IN THE SEYCHELLES COURT OF APPEAL

[Coram: M. Twomey (JA) , B. Renaud (JA) F. Robinson (JA)**]**

Civil Appeal SCA 01/2017

(Appeal from Supreme Court Decision 113/2015)

Jerina Ah-Tive — Appellant

Versus

Allen Hoareau (Executor of the Estate of Heirs Renee Hoareau) — Respondent

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Heard: 03 May 2019

Counsel: Bernard Georges for the Appellant

John Renaud for the Respondent

Delivered: 10 May 2019

JUDGMENT

M. Twomey (J.A)

Background to the Appeal

[1] In December 2016, the Respondent initiated a suit in the Supreme Court against the Appellant, the owner of Parcel V5677 in which he claimed, as executor of his mother's estate, that the Respondent had obstructed a right of way to Parcel V5653 which was part of the estate, and which right of way had already been the subject of a court order in 1978.

[2] It was not disputed that a right of way had once existed through the Appellant's land, Parcel V56667, and that a perpetual injunction had issued restraining interference with the same. But it was the Appellant's defence that the right of way had not been used for over twenty-five years, had fallen into disrepair and disappeared and hence had been extinguished.

[3] The learned trial judge found in favour of the Respondent in the present suit, stating that the right of way had not been extinctively prescribed on the evidence. She also found, notwithstanding Article 697 of the Civil Code, that the Appellant had allowed a mango tree to grow on the servient tenement land blocking access to the right of constructed and rebuild the demolished steps that had formed part of the right of way. She further ordered the Appellant to pay damages to the Respondent in the sum of SR 30,000.

Grounds of Appeal

[4] From this decision the Appellant has appealed to this court on the following four grounds:

1. The Learned Trial Judge erred in her calculation of the extinctive period of prescription (from an agreed starting point of 1986) to the filing of the plaint in 2015

a. by stopping the running of the period at 1995 or 1995 when the house of the Appellant was constructed instead of simply interrupting the running to the period during the period of construction of the house

b. by not calculating another period of 20 years from the construction of the house of the Appellant in 1995 to the filing of the plaint in 2015

c. by discarding the evidence on record that there had been no use of the right of way between 1986 and the letter from the Respondent in 2015, and no written notice of the blocking of the right of way from the Respondent until 2015, which support the defence that the right of way had been abandoned and therefore ceased to exist by the effluxion of time.

2. The Learned Trial Judge erred in failing to give any weight to the fact that the right of way had disappeared through a landslide on the land of the Respondent and had only been blocked through necessity caused by the need to build a retaining wall in order to prevent further damage to the land of the Appellant and not for any other reason.

3. The Learned Trial Judge erred in ordering the Appellant to construct the right of way of the Respondent in view of the legal provision that any cost of constructing or maintaining a right of way is on the dominant tenement and not on the servient

tenement and that, notwithstanding the maters raised hereinbefore, the Appellant was prepared to allow the Respondent to have access over her land.

4. The Learned Trial Judge erred in awarding any damages against the Appellant in light of the fact that the right of way had disappeared through a landslide, and in the absence of any evidence that the Respondent had needed access to his land since then and had been deliberately prevented from having it.

Ground 1 – was the right of way extinctively prescribed by non-usage.

[5] With regard to the law on this issue, Articles 706 and 707 provide in relation to the extinction of easements as follows:

> *"Article 706 - An easement is extinguished by non-use over a period of twenty years.*
>
> *Article 707 - The period of twenty years begins to run, according to the kind of easement, either from the day when its enjoyment ceased in the case of discontinuous easements, or from the day when an act contrary to it was done in the case of continuous easements."*

[6] A right of way is a discontinuous easement (see Article 688) and therefore its extinction runs from the date it ceases to be exercised.

[7] Mr. Georges, learned counsel for the Appellant, has submitted that the defence evidence that the right of way had been extinguished by non-use was misapprehended by the trial judge. It is his submission that the Appellant's evidence confirm that the owners of the dominant tenement left for good in 1986/7/8 and that when the Appellant returned from her studies she saw nobody on the Respondent's property. Further, that even when they did reside on the land the Respondent's family used an alternative access because the right of way had been obstructed by landslides. He submits further that the Respondent did not object to the Appellant rebuilding and walling the compound which blocked off access to the right of way between 1987 and 1995/6.

[8] Learned Counsel for the Respondent has not responded to these submissions with the counter evidence. He has only submitted that the Appellant's submissions are irrelevant as

concerns the extinction of a right of way given the fact that a perpetual injunction was granted in respect of the same.

[9] At the hearing of the appeal Mr. Georges submitted that a right of way once granted on enclaved land can never be extinguished but rather it is the *assiette de passage* which is subject to extinction by its non-use over a period of twenty years.

[10] We do not see the need to distinguish between the right and the *assiette de passage* in the present case for the reasons which follow. First, since Mr. Georges concedes that the right of way subsists we do not have to be drawn in on the non-use of the right of way. The evidence in any case on this issue is controverted and the trial judge made a finding in favour of the Respondent. She was satisfied that the right of way was used, albeit intermittently.

[11] Secondly, as concerns the subsistence of the right of way it would seem to be a logical inference that can be drawn from Article 707 (supra). If the enclavement subsists, so does the right of way. This principle has been settled by the loi du 25 juin 1971 in France- that if the enclavement ceases by virtue of the fact that an alternative access is available so does the servitude. We find similar provisions in Seychellois law. Article 685 provides:

> *"1. The position and the form of the right of way on the ground of non-access are determined by twenty years' continuous use. If at any time before that period the dominant tenement obtains access in some other way, the owner of the servient tenement shall be entitled to reclaim the right of way on condition that he is prepared to return such a proportion of any compensation received under paragraph 1 of article 682 as is reasonable in the circumstances.*
>
> *2. The action for compensation as provided in paragraph 1 of article 682 may be barred by prescription; but the right of way shall continue in spite of the loss of such action."*

[12] In any case, there is Seychellois jurisprudence to the effect that the extinguishment of easements by operation of the provision of Article 707 only applies to easements granted because of the enclavement of property and the exclusive use of an alternative access (*Collie v Mousbé* (1977) SLR 118).

[13] Further, in this regard, Térré and Simler citing the arrêt of Civ.3e, 1er Juillet 1980 continue:

> *"Ainsi l'extinction du droit de passage ne résulte pas de la seule disparition de d'état de l'enclave: la servitude demeure, quelle que soit la durée pendant laquelle elle a été éxercée, tant qu'une convention ou une decision judiciaire n'aura pas constatée son extinction" (François Térré and Philippe Simler, Droit civil- Les bien. – e edn, Dalloz p. 258)*

[14] It must also be pointed out that section 58 of the Land Registration Act provides:

> *"1) Upon presentation of a duly executed release in the prescribed form or of an order of the court to the same effect the registration of an easement or restrictive agreement shall be cancelled and thereupon the easement or restrictive agreement becomes extinguished.*
>
> *(2) On the application of any person affected thereby, the Registrar may cancel the registration of an easement or restrictive agreement upon proof to his satisfaction that-*
>
> *(a) the period of time for which it was intended to subsist has expired, or*
>
> *(b) the event upon which it was intended to determine has occurred."*

[15] Such an application has neither been made to this Court nor to the Lands Registrar. The present right of way was granted by deed of title, was the subject of a court order, and registered on 5th August 1988. The submission by Mr. Renaud that the order of the court granting a perpetual injunction prohibiting the obstruction of the right of way is therefore

rightly made in this context. It is an extra security for the maintenance of an easement which created by title and registered. It would in any case be a sad day for this Court to countenance a breach of a court order on the grounds that the substrata of the order no longer existed. Self-help remedies cannot be encouraged especially in view of clear provisions against their availment. Unless and until a registered right of way or one which is the result of a court order is set aside by a further order of the court, it subsists perpetually.

Grounds 2 and 3 - The destruction of the right of way and the onus to restore it

[16] It is a hotly contested issue as to who or what caused the collapse of the steps and the obstruction of the right of way. It is however conceded by the Appellant that the right of way is obstructed from the main road by the wall constructed by the Appellant.

[17] As regards the relevant law, Articles 697 and 698 provide:

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

[18] The document of title does not specify that it is the servient tenement who ought to maintain the right of way - all that the title deed states in relation to the right of way is the following:

> *"Il est ici fait observer qu'il résulte des titres de propriété anterieurs du sus dit surplus du terrain que les vendeurs originaires du dit bien se sont réservés un droit de passage pour se render du dit bien à la route publique et il a été stipule que ce droit de passage devrait s'exercer par un sentier de deux pieds et demi de large le long du balisage…"* (Exhibit P2).

It does not contain a provision for the maintenance of the right of way by the owners of the servient tenement.

[19] In the circumstances the statutory provisions apply; it is the owner of the dominant tenement, that is, the Respondent, who has the burden of preserving the easement. However, it must be noted that the learned trial judge found that the steps although in ruins at some point were removed by the Appellant. The following admission can be found at Page 51 of the transcript of proceedings of the visit to the locus in quo:

> *"Q. So this is the right of way, it goes on until there, part of the steps is still there?*
> *A. Yes*
>
> *Q. Those trees were here before?*
> *A.Yes it has been here all along.*
>
> *Q. So they just passed through here*
> *A. Yes*
>
> *Q. So what, you have removed the steps and then you have blocked the front*
> *A. Yes* (Verbatim, p. 51 transcript of proceedings).

[20] In this respect therefore, we do not find any manifest error on the part of the trial judge in finding as she did that the steps were demolished by the Appellant. She did however also find that they were old and there is evidence that landslides occurred in the area and caused damage to the steps. In the circumstances, we do not think that the Appellant was solely to blame for the demolition of the steps. The cost of repairing the same will have to be shared by the parties.

[21] That part of the boundary wall obstructing the right of way which was built by the Appellant will have to be removed at her cost. As for the mango tree it appears from the evidence that it is on the right of way; that being the case, the burden of removing it would have fallen entirely upon the Respondent were it not for the fact that they were obstructed to use the right of way altogether by the erection of the wall. Provision should have been made by the Appellant in allowing for an opening in the wall for the right of

way to be exercised by the Defendant. The cost of felling a tree which was allowed to grow will therefore have to be borne by both parties.

Ground 4 – damages to the Respondent occasioned by loss of access

[22] It was the decision of the learned trial judge that the Respondent was denied access to his property. We have seen no reason to disagree with that finding. The quantum of damages was not an issue in this appeal. In the circumstances we refuse to interfere with the learned trial judge's decision on this issue and on the quantum of damages awarded.

Our decision and orders

[23] This appeal is partly allowed to the extent that we find that the cost of the repairing the steps and felling the mango tree will have to be shared by the parties. As regards the interference to the right of way, we find that the Appellant did obstruct the right of way in breach of the provisions of the law and the court order. We also find that damages of SR30, 000 as ordered by the trial judge are due and payable.

[24] We make the following orders:

1. The Appellant is to make an opening in the boundary wall at the roadside to reopen and restore access to the right of way.

2. The parties are to share the costs of rebuilding the steps and felling the mango tree.

3. The Appellant is to pay the Respondent the sum of SR 30,000 in damages.

M. Twomey (J.A)

I concur:. **…….** B. Renaud (J.A)

I concur:. **…….** F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019