IN THE SEYCHELLES COURT OF APPEAL

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

Civil Appeal SCA 35/2016

(Appeal from Supreme Court Decision 06/2013)

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[1] Marise Prosper
[2] Reginald Prosper — Appellants

Versus

Desire Fred — Respondent

Heard: 06 December 2018

Counsel: Mr. S. Rajasundaram for Appellants
Mr. Nichol Gabriel for the Respondent

Delivered: 14 December 2018

JUDGMENT

M. Twomey (J.A)

Background

[1] The Appellants in the court a quo were husband and wife and had purchased Title S6927 from the First Appellant's daughter, one Nadege Fred in 2009. When they bought the property, a house was already built on the land. They made no changes to the structure of the house. The Respondent is the adjoining land owner to Title S6927, namely Title S1852 and acquired the same by transfer registered in 2009. He entered a Plaint in 2013, in which he claimed that the Appellants had encroached on his land by partially

constructing a house thereon and had thus interfered with his enjoyment of his property and caused him moral damage in the sum of SR100, 000. He prayed for the demolition of that part of the house encroaching on his land.

[2] The court a quo found in his favour, ordering the Appellants to demolish that part of their house encroaching on the Respondent's land and the payment of SR1 in damages.

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

The Grounds of Appeal

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

1. The learned trial judge in the court below failed to appreciate that the aged Appellants had never encroached on the property themselves and further failed to consider that the Appellants were only bona fide purchasers of Title S6927 (sic) for value, unaware of any encroachment at the time of the purchase of the property.

2. The learned trial judge failed to consider that demolition of part of the construction measuring only 16 square meters would result in grave injustice to the aged Appellants under exceptional circumstances.

3. The learned trial judge failed to consider the minimal area of the encroachment measuring 16 square metres would cause no prejudice or substantial loss to the Respondent whereas the learned judge ought to have considered that suitable damages and compensation commensurate with the 16 square meters of the encroached portion payable to the Respondent.

4. The learned trial judge erred in his finding that on the date of filing of their defence, the Appellants were unaware of any encroachment and given the circumstances could not plead, specifically admit any encroachment so as to give evidence that demolition would cause injustice and hardship.

[5] Having examined the grounds of appeal and after hearing the submissions of both Counsel it is abundantly clear to us that only two grounds of appeal are being argued, namely, (1) whether the Appellants' predecessors in title had acquisitive prescription (uscapion) over that part of Title S1852 on which their house has encroached and (2) whether in any case the encroachment was so minimal as to attract the benefit of the *abus de droit* principle.

(1) Acquisitive prescription (*uscapion*)

[6] It must be noted that generally prescription must be pleaded and cannot be raised by the court itself (see Article 2223 of the Civil Code and *Gayon v Collie* (2004-2005) SLR 66. In this respect, Article 2224 of the Civil Code provides:

> "A right of prescription may be pleaded at all stages of legal proceedings, even on appeal, unless the party who has not pleaded it can be presumed to have waived it."

[7] The provisions of Article 2224 do not propose how the right to prescription should be pleaded. In our view they may be specifically pleaded or they may be pleaded by inference. In the present case the right of prescription was raised by counsel for the Appellants in their statement of defence (in paragraph 5 by specific pleading), in the course of examination-in-chief of Nadege Fred (page 106 of the transcript) in the court a quo, in the cross examination of the Respondent (pages 28 and 32 of the transcript) and in the appeal (in ground 1 by inference). These are "all stages of the legal proceedings" envisaged in Article 2224 (supra). We therefore find that the trial judge by oversight omitted to rule on this issue and it befalls this appellate court to make a finding in this respect.

[8] The law relating to acquisitive prescription (uscapion) in Seychelles is contained in the provisions of Articles 2229 - 2235 and 2261 of the Civil Code of Seychelles as set out hereunder:

[9] Article 2229 provides that:

"In order to acquire by prescription, possession must be continuous and uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of an owner."

Article 2232 also provides:

"Purely optional acts or acts which are merely permitted shall not give rise to possession or prescription."

Further Article 2229 of the Seychelles Civil Code provides that in order to acquire by prescription, possession must be continuous, uninterrupted, peaceful, public and unequivocal and Article 2261 that the rights by prescription shall be acquired when the last day of the period has ended. Article 2219 of the Civil Code limits the exercise of rights by prescription.

[10] In *Public Utilities Corporation v Elisa* (2011) SLR 100, Domah JA explained the rationale of prescription. He stated:

"Limitation periods are not unknown in the history of law. Laws give rights. If those rights are not exercised within a set time or a reasonable time, that right lapses against the person claiming that right in favour of the person against whom it is claimed. Most rights do not have an eternal life. Some have longer lives than others. The law of prescription sets the span of life of the rights. Some rights have to be exercised within days (mise-en-Demeure); some within weeks (appeals); some within months (employment); some within years ranging from one to as long as thirty (extinctive and acquisitive prescription). The Civil Code has a special chapter on Prescriptions based on certain rationalization" (at [7]).

[11] In the present case Article 2262 bars real actions in respect of rights of ownership of land after twenty years.

[12] The Judge heard the witnesses and found that "Nadege Gertrude (the appellant's predecessor in title) had lived in the house in Title S6927 from 1989 to 2008." She further found that the Appellants had purchased the "property and the house found thereon from

her daughter, about seven years ago." Having made that finding she then goes on to consider whether a case of *abus de droit* was made out.

[13] It is our view that the consideration of whether *abus de droit* was made out might not have been necessary had the issue of prescription raised by the Appellants had been decided first.

[14] It is not disputed that Nadege Fred built and lived in the house for nineteen years and that her parents, the Appellants, her successors in title lived therein, without further alteration or construction for another four years until the plaint was instituted. The Appellant's claim to the 16 square metres of Title S 1852 on which their house has encroached is in possession of it *animo domini* by the cumulative ownership of it of their predecessor in title and by their own ownership. In this regard it is Article 712 of the Civil Code that would apply to make good their title to the land by prescription. Its provisions are categorical:

"Ownership may also be acquired by accession or incorporation and by prescription."

[15] Such possession is not without condition. Article 2229 (supra) imposes the necessity that such possession should be continuous and uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of an owner. *In Anglesy v Mussard and anor* (1938) SLR 31 Smith CJ defines each of these terms: to be continuous and uninterrupted no act must have happened to disturb possession. In this respect we do not find from the evidence any interruption to the Appellant's possession.

[16] As for peaceful possession Gardner Smith, CJ states that there are two schools of thought on this definition:

> *"According to one it means peaceful on the part of dominant owner and on the part of others, according to the other it means on the part of the dominant owner alone (Dalloz, C.C. Annoté, art. 229 nn. 44-49)…Possession is not peaceable if contradicted by resistance, by force consisting either numerous acts or in reclamation before competent authority (27 & 57, ib.n.57). Isolated acts of*

interference, immediately repressed, do not remove from the possession the character of the peaceable (ib. n. 53)."

In the present case, there was no evidence of acts of force or resistance by either party or their predecessors in title to the ownership.

[17] There is also no adverse evidence adduced on the issue of the publicity of the possession. In so far as equivocality is concerned Gardner Smith, CJ has the following to say on the subject:

"Equivocal" means ambiguous, that is, not the manifest exercise of a right (Boyer C.C Annoté, art. 2229) and "animo domini" or "à titre de propriétaire" means not à titre précaire", but exclusive and not ambiguous, Boyer, art., 2229)".

[18] In *Chetty v Boniface and anor* (1977) SLR 147 O'Brien Queen, CJ held that where possession was promiscuous it was essentially equivocal. The facts of the present case show no equivocality. It is undisputed that neither the Appellants nor the Respondent were aware that there was an encroachment by the Appellants onto the Respondent's land. It would appear that all the parties had for more than twenty years seen the house and had not had a problem with its status. They had all thought it was entirely on the Appellant's land.

[19] In the circumstances we do find the conditions satisfied for acquisitive prescription of part of Title S1852 by the Appellants.

(2) Abus de droit

[20] Having found that the Appellants succeed on their first ground of appeal it would be academic to consider the ground relating to *abus de droit*. However we wish to point out that given the fact that the matter was not specifically pleaded, pursuant to section 75 of the Seychelles Code of Civil Procedure the learned trial judge rightly found, relying on *Gallante v Hoareau* (1988) SLR 122 that notice had to be given to parties of issues on which the court would have to adjudicate. She also cannot be faulted, relying on *Pirame v Peri* (unreported) SCA 16 of 2005, for finding that even if evidence is led outside the

pleadings and not objected to it does not have the effect of translating it into the pleadings or the evidence.

[21] The Appellants have submitted regardless that the trial judge should have conducted an analysis of the hardship the demolition would cause. Learned Counsel for the Appellants, Mr. Rajasundaram submitted that the Appellants were an aged couple and that they were unable to opine as lay persons of the demolition of their veranda would affect the structure of the house. He contends that a balance of hardship exercise should have in any case been carried out.

[22] Learned Counsel for the Respondent, Mr. Gabriel has submitted that, the matter cannot be raised as this juncture as, as rightly found by the trial judge, the Appellants did not plead the material facts of demolition in their defence and had not led any evidence as to whether the demolition would cause them greater hardship.

[23] We agree with the submission of Mr. Gabriel. We cannot entertain that ground of appeal.

Our decision

[24] In the circumstances the appeal is allowed. 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 Appellants, acquired by prescription of that part of Parcel S1852 on which part of their house extends as delineated in the plan attached to this judgement.

[25] We have not been given quotations for the encroachment. Given the fact that it is not disputed that the encroachment is sixteen square metres of land sold in 2009 for SR 20,000, we think it more than generous to make an arbitrary award of SR 10,000 as compensation to be paid by the Appellants to the Respondent.

[26] We make no order for costs

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 14 December 2018