

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A.) M. Twomey (J.A) F. Robinson (J.A)]

Civil Appeal SCA 17/2017

(Appeal from Supreme Court Decision CS28/2014)

Alf Barbier

Appellant

Versu
s

Rosina Morin

First Respondent

Jean Pierre Morin

Second Respondent

Brenda Morin

Third Respondent

Norbert Dogley

Fourth Respondent

Cecile Dogley

Will Dogley

Fifth Respondent

Robin Dogley

Sixth Respondent

Simon Dogley

Seventh Respondent

The Estate of the late Leonette Dogley
represented by Her executor, Jemmy
Dogley

Eighth Respondent

Ninth Respondent

Johnny Dogley

Gerome Dogley

Tenth Respondent

Jemmy Etienne

Eleventh Respondent

Franciska Etienne

Twelfth Respondent

Thirteenth Respondent

Rolly Sinon

Fourteenth Respondent

France Sangoire

Fifteenth Respondent

Gerina Sangoire

Sixteenth Respondent

Heard: 12 August 2019
Counsel: A. Madeleine for Appellant
J. Camille for Respondents
Delivered: 23 August 2019

JUDGMENT

M. Twomey (J.A)

- [1] The Respondents jointly applied to the court *a quo* for a declaratory order of a prescriptive right of way over property belonging to the Appellant, namely Parcel V10414, and a permanent injunction restraining the Appellant from interfering or blocking access to the right of way they claimed. The Appellant, in a statement of defence, averred that the Respondents' lands were not enclaved and that they had adequate alternative access. He denied that the Respondents had any legal or prescriptive easement over Parcel V10414. He counterclaimed for a permanent injunction against the Respondents to prohibit them from further acts of trespass on his land and, in the alternative, to order the Respondents to pay him adequate compensation were the court to find that they were entitled to a right of way over his land.
- [2] In a decision delivered on 24 March 2017, the learned trial Judge Crawford McKee made factual findings in respect of the physical nature of the lands in question. He stated that he had walked along the alternative walkway and that, in his opinion, the Respondents' concerns were well founded. He found independent evidence corroborating this view

from Mr. Yvon Fostel, an experienced land surveyor, who gave evidence of the regulatory gradients of the road in issue.

[3] The learned trial Judge found that a motorable access capable of taking heavy goods was essential for the business interests of the First, Second and Third Respondent, and that the rest of the Respondents required motorable access for personal vehicles and small commercial vehicles. He stated that if the proposed alternative access was used instead, bearing in mind the gradient, width of the road, the blind spots, and the right turn at the mid-way point of the road with the vertical drop, it was more than likely that there would be a substantial risk of accidents, collisions and injuries. He concluded that he could not find that the proposed alternative road offered a satisfactory and safe route as did the road over the Appellant's land. He declared that each Respondent had a right of way over the Appellant's land on the existing motorable access road and granted a perpetual injunction restraining the Appellant from obstructing the right of way or causing damage to it. He dismissed the Appellant's counterclaim.

[4] The Appellant has appealed this decision on the following summarised grounds:

1. The learned trial Judge erred in law and on the evidence in finding that the Respondents' lands were enclaved and that they required a right of way over the Appellant's land.
2. The learned trial Judge erred in law in not carrying a balancing exercise in respect of the parties' rights to establish the necessity of the right of way over the Appellant's land in view of the resulting hardship, loss and inconvenience to the Appellant.
3. The learned trial Judge erred in failing to order the Respondents to compensate the Appellant for the use of his property.

Ground 1 – Were the Respondents' lands enclaved?

Submissions

- [5] Learned Counsel for the Appellant has submitted that the learned trial Judge’s appreciation of the evidence was erroneous in finding that the Respondents’ respective parcels of land were enclaved in terms of Article 682 of the Civil Code. She submits that on the evidence all the Respondents have admitted that they can access their properties from the alternative road built by the Government. She further submits that the safety issues raised by the witness, Land Surveyor Fostel, are unreliable as he is not an engineer and that the same issues would in any case apply to many other roads in Seychelles.
- [6] Learned Counsel for the Respondent has countered the Appellant’s submissions by citing the finding of the trial Judge at paragraph 6 of his decision in which he describes the general area of Fairview Estate and access thereto and his observation at paragraph 54 of his Judgment in which he stated –

“[The Appellant] explained that the original “blockers” had crossed his land on foot and he had tolerated that practice although he had been particularly unhappy with the First Plaintiff using this access and that they had never been on good terms. In these early times, the “blockers” would bring goods by vehicle to the Fairview Estate Road and then carry them up through land parcel V10414 to their property.”

He submits that this demonstrates that the learned trial Judge comprehensively appreciated the historical perspective in terms of the right of way.

- [7] He further submits that the finding of the trial Judge that the alternative access road was impractical based on the evidence of the Respondents and witness Fostel was in keeping with the provisions of Article 682 (1) of the Civil Code and jurisprudence, namely the case of *Azemia v Ciseau* (1965) SLR 199.

The court’s consideration

- [8]** In considering these submissions, it is perhaps best to outline the main facts of this case to understand the particular issues raised. The Appellant bought Parcel V2328 at Fairview Estate, La Misère from Cyril Abbey on 22 February 1979. At the time he purchased his land, the Respondents or their predecessors in title were living on land to the side and to the back of the Appellant's land. They accessed their land through a road over the land he had bought.
- [9]** On 2 April 2002, the Appellant wrote to the Respondents informing them that he was going to close their access to the road over his land due to the damage they caused to the road, the steady increase in traffic and the safety concerns of children crossing the area. The Respondents took their concerns over the consequences of the closure of the access road to the Government. In 2003, after subdivision of the Appellant's land (Parcel V2328) into two parcels, namely, V10413 and V10414, the Minister for Land Use and Habitat, in the national interest, compulsorily acquired Parcel V10414 of the extent of 348 square meters comprising the contentious access road.
- [10]** Ten years later, on 12 November 2013, during the hearing of proceedings in the Court of Appeal in which the Appellant had challenged the Government's compulsory acquisition of his land, the Government returned Parcel V10414 to the Appellant. It is the Appellant's evidence that, simultaneously, an undertaking had then been given by the Government to provide alternative access to the Respondents. Hence, on 9 January 2014, the Appellant wrote to the Respondents advising them that the road through his land would no longer be accessible to them. It was this that prompted the initiation of present proceedings in the Supreme Court and, subsequently, the present appeal.
- [11]** It is not disputed that no registered right of way has ever existed in favour of the Respondents. Rather, it was the Respondents' contention in the court *a quo* that they had always made use of the road through the Appellant's land and by the continued, uninterrupted, peaceful, public and unequivocal use of it over more than twenty years had prescriptively acquired a right of way.
- [12]** The learned trial Judge most correctly did not consider the prescriptive acquisition of the right of way in favour of the Respondent. This is because of the clear legal provisions of

Article 691 of the Civil Code that a right of way may not be created except by a document of title notwithstanding its long use. Instead, bearing in mind the testimony of the witnesses for the Respondents and having acquainted himself with the issue by visiting the *locus in quo* he found that the alternative road did not provide “an adequate and practical access from the enclaved properties...”

[13] At this stage, it is essential to bring to light the relevant provisions of the law. Article 682 (1) of the Civil Code of Seychelles provides:

“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. (Emphasis added)

697 - The owner of the dominant tenement shall be entitled to do all that is necessary for the use and preservation of the easement.

698 - The cost of such work shall burden the owner of the dominant tenement and not the owner of the servient tenement unless the document creating the easement provides the contrary.

701 - “The servient tenement shall do nothing to impair the use of the easement or render it more difficult, but he may offer a substitute of equal convenience. This cannot be refused.

Thus, he may not change the condition of the premises nor remove the easement to a different place from that in which it was originally located.

However, if the original location has become more onerous to the owner of the servient tenement or if it prevents him from carrying out improvements upon it, he may offer to the owner of the dominant tenement a place of equal convenience for the use of his right; such an offer may not be refused.”

[14] The learned trial Judge found that the gradient of the alternative road offered to the Respondents did not meet the regulations in force and the “upper point where the

alternative roadway met the Rosebelle Road was a blind spot and there was always a danger of collision.” In the circumstances, he did not find that it provided adequate and practical access from the enclaved properties and declared that the Respondents had a right of way over the Appellant’s land.

[15] It is trite that an appellate court may not overrule or otherwise disturb a trial court’s factual finding unless there are legal or substantial and compelling reasons for doing so. Learned Counsel for the Appellant’s contention that the Respondents’ lands are not enclaved is not borne out by the evidence as appreciated by the trial Judge.

[16] Having made findings in terms of the shortcomings of the alternative access, the trial Judge relied on the provisions of Article 682 (1) (supra) and jurisprudence, namely *Azemia v Ciseaux* (1965) SLR 199, to hold that the Respondents had “inadequate access on to the public highway” and grant them a right of way over the Appellant’s land. In the circumstances and for all the above reasons we cannot therefore find fault with his reasoning.

Grounds 2 and 3 - Loss and compensation to the Appellant

[17] With respect to the second and third grounds of appeal, the provisions of Articles 697, 698 and 701 (supra) have application to the facts of this case.

[18] In this regard, the court is sensitive to the circumstances of all the parties in this case. However, it must also rise above the squabbles of the parties and only bear in mind the *raison d’être* of a right of way. In cases such as the present one, especially where feelings run high, it is best to objectivise the usage of the easement. Rights of ways are created to permit access to enclaved land. A right of way is a right *in rem* and not *in personam* (*Sinon v Dine* (2001) SLR 88). In *Leite v Republic of Seychelles* (1981) SLR 191, the Court of Appeal held, inter alia, that an easement is a right granted in favour of a dominant tenement and not its owner, against a servient tenement and not its owner, and that it is a right appurtenant to the dominant tenement, and the benefit of such right accrues to the transferee or grantee of the dominant tenement. In summary, no personal right and obligation arises from an easement. Hence, it is not the present Respondents who would

have the use of the right of way, but rather the right is appurtenant to properties they or their successors in title hold.

[19] Equally, in terms of the legal provisions (supra), the cost of any works to restore or maintain a right of way has to be borne by the dominant tenement. It is this part of the statutory provisions together with the Appellant's constitutional right to property necessitating a balance with the Respondents' statutory rights that was perhaps overlooked by the learned trial Judge (see *Umbricht v Lesperance* (2007) SLR 23).

[20] The Appellant's main contention was that the usage of the road, especially by the First, Second and Third Respondents for their agricultural and business purposes, was daily damaging the access road and his property. It was not contested that this was so. Photographic evidence of the heavy plant machinery and the damage to the road and the vegetation on the Appellant's property was admitted. The First Three Respondents and the First Plaintiff, Cherubim Morin (now deceased) testified to the fact that they use refrigerated trucks to transport their meat products. It is evident that a road constructed first as a footpath and then with two strips of concrete would not have the adequate foundation to sustain the present heavy and constant use by the traffic generated by the dozen households it now serves.

[21] A change in the *assiette de passage* or the modalities of the right of way is permitted by French jurisprudence. The authors Terré and Simler state:

“L’assiette et les modalités du passage peuvent être modifiées, à la demande d’un changement de la destination de l’exploitation de ce fonds. Les besoins de l’exploitation qui motivent le droit de passage s’apprécient au moment où la prétention à la modification est émise. La servitude peut être lors non seulement modifiée, mais déplacée et transportée d’un fonds sur un autre.

Le changement peut aussi être décidé à la demande du propriétaire du fonds servant, à condition que le passage primitive soit devenu pour lui incommode... (Francois Terré et Philippe Simler, Droit civil – Les biens, 8e edn, Dalloz p. 256).”

[22] Applying the above doctrinal proposition, *Mirabeau v Camille* [1974] SLR 158 is authority for the proposition that both the proprietors of a servient and a dominant tenement may demand a variation in the position of a right of way in circumstances when the existing position of the right of way becomes too inconvenient for the servient tenement. The existing right of way can be displaced or transported to other property.

[23] The Court of Appeal is given the same powers of the Supreme Court by virtue of rule 31 of SI 13/2005 (Article 136(1): Seychelles Court of Appeal Rules, 2005) to “make any order which the Supreme Court ought to have given or made”. In an endeavour to pacify the obvious tense relations between the parties, we have given anxious scrutiny to the plans and photographs submitted in this case to see whether the contentious access road could be moved to the extreme of the eastern boundary of Parcel V10414. At the hearing of the appeal the Appellant himself admitted that it could not be moved.

[24] We have therefore looked at the statutory provisions governing whom might bear the burden of repairing the road. The Respondents have submitted that the Appellant are estopped from claiming any compensation as no such relief was pleaded by the Appellant before the trial court. Upon a close reading of the pleadings we find that the Amended Defence and Counterclaim filed on 7 November 2016 we find that the Counter Claim had a specific claim for compensation arising from the “undue hardship, prejudice and damage” and they pray specifically that :

“(vi) If this Honourable Court finds that the Plaintiffs are entitled to a right of way on the Defendant’s land Parcel V10414, that the Plaintiffs pays the Defendant adequate compensation therefor.”

[25] Article 682(1) of the Civil Code (supra) makes provision for compensation for damage caused to the servient tenement. The learned doctrinal authors Terré and Simler state:

“Lorsque les diverses conditions sont remplies. la servitude résulte de plein droit de la loi au profit des fonds enclavés et pour les besoins de leur exploitation. Certes, à défaut d’accord entre les parties, le juge devra déterminer l’assiette de la servitude ainsi que l’indemnité due...”(emphasis added|).

- [26] We would have liked to apportion part of this compensation to the Government of Seychelles as they were involved in creating the access road for the Respondents, had compulsorily acquired it for ten years, and had established expectations in relation to the road's maintenance. However, they were not joined as parties to the action in the trial below and we are precluded at this stage from joining them. Nevertheless, we wish to point out that this avenue is still open to the Appellant who may reasonably claim from the Government the repair of the road as the evidence indicates that such an undertaking had been given by them upon returning Parcel V10414 to the Appellant.
- [27] We have looked for guidance as to how our discretion in fixing this indemnity might be determined. Articles 697 and 698 (supra) indicate that the maintenance of the easement is the responsibility of the dominant tenement (unless otherwise provided for). In *Jerina Ah-Tive v Allen Hoareau* (Civil Appeal SCA 01/2017) [2019] SCCA 5 (10 May 2019), we ordered that the cost of repairing the right of way was to be shared by the dominant and servient tenements in the specific circumstances of that case.
- [28] In the present circumstances, complaint is made only in respect of the first two Respondents. The damage to the road is occasioned by the expansion, development and change of their business from one which was mainly agricultural focussed to one of import and sale of meat products.
- [29] Kelsy Eagen in a journal article states that:

“French law has a liberal policy towards providing passages for enclosed estates and strongly disfavors any outcome that would prohibit active use of an estate” (Eagan, K. A. (2014). Clarifying and improving the law of enclosed estates in modern day land-scarce Louisiana. Loyola Law Review, 60(1), 93-136).

In exploring the rationale for this concept, Yiannapolous states that:

“The Louisiana and French Civil Codes indicate that the forced passage in favour of an enclosed estate is a legal servitude for the utility of individuals. According to

doctrine and jurisprudence, however, this right also involves strong considerations of public or general utility. In a leading decision, the Louisiana Supreme Court declared that while the right of forced passage has been generally accepted as designed to benefit the landowner so he could produce profit for himself and obtain full utility of his land, it must now be deemed also to offer protection of public interest. As land becomes less available, more necessary for public habitation, use, and support, it would run contrary to public policy to encourage land locking of such a valuable asset and forever removing it from commerce and from public as well as private benefit...

The purpose of the forced passage is to secure the "full utility" of the enclosed estate. Hence, the scope of the right of way granted on neighbouring lands is determined in light of the actual needs of the enclosed estate...

French courts and doctrinal writers maintain that under the present version of this provision, as well as under the original version of the Code Napoleon, a forced passage may be granted not only for agricultural, but also for commercial, residential, and industrial uses of the enclosed estate. The owner of an enclosed estate is free to use it as he wishes and to make all the improvements and innovations that he considers useful. He may, for example, increase the scale of his industrial operations and demand a new passage if the original one has become insufficient. He may also completely change the use of his estate; he may thus open a mine in a field or build a factory or an apartment complex on it. In such a case, he may claim a new passage to satisfy the new needs...

...the view has prevailed that Article 682 of the Civil Code ought to be interpreted flexibly and broadly. The provision does not contain any limitation, nor does it furnish the basis of a distinction with respect to the possible uses of an immovable. Accordingly, the servitude of passage ought to be adapted to emerging conditions; to condemn an enclosed estate to a static use would be contrary to the letter and spirit of the law." (Yiannopoulos, A. A. (1996). Legal servitude of passage. Tulane Law Review 71(1), 1-44.)

[30] We can do no better than stand guided by these views and interpretation of Article 682 of the Civil Code. In this regard, the provision of the right of way over the Appellant's land is the correct approach. Equally, we are of the view that the evidence in this case and the provisions of Articles 697, 698 and 701 (supra) lend themselves to the proposition that the owners of the dominant tenement, specifically the present owners of Parcels V3379, B777, B778, and B1829 and or their subdivisions, must repair the road that they use over the Appellant's land. They have not countered the Appellant's evidence of the damage they have caused.

[31] In the circumstances, the appeal is allowed to that extent.

[32] We therefore make the following orders:

1. The order of the Supreme Court in respect of the declaration of the right of way in favour of the Respondents' enclaved properties over the Appellant's land Parcel V10414 along the existing motorable access road is maintained.
2. The permanent injunction restraining the Appellant from interfering with the Respondents' use of the said right of way is also maintained.
3. The First, Second and Third Respondents are ordered to repair and make good the motorable access granted within six months of this order failing which the Appellant may repair the road and charge the cost to them.
4. Each party is to bear his own costs.

M. Twomey (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 17 December 2019