IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] SCCA 37
(19 August 2022)
SCA 05/2020
(Arising in SC 05/2013)

MICHEL NANON **Appellant**

(in forma pauperis rep. by Mr. Divino Sabino)

and

THE ESTATE OF THE LATE JANINE THYROOMOOLDY **Respondent**
(rep. by Mr. Basil Hoareau)

Neutral Citation:	*Nanon v The Estate of the late Janine Thyroomooldy (*SCA 05/2020) [2022] SCCA 37 (29 August 2022) (Arising in CS 05/2013) [2019] SCSC 1129
Before:	Fernando, President, Twomey-Woods, André, JJA
Summary:	encroachment onto parcels of land of third parties, article 555 of the Civil Code, remedy.
Heard:	2 August 2022
Delivered:	19 August 2022

ORDER

The appeal is dismissed. (1) The Appellant, Mr. Michel Nanon, is ordered to remove the two structures and the cultivation encroaching onto Parcel H6440 within six months from the date of this judgment. In case Mr. Nanon fails to take the above steps within six months as ordered, the Respondent (the Estate) is at this moment authorised to carry out all the said works for the removal of the encroachments and all incidental works to it and shall claim the costs for the same as duly certified by a quantity surveyor. Mr. Nanon shall, within one month, settle the claim. (2) The structures and cultivation Mr. Nanon needs to remove from the Estate's property are shaded in orange in exhibit P7 attached to this judgment. (3) A Prohibitory Injunction is issued prohibiting Mr. Nanon from carrying out any other or further encroachments on the Estate's land.

JUDGMENT

DR. M. TWOMEY-WOODS JA

(Fernando PCA and Andre JA concurring)

Background

[1] This matter has haunted the corridors of this Court in one form or another for close to a decade. This Court hopes that all issues, in this case, will be laid to rest in this decision.

[2] The facts of the case are simple. Mr. Nanon, a self-confessed analphabet, built a house and store and planted crops on two parcels of land (H6440 and H1798), neither of which belonged to him although his land was undeveloped (Parcel H5355) is adjacent to the two parcels.

[3] Several actions ensued by the late Janine Thryoomooldy as the owner of Parcel H6440 while she was still alive and now by her estate. In the first case before the Supreme Court, the court found that Mr. Nanon had encroached on the land of Mrs. Thyroomooldy and, pursuant to Article 555 of the Civil Code, demanded the removal of the structures and plants. On appeal by Mr. Nanon, this Court held that the learned trial judge had erroneously applied Article 555 instead of Article 545. A new case was filed by Mrs. Thyroomooldy but dismissed by the court on the grounds that the matter was *res judicata.* On appeal, this Court found that the issue was not *res judicata* as the previous decision was grounded entirely in law without the merits being heard and remitted to the Supreme Court for hearing on the merits.

[4] The present appeal concerns the hearing of the remitted case in which the learned trial judge stated that he was bound by the Court of Appeal's judgment to decide the matter under Article 545.

[5] We must say at the outset that the previous decision of the Court of Appeal that Article 545 applied and not Article 555 has constrained and pitted the parties and the court *a quo* against insurmountable obstacles. We observe that the initial case did not contain accurate facts about the encroachment, which, if it had, may have compelled the Court of Appeal to find differently than it did in 2010. It was in this light that Mrs. Thyroomooldy sought an amendment to the present plaint, which identified the nature and extent of the encroachment over the two parcels of land not belonging to Mr. Nanon. The amendment was refused, but we hasten to note that the plaint in the present case was sufficient in its pleadings relating to the encroachment to allow the court to make its findings based on

both the crucial evidence adduced by the land surveyor and the documentary evidence of the exact nature of the encroachment.

[6] In its decision of 6 December 2019, the court found that the Appellant had indeed encroached on Parcels H6440 and H1798 belonging to Mrs. Thyroomooldy and Mrs. Gisele Estro, respectively. The court found that by using the land of a third party (Mrs. Estro), Mr. Nanon had further aggravated the nature of the claim against him and, applying Article 545, found that since he had neither pleaded *bona fides* encroachment nor *de minimis* encroachment, an order for removal of the two structures and cultivation within six months of the order together with the payment of SR 50,000 as compensation to Mrs. Thyroomooldy of the judgment was proper in the circumstances.

[7] Mr. Nanon has appealed this decision on five grounds, namely:

> *1. The learned trial judge in the court below by failing to take into account that the encroachment of the Respondent's property did not originate from the Appellant's land but rather from the property of a third party namely Gisele Estro who was never joined as a party to the case.*
>
> *2. The learned trial judge failed to consider that demolition of part of the construction on the Respondent's property and measuring 625 square metres would result in grave injustice to the Appellant under exceptional circumstances (sic).*
>
> *3. The learned trial judge erred in making a finding which is ultra petita on the basis that the Respondent in her plaint had never pleaded encroachment from parcel H1798 over parcel H6440.*
>
> *4. The learned trial judge erred in law and in fact in failing to make a finding in his judgment for the joinder of the owner of Parcel H1798 as a party to the suit.*
>
> *5. The learned trial judge erred in awarding the sum of SR 50,000 as compensation to the Respondent despite the failure of the latter to adduce evidence in support of the claim.*

[8] In between the decision of the court *a quo* and this appeal, Mrs. Thyroomooldy passed away; the present appeal is continued by her estate (hereinafter the Estate).

[9] With regard to ground 5, Mr. Hoareau, Counsel for the Estate, has indicated that the latter will not be pressing for the payment of damages. Therefore, we take it that the ground is not contested and need to say no more about it. We next deal with the rest of the grounds logically.

Grounds 1, 3 and 4 – encroachment on the land of Mrs. Estro and effect of her non-joinder

[10] Mr. Sabino, Counsel for Mr. Nanon has submitted that there is no averment in the plaint about the encroachment on Mrs. Estro's land (Parcel H1798) and that any finding concerning her land is *ultra petita*. Counsel further submits that had she been made a party to the suit, it would have clarified the facts on the structures built on her land and that of the Estate. In the circumstances, he contends, she may re-agitate matters by bringing a suit for opposition pursuant to section 172 of the Seychelles Code of Civil Procedure (SCCP). Further, Counsel contends her interests with regard to the structures in issue were not safeguarded by the court.

[11] Mr. Hoareau has submitted in response that it is immaterial that Mrs. Estro is joined to the suit as she is not the person who encroached on the Estate's land. Her presence was not necessary for the court to adjudicate on the encroachment issue by Mr. Nanon on Parcel H 6440, which does not belong to her. Counsel further contended that Mr. Nanon had made a judicial admission that the two structures partly built on Mrs. Estro's and the Estate's lands were constructed by him. It was uncontroverted that he alone benefited from the structures. Moreover, no material facts were pleaded or evidence adduced with regard to Mrs. Estro's interest in any of the structures built by Mr. Nanon. Mr. Hoareau further submits that in any case, section 112 of the SCCP provides that the non-joinder of a party does not defeat an action unless there is a breach of the right to fair hearing of the party not joined.

[12] It is appropriate at this juncture to examine the provisions of section 112 of the SCCP:

> *"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

> *The court may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any persons improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."*

[13] The Court of Appeal in the case of *Vanacore v Port-Louis* (2011) SLR 143 agreed that on the basis that all questions in controversy should be tried at the same time in one trial, courts would be more inclined to allow joinder of other parties when their presence is necessary for the effective and complete adjudication of issues in dispute. However, the court was at pains to point out in the case that such an application for joinder must be made formally with a supporting affidavit to satisfy the court that the joinder is indeed necessary.

[14] In this regard, it must be emphasised that at no time in the present case did Mr. Nanon seek to join Mrs. Estro either by formal application or during the course of proceedings, and it is not clear even at this stage whether she would have been joined as a plaintiff or a defendant. Had she been joined a plaintiff, she would have needed to consent in writing to her joinder (see section 113 of the SCCP). The learned trial judge's findings went directly to the encroachment on the Estate's land, the subject matter of this suit. In that regard, they were not *ultra petita*. Parties bear a responsibility to vindicate their rights, and it is not for the court to make a case for any party, let alone a third party, to proceedings before the court. The grounds raised in this respect are therefore otiose, have no merit and are dismissed.

Ground 1- the erected structures on the Estate's land and the consequences of their removal

[15] Mr. Sabino contends that demolishing the buildings extending over 625 square metres would result in grave injustice to Mr. Nanon. Counsel relies on the findings of Hodoul JA in the first appeal by the parties (SCA 41 of 2009) [2011] SCCA 7 (29 April 2011), where he stated that the demolition of the house would be an abuse of Mr. Nanon's right.

[16] In reply, Mr. Hoareau has submitted that Mr. Nanon's statement of defence is only to the effect that he had not encroached on Parcel H6440 belonging to the Estate. Mr. Nanon did not plead exceptional circumstances or that grave injustice would be caused to him. This was not even raised during the proceedings, and Mr. Nanon cannot now be heard to rely on the same. Mr. Hoareau relies on the case of *Chetty & Anor v Laporte* SCA (119 of 2019) [2021] SCCA80 (17 December 2021) for this proposition.

[17] In the case of *Chetty*, the appellants had encroached on the respondent's land to the extent of 140 square meters. They had not sought a counterclaim for a declaration of ownership by *uscapion.* Nor had they claimed that the demolition of the structures they had built would result in grave injustice or that they had built in good faith. The Court's unanimous decision was that since the appellants had not done so, they could not succeed in their appeal against the trial judge's finding that the demolition should take place or that they had not acquired the encroached land by *uscapion*. We endorse these findings, and if we apply Article 545 to the present appeal, *Chetty* will prevail to have it dismissed.

[18] We observe at this point that despite this court's findings in 2011 that the applicable provision of the Civil Code to this case is Article 545, the evidence adduced in the present case throws a different light on the circumstances of this case. In the case in 2011, the Court of Appeal relied on the incorrect facts that Mr. Nanon had encroached from his property onto the land belonging to Mrs.Thyroomooldy. That is why Article 545 and the principle of *abus de pouvoir* were relied on.

[19] The evidence in the present case presents an entirely different scenario: Mr. Nanon has never built on his own land. He has erected structures on land belonging to two other persons and also across a right of way between these two properties. What do the law and jurisprudence say about such circumstances?

[20] In land issues, one's ownership rights often collide with that of one's neighbours. Often a construction (or plantation) is carried out by a person with no right of ownership of the land. The owner's interests must then be reconciled with those of the builder, who may have believed, in good faith, that he was the owner or authorised to build.

[21] In this respect, Article 555 in relevant part provides:

> *"1. When plants are planted, structures erected, and works carried out by a third party with materials belonging to such party, the owner of land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them.*
>
> *2. If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of land.*
>
> *3. If the owner elects to preserve the structures, plants and works, he must reimburse the third party in a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of such reimbursement, after taking into account the present conditions of such structures, plants and works.*
>
> *4. If plants were planted, structures erected and works carried out by a third party who has been evicted but not condemned, owing to his good faith, to the return of the produce, the owner may not demand the removal of such works, structures and plants, but he shall have the option to reimburse the third party by payment of either of the sums provided for by the previous paragraphs.*
> …"

[22] The provisions above lay down three rules: First, the landowner becomes the owner of the constructions or plantations. Secondly, the owner may require demolition at the builder's expense if the latter is in bad faith. Thirdly, if the owner retains the constructions, he must pay the builder a sum representing either the increase in value of the land or the current price of the labour and materials used.

[23] The consequences of accession imposed by Article 555 presuppose that the constructions or plantations were built by a third party, that is, a person other than the owner. In their book "Les Biens" (Droit Civil), Philippe Malaurie and Aynés[1] state with regard to a third party constructing wholly on another person's land state that —

[1] at page 127, paragraph 448

> *"En visant les plantations, constructions et ouvrages faits par un tiers, l'article 555 vise la situation du possesseur qui construit sur un terrain auquel il n'avait pas droit et se trouve ensuite évincé par le véritable propriétaire, à la suite d'une action en revendication. La jurisprudence n'a pas hésité à appliquer la règle aux cas plus fréquents ou le titre d'un acquéreur a été annulé ou résolu après la construction; ou celui ou la construction a été faite par le bénéficiaire d'une promesse de vente qui n'a pas levé l'option; dans toutes ces hypothèses, le constructeur n'avait, par suite de la rétroactivité de la nullité, ou de la condition résolutoire, ou de l'absence de vente, aucun droit sur le terrain. »*

[24] Hence, the person who builds on another's land has no rights over the land he has constructed. Article 555, as opposed to Article 545, applies only to constructions carried out entirely on the land of others. It governs the relationship between the landowner and third parties who have built plantations, buildings and works on them. A third party, as pointed out above, is a person who has no right to the land.

[25] There is a supplementary nature to Article 555. Its provisions, like all the rules concerning accession, are not mandatory: public policy is not at issue. Whether it is a question of the very principle of the acquisition of the buildings by the owner of the land, of the time of that acquisition, or of the compensation of the builder, or whether it is prior to, concomitant with or subsequent to the building, the agreement of the parties is sovereign.[2]

[26] In the present case, the evidence clearly establishes that Mr. Nanon had not effected any construction on his own land, namely H5355, but rather constructed entirely on others' properties. As pointed out above, with regard to Parcel H1798, belonging to Mrs. Estro, on which Mr. Nanon had partly constructed the buildings, Mr. Nanon has neither pleaded nor adduced any evidence that Mrs. Estro had authorised him to construct the two buildings partly on her land. The salient fact remains that we are here concerned with the issue of Mrs. Thyroomooldy's Estate's land (H6440), which without the consent of Mrs. Thyroomooldy or her predecessors in title to build on her land, Article 555 is applicable because the structures are entirely on others' properties including that of Mrs. Thyroomooldy.

[2] See in this regard, Arrêt du 6 novembre 1970 de la 3eme chambre civile de la Cour de cassation, epx David, Bull.civ.III, n. 592 ;D., 1971.394)

[27] In "Les Biens"[3] the authors when discussing "la construction sur le terrain d'autrui" (building on another person's land), state[4]

> *"... La jurisprudence est à peine plus nuancée lorsqu'il s'agit de déterminer qui est "autrui", au sens de la construction sur le terrain d'autrui."*

[28] French jurisprudence does not provide any clear-cut and complete definition of the term emphasised in the above quotation ("others"). The authors continue:

> *"Autrui désigne les autres (que ce soit les autres membres d'une communauté ou, au sens large, les autres hommes en général) mais le terme est toujours utilisé dans une mise en relation. »*
>
> *("Autrui refers to others (whether other members of a community or, in a broader sense, other humans in general), but the term is always used in a relational sense.")*

[29] Further, although Article 555 reads "owner of land" in its singular form, we should imply that "owner of land" also encompasses multiple owners of land[5] subjected to the building of entire structures on their lands by a third party. Whenever a person without valid title or authorisation to do so erects structures or plant plants, Article 555 is applicable for their owner to either retain their ownership or to compel the third party to remove them at the expense of the third party without any right of compensation.

[30] Much as we have sympathy for Mr. Nanon's plight, probably caused by his illiteracy cannot condone his encroachment on the Estate's land. We can only grant him time to remove his structures and cultivation. He has, in any case, had good innings over nearly ten years enjoying someone else's land.

Our decision

[31] The Estate, in this case, the owner of Parcel H6440, seeks the removal of the structures that Mr. Nanon erected on its land and a prohibitory injunction prohibiting him from

[3] Supra fn 1
[4] Ibid, p. 127
[5] Section 20 of the Interpretation and General Provisions Act provides that "[I]n an Act words in the singular include the plural and words in the plural include the singular."

further or other encroachments. It is entitled to those orders in the circumstances of this case. The appeal is without merit and is therefore dismissed.

Our Orders

[32] We endorse the court *a quo's* orders, but for the sake of clarity, state as follows:

(1) The Appellant, Mr. Michel Nanon, is ordered to remove the two structures and the cultivation encroaching onto Parcel H6440 within six months from the date of this judgment. In case Mr. Nanon fails to take the above steps within six months, the Respondent (the Estate) is at this moment authorised to carry out all the above works, that is, removal of the encroachments and cultivation and all incidental works and shall claim the costs for the same as duly certified by a quantity surveyor. Mr. Nanon shall, within one month, settle the claim.

(2) The structures and cultivation Mr. Nanon needs to remove from the Estate's property are shaded in orange in exhibit P7 attached to this judgment.

(3) A Prohibitory Injunction is issued prohibiting Mr. Nanon from carrying out any other or further encroachments on the Estate's land.

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Dr. M. Twomey-Woods, JA.

I concur

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A. Fernando, President

I concur

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S. André, JA

Signed, dated and delivered at Ile du Port on 19 August 2022.