

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 48 (13 August 2021)

SCA 74/2018

(Appeal from CS 41/2018)

In the matter between

JOSEPH EVANS AGLAE
(rep. by Mr Bernard Georges)

Appellant

and

RAJA ROBERT
(rep. by Mr France Bonte)

Respondent

Neutral Citation: *Aglae v Robert* (SCA 74/2018) [2021] SCCA 48 (13 August 2021)

Before: Fernando President, Robinson, Tibatemwa-Ekirikubinza JJA

Summary: Creation of easements - Discontinuous easements - Right of way - Document of title - Road access - Sections 3, 28 and 52(3) of the Land Registration Act - Land Registration Act has primacy over the manner and form of creating easements - *Mondon & Ors v Weller & Anor* [2016] SCSC 451 omitted to consider imperative provisions of the Land Registration Act - An easement is a registrable right and is required to be created in a specific form in accordance with the Land Registration Act - Appeal allowed - With costs to the respondent

Heard: 3 August 2021

Delivered: 13 August 2021

ORDER

- (1) Appeal allowed in its entirety
 - (2) Orders of learned Judge quashed
 - (3) CS 41/2018 remitted to the Supreme Court
 - (4) Assessments as to whether or not the respondent's parcel is enclaved, and if so, whether or not the respondent has a right to a motorable right of way, and if so, whether or not this should be exercised over parcel T821 or parcel T1932
 - (5) With costs to the respondent
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JUDGMENT

**ROBINSON JA (FERNANDO PRESIDENT, TIBATEMWA–EKIRIKUBINZA JA
CONCURRING)**

THE BACKGROUND

1. This is an appeal from a judgment of the Supreme Court on the 21 November 2018, in which the learned Judge ordered —

"- *That the Plaintiff has a motorable right of way/access on property T.1932*

- *That the Defendant and or his agents should not interfere with the said road access.*

- *The Land Registrar makes the necessary entries in the Land Registry records to reflect the order".*

2. It is common ground that the appellant and the respondent are adjoining owners of land at Bougainville. The appellant and his wife own parcel T1932, which they bought from Mr Philippe Le Galle in January 2016, whereas the respondent is the owner of parcel T822, which he bought much earlier. It is also common ground that before the purchase by Mr Philippe Le Gall of parcel T1932, the respondent, with the consent of Mr Philippe Le Gall's predecessor-in-title, had constructed a road traversing the front of parcel T1932 to access parcel T822. By a unilateral document under his hand, made on the 1 May 2001 and registered on 25 October 2017 (Exhibit P1), Mr Philippe Le Gall recognised that the respondent had constructed a road across parcel T1932 with the permission of his predecessor-in-title and granted the respondent road access or *droit de passage* over that road to access parcel T822.

3. In his pleas, the respondent claimed that he has been granted road access or *droit de passage* over the appellant's land (parcel T1932) by his predecessor-in-title, Mr Philippe Le Gall, to reach his land (parcel T822). The respondent claimed that the access over the road on parcel T1932 is the only access to parcel T822. He prayed for a declaratory order that he has a motorable right of way over parcel T1932 to access parcel T822, to be exercised along the road access he had earlier constructed, and orders to reflect this on the Land Register and to prevent interference with the access.

4. In his pleas, the appellant denied the respondent's claims on the ground that (i) parcel T822 was not enclaved, (ii) it was an act of self-enclavment by the construction of a retaining wall along its whole road frontage, or the subdivision of parcel T822 from its parent parcel T283, and (iii) there was an alternative access over a road on parcel T821, the remainder of the subdivision of parcel T283.
5. The learned Judge found for the respondent on the ground that his written document, Exhibit P1, granting him a road access over parcel T1932, although not registered under the Land Registration Act, constituted sufficient title to establish a motorable right of way over parcel T1932. Against this finding, the appellant has appealed on three grounds as follows —

"1. The Learned Trial Judge erred in relying on the authority of Mondon & Ors v Weller & Anor (which was based on very different facts concerning the access road) and consequently relying on a document which was not a registered easement as being a document of title and using it to circumvent the clear provisions of the Land Registration Act as to the form of registered easements.

2. The learned Judge erred in finding that the Respondent had an easement of right of way over parcel T1932.

3. If the Respondent's land was enclaved, the Learned Trial Judge erred in not considering whether the Respondent had alternative access over parcel T1932".

THE EVIDENCE

The evidence for the respondent

6. I reproduce a copy of a document titled, "Road Access Authority", Exhibit P1, which states —

"ROAD ACCESS AUTHORITY

I, Philippe Le GALL, national Identity number [...] with residence at Bel Age, Anse Royale owner of plot T 1932 located at Anse Parnel where I plan to build up a house.

DECLARE

That I grant to neighbour

Mr Raja ROBERT

Owner of plot T822

*road access to his property via the road crossing my own plot, as per verbal agreement he made with previous owner of plot T1932
this road built by Mr Robert being at the advantage of the two parties and
securing in due time a 2nd access to my house (still to be built)*

Anse Royale

May 1, 2001

(SD)

Philippe Le Gall". (Verbatim)

7. Exhibit P1 granted the respondent road access over parcel T1932. The respondent testified that he does not have a right of way over parcel T821 to the south of parcel T822, and that parcel T1932 is his only access to parcel T822.
8. When cross-examined, the respondent testified that the whole front of parcel T822 abuts the main road. He adds that there is a road over parcel T821, which is part of the parent parcel of T822. The respondent accepted that he has a driveway across the front of the appellant's property – parcel T1932. He built the road over parcel T1932 when Mr Olaf D'Offay, the predecessor-in-title of Mr Philippe Le Gall, owned parcel T1932.
9. The respondent denied the suggestion of Counsel that Exhibit P1, registered in 2017, does not amount to an easement of right of way over parcel T1932. He also rejected the proposition of Counsel that he could not in law claim any access over parcel T1932 to access parcel T822 because the whole front of parcel T822 abuts the main road.
10. When re-examined, the respondent stated that his property is enclosed. He added that he had built a high retaining wall along the entire road frontage of his property.

The evidence for the appellant

11. The appellant and his wife have a property at Bougainville, which they run as a tourism establishment. On the 5 January 2016, the appellant and his wife purchased parcel T1932 (Exhibit D1, a copy of the instrument of transfer) adjacent to their property to extend their business. Exhibit D5, a copy of a document titled, "*Certificate of Official search*",

concerning parcel T1932, dated 25 July 2018, contains a "Nil" entry concerning "*BENEFICIAL EASEMENT ETC*".

12. Mr Philippe Le Gall did not tell the appellant about Exhibit P1 when the latter purchased parcel T1932 from him. He knew that the road traversed the front of parcel T1932 when he bought it, and that it led to the respondent's house.
13. He stated that he is desirous of building a retaining wall along the main road to secure his property in the same manner as the respondent has built one. There is concrete road access over parcel T821, which can serve the respondent. He added that parcel T283 had been subdivided into two parcels, namely T821 and T822 (Exhibit D7 – a copy of the approved Cadastral District Takamaka Property No. T283 Folio No. TD/268). The appellant stated that if he were to block the road that traversed the front of his property, which the respondent uses, the respondent would have access over parcel T821, which belongs to the respondent's sister. Exhibit D8, a copy of a document titled, "*Certificate of Official search*", concerning parcel T283, of the extent of 1791 square metres, dated 3 August 2018, *inter alia*, contains a "Nil" entry concerning "*BENEFICIAL EASEMENT ETC*" and the information, "*Closed on Sub-division, See Parcel No. T821 & T822*".
14. When cross-examined, he stated that he was unaware of Exhibit P1 when he purchased parcel T1932. He accepted that the respondent has been using the road over parcel T1932 before he purchased it.

ANALYSIS OF THE CONTENTIONS OF THE APPELLANT AND THE RESPONDENT

Ground 1 of the grounds of appeal

15. I consider the following issue under the first ground. Whether or not the respondent has a motorable right of way by way of an easement across parcel T1932 through Exhibit P1.
16. The first ground concerns the value of Exhibit P1, the document granting road access or *droit de passage*. Exhibit P1 is the foundational piece of evidence on which the learned

Judge based his finding.

17. Pausing there, I refer to the relevant provisions of the Civil Code of Seychelles with respect to this appeal. A right of way is a discontinuous easement under Article 688 of the Civil Code of Seychelles. Discontinuous easements can only be created by a **document of title** (Article 691 of the Civil Code of Seychelles) or by a court order when a plaintiff seeks a right of way under Article 682 of the Civil Code of Seychelles because his land is enclaved. Article 691 of the Civil Code of Seychelles stipulates that a discontinuous easement cannot be created by possession, even from time immemorial. In this present appeal, it is plain that the fact that the respondent has used the road access for a long time cannot give him an easement.
18. I also refer to the relevant provisions of the Land Registration Act, namely sections 3, 52 and 28. Section 3 of the Land Registration Act stipulates —

"3 Except as otherwise expressly provided in this Act, no other written law relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act; but save as aforesaid any written law relating to land, unless otherwise expressly or by necessary implication provided by this or any other Act, shall apply to land registered under this Act whether expressed so to apply or not:

Provided that nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the sanction or approval of any authority to any dealing." Emphasis supplied

19. Section 52 of the Land Registration Act stipulates —

*" 52(1) The proprietor of land or a lease may, by **an instrument in the prescribed form** grant an easement to the proprietor or lessee of other land for the benefit of that other land.*

(2) The instrument creating the easement shall specify clearly —

(a) the nature of the easement, the period for which it is granted and any conditions, limitations or restrictions intended to affect its enjoyment; and

- (b) *the land burdened by the easement and, if required by the Registrar, the particular part thereof so burdened; and*
- (c) *the land which enjoys the benefit of the easement, and shall, if so required by the Registrar, include a plan sufficient in the Registrar's estimation to define the easement.*

(3) The grant of the easement shall be completed by its registration as an encumbrance in the register of the land burdened and in the property section of the register of the land which benefits, and filing the instrument.

(4) An easement granted by the proprietor of a lease shall be capable of subsisting only during the subsistence of the lease." Emphasis supplied

20. Section 28 of the Land Registration Act stipulates—

"28 Notwithstanding any provision contained in any other written law, no land, lease or charge registered under this Act shall be capable of being dealt with except in accordance with the provisions of this Act and every attempt to deal with such land, lease or charge otherwise than in accordance with the provisions of this Act shall be ineffectual to create, extinguish, transfer, vary or affect any right or interest in the land, lease or charge."

- 21. In this case, the learned Judge based himself on *Mondon & Ors v Weller & Anor* [2016] SCSC 451 (delivered on the 30 June 2016) to come to his finding. In **Mondon** the learned Judge accepted five documents dated October 2000 as sufficient title, notwithstanding that they were neither in the Land Registration Act prescribed form nor registered under that Act.
- 22. In his heads of argument, Counsel for the appellant argued that the parcels of concern were all on the Land Register, and that the Land Registration Act has primacy over the manner and form of creating easements. He argued that **Mondon** omitted to consider imperative provisions of the Land Registration Act, namely sections 52 and 28. I consider the written and oral submissions of Counsel for the appellant in support of his submissions below.
- 23. For his part, Counsel for the respondent argued that the learned Judge's approach in **Mondon** was correct, and that, based on **Mondon**, the learned Judge, in the present case, was correct to conclude that the respondent had an easement of right of way over parcel T1932.

24. After prudently considering the written and oral contentions of the appellant and the respondent concerning the first ground of appeal, I hold that the appellant's approach is correct. In this respect, I reject the submissions offered on behalf of the respondent. I give reasons for this holding.
25. The construction of "*document of title*" as "*titre*" in **Mondon**, assuming that it is correct, suggests that Exhibit P1 amounts to a "*titre*", and, therefore, to a document of title, and that the consequence of that assumption is that a right of way could be created. I accept the submission offered on behalf of the appellant that the *de jure* creation of such an easement remains in jeopardy based on sections 3, 52(3) and 28 of the Land Registration Act.
26. An easement is a registrable right and is required to be created in a specific form. The Land Registration Act is specific on this point. Section 52(1) of the said Act stipulates that an easement must be "*in the prescribed form*" (the form being L.R.10 in the Second Schedule to the Act) and, under section 52(2), "*specify clearly*" several matters and further, under section 52(3), "*completed by its registration as an encumbrance in the register of the land burdened*". None of these provisions exists with respect to Exhibit P1. I observe that Exhibit D5 unambiguously states that there are no encumbrances registered against parcel T1932. Thus, I accept the submission offered on behalf of the appellant that the purported grant of an easement has not been completed.
27. It follows, therefore, that the issue arising for consideration is whether or not the purported grant of an easement could be completed, for instance, by order of this Court. Counsel for the appellant submitted that the learned Judge in **Mondon** attempted to save the documents in the Supreme Court by extending the definition of "*instrument*¹" and "*prescribed form*" to encompass, firstly, any "*other document requiring or capable of registration*²" and, secondly, "*in such other form as the Registrar may in any particular case approve*³". I observe that the combination of these two statements could be

¹ Under section 2 of the Land Registration Act, "*instrument*" includes any deed, judgment, decree, order **or other document requiring or capable of registration under this Act**;" Emphasis supplied

² Ibid footnote 1

³ Section 58 (1) of the Land Registration Act, which stipulates that —

construed to cover the document under the hand of Mr Philippe Le Gall. Nonetheless, I accept Counsel's submission that it cannot happen for two reasons.

28. First, the Registrar did not approve any other form of a grant of easement generally, and specifically not the document under the hand of Mr Philippe Le Gall, namely Exhibit P1. It stands to reason, therefore, that the fact that the Land Registrar neither registered the Mr Philippe Le Gall document under the Land Registration Act nor entered it in the registers of the dominant and servient parcels, as she could under section 52(3), establishes that she had not approved it as a legal form. I observe that Exhibit P1 was registered under the Mortgage and Registration Act.
29. Second, such an attempt by this Court would be ineffectual in terms of section 28 of the Land Registration Act. Under section 2 of the Land Registration Act, "*dealt*" and "*deal*" are defined as including "*dispositions*", which is further defined as an act whereby a person's interest in land is affected. In my considered opinion, this would consist of an attempt to create an easement through an unauthorised form.
30. For the reasons stated above, I accept the contention of Counsel for the appellant that the attempt by the learned Judge to rescue the case for the respondent does not comply with the law and, therefore, cannot succeed.
31. At most, what the respondent has in terms of Exhibit P1 is a licence to cross parcel T1932. The fact that a road has been built on parcel T1932 with the permission of the then owner, and that the respondent has used it for an extended period is completely irrelevant and gives no right to the respondent. As correctly submitted by Counsel for the appellant, unless a *droit de passage* is an easement, it is nothing more than a licence which can be withdrawn at any time: *Delorie v Alcindor*[1981] SCAR 28.
32. Before leaving this ground, I also add in passing that the fact that the road has been built on parcel T1932 may only serve to indicate the *assiette de passage* across which an easement, if

"(1) Every disposition shall be effected by an instrument in the prescribed form **or in such other form as the Registrar may in any particular case approve.**" Emphasis supplied

granted by the court, is to pass (Article 685 of the Civil Code of Seychelles). Even then, it has to have been in existence for over twenty years to be determined as an *assiette de passage*. It gives no right on the land itself as an easement would.

33. For the reasons stated above, I allow the first ground of appeal.

Ground 2 of the grounds of appeal

34. In consequence of a successful first ground of appeal, I conclude that the learned Judge erred in finding that the respondent has an easement of right of way over parcel T1932.

35. I allow the second ground of appeal.

Ground 3 of the grounds of appeal

36. Under ground three, the appellant contended that the learned Judge never considered the alternative access which the respondent has, or may have, over parcel T821. I note that both the appellant and the respondent accepted that there is a road access over parcel T821, which parcel T821 is part of the parent parcel of T822, on which the respondent's house has been constructed.

37. An examination of the judgment revealed that the learned Judge, in paragraph [15] of it, mentioned that: "*It has also been submitted that the Plaintiff can use a right of way on plot T821, on the south of plot T822*". However, the learned Judge did not consider the alternative access T821, which had been pleaded.

38. Thus, I accept the submission of Counsel for the appellant that this case be remitted to the Supreme Court to make assessments as to whether or not the respondent's parcel is enclaved, and if so, whether or not the respondent has a right to a motorable right of way, and if so, whether or not this should be exercised over parcel T821 or parcel T1932.

39. In light of the above, I allow the third ground of appeal.

THE DECISION

40. For the reasons stated above, the appeal is allowed in its entirety. Thus, I quash the following orders of the learned Judge —

"- That the Plaintiff has a motorable right of way/ access on property T.1932

-That the Defendant and or his agents should not interfere with the said road access.

- The Land Registrar makes the necessary entries in the Land Registry records to reflect the order".

41. Therefore, I make an order remitting this case to the Supreme Court for the learned Judge to make assessments as to whether or not the respondent's parcel is enclaved, and if so, whether or not the respondent has a right to a motorable right of way, and if so, whether or not this should be exercised over parcel T821 or parcel T1932.

42. With costs in favour of the appellant.

Robinson JA

I concur

Fernando President

I concur

L. Tibatemwa-Ekirikubinza JA

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