

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A) , B. Renaud (J.A), F. Robinson (J.A)]

Civil Appeal SCA 03/2016

(Appeal from Supreme Court Decision CS No. 27/2014)

Regis Ah-Kong

Appellant

Versus

Conrad Benoiton

1st Respondent

Marie-Rose Benoiton

2nd Respondent

Heard: 05 December 2018

Counsel: Mr. Anthony Derjacques for the Appellant

Mr. Basil Hoareau for the Respondents

Delivered: 14 December 2018

JUDGMENT

1. B. Renaud (J.A) In this appeal the Appellant is appealing against the judgment of the learned trial Judge of the Supreme Court whereby he was ordered to pay the sum of SR1,694,105.00 as damages to the Respondents and a prohibitory injunction was granted against him preventing him from trespassing and encroaching onto the Respondents' property, namely parcel BI624.
2. The Appellant being dissatisfied with that judgment has filed an appeal against the same. Grounds 1 to 4 of the grounds of appeal questioned the finding of the learned trial Judge that the Appellant had trespassed and encroached onto parcel B1624 by erecting structures on the said parcel of land and cultivating thereon. At the hearing of the appeal Counsel for the Appellant accepted that grounds 1 to 4 of the grounds of appeal should

fail on the ground that the testimony of the Appellant to the effect that he had lawfully built the structures and carried out works and cultivation on parcel B1624, is clearly and completely outside of his pleadings and that the learned trial Judge rightly disregarded such testimony.

3. The question in issue in this appeal concerns the assessment and award of damages made by the learned trial Judge.
4. It is trite law that an appellate court will not alter damages awarded by a trial court merely because it thinks it would have awarded a different figure, but rather the appellate court would interfere with the amount of damages awarded only if: (i) the trial court acted on the wrong principle; or (ii) the amount of damages is extremely high or extremely low so as to make it an erroneous estimate : see for instance *Michel & Ors v Talma & Ors (SCA 22/10)* and *Government of Seychelles v Rose (SCA14/2011)*.
5. Counsel for the Respondents who in his written submissions offered on their behalf, stated that the ground of appeal against the award of damages did not give rise to the issue that the said amount was so extremely high as to make it an erroneous estimate, informed us during the course of submissions that he is leaving the issue of the challenge in relation to the amount of damages in the "*hands of the court*".
6. In their plaint the Respondents have claimed damages as follows:

"PARTICULARS

Damages

- (1) Encroachment including the unlawful construction of a brick store, wall and concrete drain SR600,000.00
- (2) The unlawful extraction and earth cutting between beacons BCNI and MH622 SR400,000.00
- (3) The formation of an escarpment as a result of water coming from the drain and other damages to land SR250,000.00

(4) Loss of use and enjoyment of land SR250,000.00

(5) Inconvenience, anxiety and distress (Moral Damages).

7. The learned trial Judge stated in the judgment that *"As for the quantum of damages payable in this case while I believe the Plaintiffs that untold damage has been done to their land and that they have suffered distress and not been able to enjoy their land for over a decade, not all their claims are made out sufficiently to justify the quantum set out in their Plaint...I can only grant what the parties have pleaded in their plaint. I therefore award the sum pleaded."*
8. We observe that the second respondent did not give evidence at the hearing.
9. Notwithstanding the learned trial Judge's finding that *"not all [the Respondents'] claims are made out sufficiently"*, she made award for damages based on *"what the parties have pleaded in their plaint"* as follows:

o [15] ... *This Court has stated on many occasions that where parties fail to substantiate their claim the trial judge can only make an arbitrary assessment and award of damages. I err in this exercise on the side of caution and fairness.*

[16] *Although the Plaintiffs have deponed as having spent SR 17,000 for land survey, relocating and placing beacons on their property they have only claimed SR14, 105.00 in their plaint for the work. I can only grant what the parties have pleaded in their plaint. I therefore award the sum pleaded. The parties have claimed SR 600,000 for the encroachment. At the trial they did not substantiate the claim with any documentary evidence nor did they produce a quantity surveyor to substantiate this claim. As they corroborate each other I am prepared to accept that substantial damage was caused to their property by the encroachment and the building of the wall, store and drain. I award SR400, 000 under this head. As for the damage caused by the unlawful excavation*

and earth cutting I make an award of SR250, 000. The escarpment is partly covered by the head of damages relating to the encroachment already awarded but I accept that it will cause further damage to the property. For this I award SR150, 000. In terms of the loss of use and enjoyment of their land I award SR 100,000. I award the Plaintiffs another SR80, 000 moral damages for inconvenience, and anxiety and distress.

[17] Rehabilitation work will have to be undertaken namely in terms of the construction of a retaining wall by the Defendant. As I have already said I cannot accept a quote for this work as that quote was submitted after the hearing. I can only make an arbitrary award, while the Defendant is ultimately liable for its construction I anticipate that there will be problems in its construction or the standard of the construction of the wall if it were to be built by the Defendant. I therefore make a further order of SR700, 000 for its construction by the Plaintiffs."

10. Having considered the award of damages stated above, we are satisfied that there is no basis for the awards made. It is evident that the learned trial Judge had awarded damages as pleaded. With respect to the expenses the Respondents had incurred for survey works we are of the opinion that such a claim should fail in all the circumstances of the case.
11. For the above reasons, we allow the appeal partly. We uphold the grant of prohibitory injunction preventing the Appellant from trespassing and encroaching onto the Respondent property, namely parcel BI624. We allow the appeal of the Appellant against the award of damages amounting to SR 1,694,105, which award is hereby set aside.
12. By virtue of the powers vested in this Court by Rule 31 of the Seychelles Court of Appeal Rules 2005, we hereby issue a mandatory injunction to compel the Appellant to remove all unauthorised construction on parcel B1624 within six months of the date of this judgment, at his own costs.

B. Renaud (J.A)

I concur:.

A.Fernando (J.A)

I concur:.

F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 14 December 2018