported) (5 of 2004) [2005] SCCA 7). The only exception to this rule would be where the court would err in law or act unfairly if the point of law is ignored. It would not have been so in the present case.

Grounds 1, 4, and 5 – right of way arising out of an enclavement from the subdivision of a mother parcel.

[10] Before we explore the law as to rights of way in general, we need to put to bed the Appellant's submission in respect to ground 1of the appeal that the Respondent' land is not adjacent to land from which the right of way is claimed. Indeed the site layout prepared by land surveyor R. B. Ekanayake does show that Parcel S6928 is accessed through Parcel S1854 from the Appellant's land (S1852) and that Parcel S6928 is not adjacent to Parcel S1852. However, what the Appellant has failed to address his mind to is the fact that Parcel S1854 is a reserved right of way) and indicates the *assiette de passage* from the estate road which continued onto parcel S1852 and which was used by the Respondents for over twenty years and. This evidence was adduced (and not opposed) in the Respondents' joint affidavit dated 24 January 2009, namely that :

> *"Parcel S1854 remains a right of way and originates partly from S1856 and […] S1852."*

[11] We also note that all the relevant parcels of land namely S6928 (amalgamated from S1855 and S6924), S1852, S1853, S1854, S1856 are all subdivisions of Parcel S1422 which belonged to the Fred estate of which the parties in this case are heirs.

[12] The learned trial judge's decision is being impugned on the grounds that a better and more convenient right of way could be created through the land of a third party (Parcel S6922) to the suit. How such a right of way could have been ordered is beyond us given the fact that that third party was never joined in the suit in the first place.

[13] To return to the applicable legal principles in this case, it must be noted that it is undisputed that the Respondents' land is enclaved. The only question that arises is

whether a right of way can be claimed from the Appellant or any of the Respondent's neighbours' land. It is remembered that both the Appellant's land (S6928) the Respondents' land (S1852) formed part of the Appellant's and Respondents' parent's land and from which the subdivisions were created.

[14] The relevant laws in respect of rights of way in the circumstances of this case are contained in Articles 682 and 684 of the Civil Code which provide in relevant part:

> *"682 1: The owner whose property is enclosed on all sides, and has no access or inadequate access on to the public highway, either for the private or for the business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause.*
>
> *684: "If the non-access arises from a sale or an exchange or a division of land or from any other contract, the passage may only be demanded from such land as has been the subject of such transactions. However, if a sufficient passage cannot be provided from such land, paragraph 1 of article 682 shall apply."*

[15] It is clear from the provisions above and Seychellois *jurisprudence constante*, namely the authorities of *Azemia v Ciseau* (1963-1966) SLR 199 Vol III (*Azemia 1*) *Vadivelou v Otar* (1974) SLR 216, *Azemia v Ciseau* (1978) SLR 158 (*Azemia 2*) and *Georges v Basset* (1983) SLR177 that where, as in this case, the land in issue is a subdivision of a bigger plot of land and the enclavement arises from that fact, a right of way ought to be claimed from the land from which it is subdivided.

[16] In *Vadivelou*, the Court cited the following passage from *Lolljee v Gobine* (1969) M.R.159 with approval:

> *"That rule has been evolved from the obligations originating from the contract by virtue of which the "enclave" has been created. Where the contract is one of sale, as in the present instance, the obligations are those imposed on the vendor by Article 1603 of the Code, namely, "celle de délivrer et celle de garantir la chose qu'il*

vend". The Courts have thus held that it is only a consequence of those obligations that, where the "enclave" is caused by the partial transfer of an estate which, when whole, had access to the public road a right of way must normally be given to the purchaser of the enclaved portion by the vendor who has remained owner of the other portion abutting on the public road. But they have, for the same reason, laid down a proviso to that rule: it will not apply except in the case where the "enclave" is the immediate result of the transfer. If not, the purchaser can only obtain a right of way to the public road through one of the neighbouring lands under Article 682 et seq. of the Code, which provide that the passage to be given to the owner of an "enclave" should lie on the side on which it is the shortest and at a spot where it will cause the least damage to the person on whose property the crossing is to be made."

[17] The proviso above, that is, that the rule does not apply when the *enclave* arises on a subsequent transfer is not applicable in this case as the enclave did result from the transfer by Heirs Fred to the Appellant. .

[18] It is our view that the leaned trial judge rightly found that, given the circumstances of this case, there was no need to resort to Article 682 when sufficient passage could be obtained from land that had formed part of the *mother parcel.*

[19] These grounds of appeal are therefore also dismissed.

Ground 6- the remedy granted was ultra petita

[20] Counsel for the Appellant submits finally that the learned trial judge granted a remedy to the Appellants which they had not prayed for. It is reminded that the trial judge declared "a right of way, a motorable two meter wide access road benefiting their enclosed property…"

[21] One of the prayers of the Respondents had been for the allocation of a "reasonable and standard portion of land as access road as would be demarcated by a land surveyor." It is further reminded that such an exercise was carried out by the surveyor R. B. Ekanayake.

The Appellant's ground of appeal appears to us as an exercise in splitting hairs, one into which we are not willing to venture. Suffice it to say that we are satisfied that the prayer granted was entirely within the remedy pleaded for. We find therefore that that ground of appeal also has no merit.

Our decision

[22] In the circumstances, the appeal is dismissed entirely. With costs.

[23] For the avoidance of doubt we again reiterate that the Respondents are entitled to a right of way as demarcated by the land surveyor R. B. Ekanayake in the site layout contained in Exhibit P1.

M. Twomey (J.A)

I concur:. **…….** F. MacGregor (PCA)

I concur:. **…….** B. Renaud (JA)

Signed, dated and delivered at Palais de Justice, Ile du Port on 31 August 2018