

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 35 (13 August 2021)
SCA 08/2019
(Appeal from CS 101/2017)

O’NIVO CONSTRUCTION (PTY) LIMITED

1st Appellant

JIN HUA ZHOU

(rep. by Mr. France Bonte)

2nd Appellant

and

JACQUELINE BIJOUX

1st Respondent

ROBERT CICOBO

(rep. by Mr. Guy Ferley)

2nd Respondent

Neutral Citation: *O’Nivo Construction (Pty) Ltd & Anor v Bijoux & Anor* (SCA 08/2019) SCCA 35 [2021] (Arising in CS 101/2017) (13 August 2021)

Before: Twomey JA, Tibatemwa-Ekirikubinza JA, Dingake JA

Summary: Delict/tort-nuisance – proving of nuisance by sound, smell and dust. Once nuisance is proved, it is no defence that the defendant was unaware that their actions caused damage to the plaintiff.

A party cannot seek relief outside their pleadings

Heard: 4 August 2021

Delivered: 13 August 2021

ORDER

The appeal is dismissed with costs to the respondents. Consequently, the judgment and the orders of the Supreme Court are upheld.

JUDGMENT

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA

The Facts

1. The 1st respondent (Jacqueline Bijoux) owned and lived in concubinage with the 2nd respondent (Robert Cicobo) in their home situated on land parcel V11742 at Nouvelle Vallée. At the time of filing their plaint in the Supreme Court, they had been living on the said property for 10 years.
2. The 2nd appellant (Jin Hua Zhou) purchased an adjoining parcel and commenced construction of a villa complex on the land next to that of the respondent's house. The 2nd appellant contracted the 1st appellant (O'Nivo Construction Pty Ltd) to carry out the construction.
3. In the plaint, the respondents averred that during the construction, the 1st appellant trespassed onto their property and caused excessive noise, pollution, dust as well as discharge of water. According to the 1st respondent's evidence, all these acts occurred on occasions during weekdays, weekends and even public holidays.
4. In their joint defence, the appellants denied the allegations contained in the plaint. In paragraph 4 of their defence, they averred that they had secured their property, fenced it and barricaded it to prevent intrusion and that works were being carried out with the necessary precautions and under strict supervision during normal working hours, that is, from 8:00 a.m. to 4:00 p.m. The appellants moved Court to have the plaint dismissed with costs.
5. The trial judge, Burhan, J, having addressed himself on the law of delict or tort contained in Article 1382 of the Civil Code of Seychelles, found that on a balance of probability, it was clear that it was the fault and offence of the appellants that caused or resulted in loss, pain and suffering to the respondents in respect of their health, tranquility and peace of mind, resulting into unnecessary and unwarranted inconvenience being caused to them.
6. The trial Judge then entered judgment in favour of the respondents. He ordered the appellants jointly and severally to pay the respondents moral damages in the sum of SR

200,000/= together with costs. Legal interest was also awarded to accrue on the said amount from the date of filing the plaint till the date the award is paid.

7. Dissatisfied with the judgment of the Supreme Court, the appellants appealed to this Court on one ground as follows:

- 1. The Judgment of the Learned Judge is wrong on the fact that the Plaintiff has failed to prove nuisance either by sound or dust or otherwise.**

Reliefs sought by the appellant

1. An order allowing the appeal and reversing the Judgment of the learned Judge.
2. In the alternative, the damages awarded be substantially reduced under the circumstances.
3. Any other relief as the Honorable Court shall deem fit.

Appellant's submission

8. In his written submissions, the appellant argued that the Learned Judge “wrongly appreciated” the evidence of the defendants and his witnesses to arrive at the conclusions he did *to wit*: that the plaintiff had established their case on a balance of probabilities; that the fault of the defendant caused pain, suffering and inconvenience which continued since 2016 and were continuing even at the time of the delivery of judgment (8th February 2019); that despite the warning from authorities the defendants failed to take remedial action.
9. Counsel further submitted that the evidence of the defendants and his witnesses was more plausible and the judge's reasoning and conclusion was therefore grossly unreasonable. That the judge should have taken into consideration all evidence submitted. That the records clearly show that the appellant's property was properly secured to avoid intrusion from outside and that the works were carried on with strict supervision during normal working hours.

10. I note that Counsel did not support his averments by referring this Court to any particular piece of evidence adduced by the defendant which the Trial Judge either ignored or failed to appreciate.

Respondent's reply

11. The respondent's counsel relied on the testimonies on record and submitted that nuisance by dust, noise and smell were proved. For instance, Counsel relied on the 1st respondent's testimony where she stated that dust emanated from the construction which was near her boundary wall. That the cement would be mixed close to her bedroom and as such the dust would enter the said bedroom. Counsel submitted that the said evidence was corroborated by Corporal Xavier Barra who confirmed that he saw lots of dust when he visited the appellant's worksite.
12. Regarding nuisance by noise, Counsel highlighted the 1st respondent's testimony where she stated that lots of noise emanated from the use of JCB machines and the drills used to drill into the big rocks found close to her house. That this evidence was corroborated by two other independent witnesses.
13. In respect of nuisance caused by water and smell, Counsel still relied on the 1st respondent's testimony that a large amount of water from the 2nd appellant's land would enter her house whenever it rained because the 1st appellant failed to build a drainage system or gutters. Furthermore, that the construction site had no proper toilet facilities installed for the workers. Counsel submitted that this evidence was corroborated by the testimony of the 1st appellant's site manager-Mr. Liu Hoa who admitted in cross-examination that for a period of two weeks, the said workers had no place to discharge their bodily functions.

Court's consideration

14. Nuisance is a state of affairs that is either continuous or a recurrent condition or activity which unduly interferes with the use or enjoyment of land.¹

¹ *De Silva v United Concrete Products Services* (1996) SLR 74.

15. In order to successfully prove nuisance, a party must, on a balance of probabilities, show that the actions complained of exceeded the ordinary obligations of the neighbourhood. In **Rose vs. Civil Construction Company Ltd (2012) SLR 207**, this Court *inter alia* held that the plaintiff must prove the damage that is suffered was caused by the acts of the defendant or its servants and agents. Furthermore, in proving nuisance by noise, no absolute standard can be applied.² It is sufficient if the complainant shows that the nuisance was serious. Thus, proving nuisance is an evidentiary issue.

16. The appellants' arguments are that the trial Judge came to the wrong conclusion that nuisance by noise and dust had been proved. The following evidence on record was considered:

The 1st respondent testified at trial that construction of the said building resulted in dust emanating from the work site which affected her and the house she lived in. That the cement would be mixed close to her bedroom and the dust would enter her bedroom and settle on the clothes hanged outside. She further stated that there were up to 15 workers with no proper toilet facilities. The workers would work throughout the week on Saturday and Sundays from 7:00 a.m. – 6:00 p.m. including public holidays. She stated that the noise and disturbance affected her peace as well as that of her husband for the past two years and she had lodged a complaint with the Environment Authority and the police.

17. The trial Judge found that the above evidence was corroborated by Corporal Barra who carried out investigations into the complaint and found that the construction site emitted a lot of dust and noise. Furthermore, the trial Judge found that the evidence of the Chief Environment Police Officer with the Ministry of Environment and Energy corroborated the 1st respondent's testimony. He stated that workers were permitted to work until 4:00p.m and 1:00 p.m. during week days and Saturdays respectively. That however, he found the workers at the site working on Sundays and public holidays and had on several occasions stopped them.

² See *Laporte v Berjaya SCA* No.12 of 2002; *Bouchereau v Francois* (1980) SLR 80.

18. The director of the appellant company admitted that the workers used to work beyond the permitted hours and that the construction site was close to the respondents' premises. He however denied knowledge of causing damage to the premises.
19. In evaluating the evidence, the trial Judge stated that:
"It was clear that such conduct on the part of the 1st appellant had resulted in inconvenience, ill health and breach of peace and tranquility. In addition the Enforcement Authority Notice P6 which was issued to the 2nd appellant specified that the conduct constituted an offence under Section 44 (6) of the Environment Protection Act. It is clear from the evidence in Court that despite complaints being made and warnings being given to them, the defendants [appellants] continued unabated and this resulted in an Enforcement Notice being served on the defendants and a case being filed against them."
(My emphasis)
20. The trial Judge then held as follows:
"When one considers the evidence as analyzed above, it is clear that the corroborated evidence of the plaintiffs [respondents] clearly establishes on a balance of probability that it was the fault and offence creating acts of the defendants that caused or resulted in loss, pain and suffering to the plaintiffs in respect of their health, tranquility and peace of mind resulting in unnecessary and unwarranted inconvenience being caused to them. I am therefore satisfied that the plaintiffs have established their case on a balance of probabilities."
21. From the above, I find that the trial Judge's finding that nuisance was proved was based on the evidence adduced. The evidence was sufficient to prove the fact that the damage caused was as a result of the appellants' fault.
22. **Articles 1382 (1) and 1383 (1) of the Seychelles Civil Code** make a person liable for the damage caused by their actions or negligence. The assertion by the 1st appellant's director that he was unaware that their actions caused damage to the respondents as well as their premises is no defence. In the case of **De Silva vs. United Concrete Products**³ this

³ (1996) SLR 74.

Court observed that under Articles 1382 and 1383, if one's action affects the rights of neighbours beyond what is the measure of ordinary obligations of the neighbourhood, the action constitutes a fault which attracts civil liability and the award of damages.

23. Counsel also submitted in the written submissions that in the alternative this Court should reduce the damages awarded because the quantum was grossly exaggerated. In oral submissions Counsel argued that whereas there was nuisance for some time, after receipt of a notice by the Ministry of Environment in which the appellant was informed that the manner in which the work was being carried out constituted an offence under the Section 44 (6) of the Environment Protection Act, all activities were carried out within the law. He argued that in light of this "fact", the damages awarded by the trial court were excessive. Again Counsel did not point to any evidence on record which should have led the Trial Judge to this finding.
24. On the other hand, Counsel for the respondents submitted that the trial Judge was correct when he awarded moral damages in the sum of SR 200,000.00 cts. This is because the 1st respondent in her undisputed testimony stated that due to the noise arising from the construction, she suffered high blood pressure and had to be on medication. Furthermore, that since 2016, her quiet enjoyment of her property as well as that of her husband was disturbed.
25. In regard to the relief sought regarding damages it is important to point out that the appellant never appealed against the quantum of damages. The appellant filed a "one ground appeal" and the ground of appeal was in regard to liability. It is trite law that a party cannot seek relief outside his grounds of appeal. Rule 18(8) provides that an appellant shall not without leave of the Court be permitted, on the hearing of that appeal, to rely on any grounds of appeal other than those set forth in the notice of appeal.
26. **In Re Ailee Development Corporation and the Companies Act 1972 (SCA 13/2008) [2010] SCCA 1 (07 May 2010) the Court of Appeal stated:**

We have a procedural impediment in addressing this issue on appeal.

We note that it was not raised below at any stage or on the face of the

pleadings as per the affidavit of the appellant at Fl. Can it be raised now and would it be fair to do so?

By rule 18(8) of the Court of Appeal Rules the Court cannot entertain such ground without leave of the Court, which has not been sought nor granted.”

27. Consequently the submission made regarding the award of damages were ill founded. The appeal must therefore be decided on only one ground.
28. I have already made a finding that the evidence adduced at trial was sufficient to support the judge’s conclusion that the damage caused was as a result of the appellants’ fault. In light of the analysis above, I dismiss the appeal with costs to the respondents.
29. Consequently, the judgment and the orders of the Supreme Court are upheld.

Dr. Lillian. Tibatemwa-Ekirikubinza, JA.

I concur

Dr. Mathilda Twomey, JA.

I concur

Dr. O. Dingake, JA.

Signed, dated and delivered at Ile du Port on 13 August 2021.