

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] Civil Appeal SCA 2/2020
SCCA 43 (19 August 2022)
(Arising in CS 77/2017 [2019] SCSC
1130)

In the matter Between

THERESIA CHANG PEN-TIVE

1st Appellant

And

MS ALICE DORICE CHANG PEN-TIVE
(rep. by Mr. Guy Ferley)

2nd Appellant

And

MARIE-ANDRE ALPHONSE
(rep. by Mr. Elvis Chetty)

Respondent

Neutral Citation: *Chang Pen-Tive & Anor v Alphonse* (Civil Appeal SCA 02/2020) [2022] SCCA 43 (Arising in CS 77/2017 [2019] SCSC 1130)

Before: Twomey-Woods, Robinson, Andre JJA

Summary: Appeal against a decision of the Supreme Court- Locus standi - Official representative of the Estate of Heirs – Unlawful encroachment – Claim of damages

Heard: 3 August 2022

Delivered: 19 August 2022

ORDERS

The Court makes the following Orders:

- (i) The Appeal is dismissed as the parties were not duly before the Court.
- (ii) No order is made as to costs.

JUDGMENT

ANDRE, JA

INTRODUCTION

- [1] This is an appeal arising out of the notice of appeal filed on the 7 January 2020 by Theresia Chang Pen-Tive (1st Appellant) and Ms Alice Dorice Chang Pen-Tive (2nd Appellant) (collectively referred to as Appellants), against Marie-Andre Alphonse (*Respondent*), they being dissatisfied with the decision of Honourable Pillay J dated 4 December 2019, in CS No. 77 of 2017 and SCSC 1130 of 2019. The appellants appeal to the Seychelles Court of Appeal, against the whole of the decision, upon the grounds set out in paragraph 2 of the notice of appeal (treated below) and seek the relief set out in paragraph 3 of the notice of appeal. In particular, the appellant pray for the setting aside of the entire judgement of the Honourable Judge, with respect to the plaint and to allow the plaintiffs' prayer in the Court a quo to compel the defendant to remove the said encroachment and to desist from any further trespass on land parcel C5710 and damages in the sum of Seychelles Rupees (SCR100,000/-) being Seychelles Rupees (SCR 50,000/-) for the value of land and Seychelles Fifty (SCR 50,000/-) for moral damages from the defendant and for the Court to issue a permanent injunction compelling the defendant to remove the said encroachment and to stop trespassing.
- [2] Both the plaint by the plaintiffs/Appellants and the counterclaim by the '*Defendant/Respondent*' were dismissed.
- [3] Both parties were duly represented in the court a quo.

BACKGROUND AND FINDINGS OF THE SUPREME COURT

- [4] The matter before the Supreme Court was that the Plaintiffs are the fiduciaries, acting on behalf of the co-owners of land parcel C5710. It appears that there was an error in the judgment of Pillay J in paragraph 2 regarding the proper description of the parcel.
- [5] The Plaintiffs submitted that the Defendant, without any authority or lawful cause constructed and continues to construct an earth embankment and earth wall on parcel C5710, thereby encroaching on the said parcel and depriving the Plaintiffs of 40 percent of their land.

- [6] The Defendant (Marie-Andre Alphonse) did not defend the plaint. Instead, two witnesses appeared for Defendant. The first witness for the Defendant, Bennett Alphonse (son of the Defendant) denied that the Defendant was the representative of heirs Pierre Francourt.
- [7] The court found that since there was no evidence that the Defendant was the author of the encroachment, the claim for encroachment failed.
- [8] On the counterclaim, the court reasoned that in terms of Article 682, the claim should be brought against the owner of the parcel and not an occupier. An action under Article 682 is against two or more co-owners and not occupiers. Since there was no evidence that the Defendant owned the property, the court concluded that she could not bring an action against the Plaintiffs.
- [9] The court dismissed both the Plaint and the Counterclaim on the basis that the parties were not properly before the Court.

GROUND OF APPEAL

- [10] Aggrieved by the findings of the Court, the Plaintiffs, (now Appellants) raised four grounds of appeal namely that the Judge in court a quo erred in law in:
- (i) failing to recognise that the Defendant was the official representative of the estate of Heirs Pierre Francourt and the occupier of land parcel C1682 and that the Defendant built the road on parcel C5710 and is the owner of the road in law;*
 - (ii) failing to determine that the said road, built by the Defendant was an unlawful encroachment on Plaintiff's land and ought to be declared illegal and be removed;*
 - (iii) holding that there was no evidence that the Defendant is the author of the encroachment in the claim made by the Plaintiff; and*

(iv) the Plaintiffs could not bring an action for trespass and encroachment against the Defendant in that the Parties were not properly before the Court.

[11] The Appellants pray for this Honourable Court for a judgment setting aside the entire judgment of the Honourable Judge, with respect to the Plaint and to:

- (i) allow the Plaintiffs' prayer to compel the Defendant to remove the said encroachment and to desist from any further trespass on parcel C5710; and
- (ii) grant damages as prayed and costs in the Supreme Court and this Court.

SUBMISSIONS BY PARTIES

APPELLANTS' SUBMISSIONS

[12] By way of submissions of the 29th July 2022, the Appellant submits in a gist as follows.

[13] On the first ground of appeal, it is submitted that it is not disputed that Defendant is the beneficiary to the succession of the registered owner of the parcel C1682. She is the wife of one of the heirs of Pierre Francourt (Page 49 of transcript of proceedings), the occupier of C1682 and enjoys access over parcel C5710. Although she is not the owner of the title to land parcel C1682, she is the owner of the house thereon.

[14] It is further admitted on ground one that since the Defendant in her counterclaim claimed *assiette de passage* over parcel C5710 for the benefit of parcel C1682 and that she and her family have a right of way to exercise the right of way, then she acquiesced that she had interests and rights in the said parcel C1682 in the form of the right of way hence cannot complain that she is not properly before the court as owner/neighbour as envisaged in article 682 of the Civil Code.

[15] With regards to the second ground of appeal, it is submitted that the evidence shows that the road occupies a significant part of the plaintiffs' land and prevents her and her

children from building a house thereon and that the road encroaches on the plaintiff's land since it is not denied by the Defendant.

[16] Reference is made to the claim of the Defendant of *enclavement* in her counterclaim and the expert evidence on file (Exhibits P1 Michel Leong's Land Surveyor's report) as confirmed by Yvon Fostel and wherein they both agree that a road and parking can be built, then also some steps (footpath) going down to the Defendant's house. Accordingly, this dis-enclaves parcel C 1682 as it has adequate access to the public road.

[17] *L'assiette de passage* as claimed in favour of Defendant is denied by the Appellant who further submits that the learned Judge had failed to make a distinction between the separate causes of action as supported by the provisions of articles 682 and 685 of the Civil Code.

[18] With reference to the third ground of appeal, Respondent submits that the evidence shows that the Defendant, with the help of her sister who came from France, concretized the road.

[19] Finally, with regards to the fourth ground of appeal, counsel submits that Defendant although she did not build the road entirely, with her household, enjoys exclusive use and control of the said road. .

[20] The Appellant moves for the appeal to be allowed and an order of removal of the road from her land.

RESPONDENT'S SUBMISSIONS

[21] The Respondent by way of written submissions of the 29 July 2022 submits as follows:

[22] On the first ground of appeal, the Learned Judge arrived at the legal conclusion namely, that the Respondent is neither an heir nor a representative of the heirs Pierre Francourt despite residing on land parcel C 1682. Further, that she was neither appointed executor

of the estate of Pierre Francourt nor documentation to that effect provided in evidence to show that she was its legal representative.

[23] The court relied on the authority of *Ragain v Nancy SSC Civ 171/1990 3 February 1992* in which the word neighbour in article 682 (supra) was defined to mean an owner of the land. In that regard, an action for the granting of a right of way should be brought against the neighbouring owner and not the occupier of the property. Hence, it is submitted that the Appellant ought to have brought an action against the heirs of Pierre Francourt.

[24] In respect to the second ground of appeal, the Respondent submits that the Learned Judge determined that no encroachment was caused by the Respondent because she did not construct the alleged encroachment. The evidence borne out in the statement of defence shows that the road was by the government of Seychelles.

[25] In response to the second ground of appeal, it is submitted that the learned Judge determined specifically that the Respondent did not construct the said road when in fact the road was constructed by the Government of Seychelles hence no evidence supporting the supposition that the Respondent constructed the road exists.

[26] The fourth ground of appeal is contested and the Respondent submits that the Learned Judge arrived at the correct conclusion as it is trite that pleadings must be in accordance with the law for its consideration.

ANALYSIS OF THE GROUNDS OF APPEAL

[27] Grounds one and four, essentially deal with the representative capacity of parties before the court. Since any of these two grounds can dispose of the matter, I shall address the first and fourth grounds together.

These grounds are:

- i. The Court failed to recognise that the Defendant was the official representative of the estate of Heirs Pierre Francourt and the occupier of land parcel C1682 and that Defendant built the road on parcel C5710 and is

the owner of the road in law; and that since in her counterclaim defendant admits

- ii. Plaintiff could not bring an action against Defendant. This ground questions the locus standi of Plaintiff to act in these proceedings.

[28] Locus standi entails the right of a litigant to act or be heard before a court. In general, this depends on whether the parties have a direct and substantial interest in the matter, as well as the requisite capacity to litigate.

[29] Closely related to *locus standi* is the question of whether the party in question has the legal standing. This is concerned with whether or not the particular litigant in a matter is entitled to prosecute or defend the matter in court.

[30] Legal standing is a legal hurdle that must be overcome if a litigant is entitled to claim the court's time and to put the opposing litigant in court proceedings. Broadly speaking, a litigant must have the capacity to litigate and sufficient interest in a matter. As I demonstrate below, the cited Defendant had no standing to defend the matter or the mental capacity to defend the plaintiff. Ultimately, there was no Defendant before the court a quo or before the Court of Appeal.

[31] It is on record that Theresia Chang Pen-Tive (nee Boniface) was appointed as Executrix estate of the late Antoine Gabriel Chang Pen-Tive on the 16 of June 2004 by an order of the Supreme Court in terms of Article 1026 of the Civil Code. Alice Dorice Chang Pen-Tive (the second Plaintiff) is a co-owner of parcel C5710. There is no contest regarding the Plaintiff's legal standing in bringing this plaintiff and in defending the counter-claim.

[32] The same cannot be said of Defendant. Counsel E. Chetty on behalf of Defendant submitted that the Defendant is an elderly lady, who suffers from dementia. He promised to bring a medical certificate to this effect.¹ The fact that Defendant suffers from dementia was not cited Defendant know each other well. Both parties were aware of the

¹ Proceedings, 15 November 2018, page 1.

Defendant's medical condition and at one point the proceedings were halted to give the Defendant time to get better.

[33] Counsel Chetty further stated before the Court that the Defendant was not going to testify and instead mentioned that someone else and an expert were going to do so. Again, the reason cited was that Defendant was not of sound mind to do so. No medical report was submitted, despite a promise by Counsel Chetty to do so.

[34] Bennett Alphonse (son of the Defendant) testified that his mother suffers from dementia and from time to time, she experiences memory loss.

[35] While a medical report would have assisted the court a quo to make a proper assessment of the effect of dementia on the capacity of the Defendant, I take judicial knowledge of the fact that dementia affects the cognitive ability of a person.

[36] Given this evidence, the lack of a medical report may not have been necessary to prove that she lacked the capacity to defend the case.

[37] The last issue is whether the Defendant/Respondent is in law, legally entitled to defend this plaint.

[38] Mr. Bennet Alphonse testified that Defendant is not the representative of the heirs of Pierre Francourt. His further testimony was to the effect that since the passing of his father who was the executor of the estate of Heirs Francourt, no one had been appointed in his place as an executor of the estate. It was not clear from the evidence when his father passed away or why an executor has not been appointed to date. In my view, the trial judge correctly pointed out that Mr. Bennet Alphonse's testimony was on facts and not in any representative capacity of the Defendant.

[39] Article 489 of the Civil Code (Cap 33), provides that a person of full age who is habitually feeble-minded, insane, or lunatic shall be interdicted, even if he has lucid intervals. Despite a lack of a medical report, the evidence before the court was clear that the Defendant suffers from dementia. The effect of Article 489 is that even if the defendant had temporary phases of dementia, she would be interdicted. Counsel Chetty

pointed out that no interdiction has been made regarding Defendant and that no one could formally represent her.

[40] I fail to see how this matter proceeded from that stage going forward. The correct approach for the parties was to bring an application for interdiction and in the same application request the appointment of a guardian in terms of Article 505 or for an appointment of a sub-guardian in terms of Article 507 of the same Code. This again would only apply if the Defendant had been the representative of the estate. The failure to appoint an executor of the estate is fatal to the case.

[41] . Sadly, the Appellants did not address this ground at all in their submissions.

DECISION

[42] In the circumstances, as the Respondent was not properly before the court the appeal is dismissed

ORDER

[43] As a result, this Court orders as follows:

- (i) The appeal is dismissed
- (ii) No order is made as to costs.

S. Andre, JA

I concur

Dr. M. Twomey-Woods, JA

I concur

F. Robinson, JA

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