COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] SCCA 72 (16 December 2022)
SCA 51/2020
(Arising in CS 110/2018)

In the matter between

Margarate Malbrook

Hanzel Zoe **Appellants**
(both rep. by Mr Rajasundaram)

And

Doreen Ellen Bouchereau **Respondent**
(rep. by Mr Sabino)

Neutral Citation: *Malbrook and Anor v Bouchereau* (SCA 51/2020) [2022] SCCA 72 (Arising in CS 110/2018) (16 December 2022)
Before: Robinson, Tibatemwa-Ekirikubinza, Andre JJA
Summary: delict — liability — trespass onto land — threatening violence — erecting barriers — obstructing entry — damages
Heard: 3 December 2022
Delivered: 16 December 2022

ORDER

1. The appeal stands dismissed in its entirety

2. We uphold the orders of the then learned Chief Justice

3. With costs in favour of the Respondent in the Supreme Court and the Court of Appeal

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JUDGMENT

Robinson JA

THE BACKGROUND

1. This is an appeal from a judgment of the then learned Chief Justice who, in an action in delict for damages brought by the Respondent (the then Plaintiff) against the then Defendants, gave judgment in favour of the Respondent.

2. Having reviewed the evidence and basing herself on comparable damages awarded in similar cases, the then learned Chief Justice made the following orders in favour of the Respondent —

> *"[51]* […] *given the level of sustained harassment and numerous acts of trespass and the cutting of vegetation on the Plaintiff's land, the sum of SR25,000 should jointly be paid to the Plaintiff by the Second and Third Defendants. I also find that the Third Defendant should pay the Plaintiff a further sum of SR10,000 for the threat of violence with a knife against her for which he was convicted. As regards the damages to be paid with regard to the illegal barrier erected by the Second and Third Defendants which prevented the Plaintiff from reaching her home for a period of seven months, I award her the further sum of SR30,000 and the whole with interest and costs.*
>
> *[52] I also issue a permanent injunction restraining the Second and Third Defendants from harassing the Plaintiff and from further cats of trespass onto and obstruction to the Plaintiff's land and home.*
>
> *[53] In summary, the following orders are issued:*
>
> 1. *The Second and Third Defendants are jointly to pay the Plaintiff the total sum of SR55,000 for trespass onto and obstruction to her Property*

2. *The Third Defendant is to pay to the Plaintiff a further sum of SR10,000 for threatening her with violence*

3. *The Second and Third Defendants are to pay the Plaintiff interests and costs*

4. *A permanent injunction is issued against the Second and Third Defendants restraining them from harassing the Plaintiff and from further cats of trespass onto and obstruction to the Plaintiff's land and home".*

3. The then learned Chief Justice dismissed the allegations against the first Defendant because the evidence showed that she was out of the country at the material time and the fourth and fifth Defendants on the ground that there was no evidence to support the allegations made against them.

4. The Respondent's case before the then learned Chief Justice was as follows. The Respondent and the Defendants are neighbours. The Respondent is the owner of the land comprised in title number V7259. The first Defendant is the owner of the land comprised in title number V6528. The first Appellant, the then second Defendant, is the owner of the land comprised in title number V6298. The second Appellant, the then third Defendant, is the son of the first Appellant. The fourth and fifth Defendants are the daughters of the first Defendant.

5. The amended plaint stated that the Appellants and the first, fourth and fifth Defendants have interfered with the Respondent's ownership, peaceful possession and enjoyment of her property and, hence, have committed a *"faute"*, particularised as follows —

(i) the first Defendant and the Appellants, on numerous occasions, had obstructed the private access to and prevented the Respondent from reaching her property;

(ii) the Appellants have trespassed and cut down vegetation on the Respondent's property on various occasions;

(iii) the second Appellant coming to her gate to threaten her and throw a knife at her;

(iv) the fourth and fifth Defendants instructing persons to go on the Respondent's property to cut down vegetation and abuse her verbally and fight with her on her property;

(v) the Appellants and the first, fourth and fifth Defendants were burning rubbish and debris on the boundary of the Respondent's property, causing smoke to blow into her property and home.

6. It is also stated in the plaint that the Respondent had to go to the police for protection, leave her car in St Louis, and walk to her house when the private access was blocked on numerous occasions and for seven months. As the Appellants and the first Defendant had blocked the private access, she had to jump down a *"ravine"* and duck under a corrugated iron sheeting to reach her home.

7. The amended plaint sought damages in the total sum of SCR750,000. The Respondent asked the Court to make the following orders in her favour —

"A. *that the Defendants and their agents are not to obstruct the access road to the Plaintiff's Property, and*

B. *that the Defendants and their agents stop passing over the Plaintiff's Property, and*

C. *that the Defendants and their agents stop cutting down the vegetation, and*

D. *that the 1st and 2nd Defendants cease threatening the Plaintiff with violence, and*

E. the Defendants jointly and severally pay the Plaintiff the sum of SR750,000.00 as damages with costs, and

F. any other order the court deems fit."

8. To the Respondent's claim, the Appellants and the first, fourth and fifth Defendants entered a statement of defence. They denied the Respondent's allegations and pleaded, in essence, that the Respondent enjoys a different right of way from them; that they did not have to access the Respondent's property; and that she has not suffered damages as alleged or at all.

THE APPEAL

9. The Appellants have appealed against the judgment on the following grounds —

*"**Ground No. 1**: the learned Judge in the court below failed to appreciate the pleadings and the evidence of the Appellants that there was no necessity at all to access through the land (V7259) of the Respondent while the Appellants' portion of land (V6298) at all material times served with the motorable access road to reach their (Appellants) property.*

***Ground No. 2**: The learned Judge ignored the findings as to the crucial evidence of the Government Land Surveyor as to the encroachment in that his evidence of no encroachment has totally been rejected.*

***Ground No. 3**: The learned Judge erred in her decision that non-registration of the status of right of way on the registration of title as against the registration in the survey plan would be adverse to the rights of the Appellants.*

Ground No. 4*: The decision of the learned Chief Justice (then) equating the 2nd Appellant's payment of the fine in a criminal case to the suit so as to decide that he committed the trespass.*

Ground No. 5*: The learned Judge (then) failed to appreciate the admission of the Respondent that her level of land is much higher on ground and that of the Appellants are on a lower level below the Respondent's property, as being relevant to the issue of the trespass and ignored the crucial value attached to this admission.*

Ground No. 6*: The only rationale besides the other rationale, the learned Judge arrived at the decision of the trespass was mere photographs (for both matters of grass cutting and existence of barrier) and in the absence of proper weight attached to the photographs, the decision is erroneous.*

Ground No. 7*: the learned Judge failed to appreciate that there is no single independent witness to corroborate the Respondent's testimony both in terms of liability and quantum but rushed with her decision and judgment against the Appellants without having any merits.*

Ground No. 8*: The learned Judge erred in her findings on the quantum of the award in the sum of SR65,000 (SR 55,000.00 and SR10,000.00) without any rational and logic however opined that the damages are payable on a compensatory basis and not on punitive method while the award against the 2nd Appellant is purely punitive and is kind of a double award against him."*

10. Counsel on both sides offered skeleton heads of argument and made additional oral submissions in Court thereon, which we have considered with care.

Analysis of the contentions of the parties:

Grounds one, two and five of the grounds of appeal

11. Counsel for the Appellants has combined grounds one, two and five of the grounds of appeal in his skeleton heads of argument. We consider these grounds of appeal in the same order.

12. Concerning grounds one, two and five, the skeleton heads of argument contended that the reasoning and conclusions of the then learned Chief Justice concerning the issues of trespassing onto the Respondent's land and obstructing the Respondent's access to and preventing her from reaching her home; and that the second Appellant violently threatened the Respondent were wrong for the following reasons.

13. The Appellants did not have to access the Respondent's property as they were using a road across Mr Hoareau's parcel V7258 to access their property. Also, the then learned Chief Justice ignored the evidence of Mr Nicolas Oniare, a government land surveyor, which showed that there had been no encroachment onto the Respondent's property. Further, the then learned Chief Justice was wrong to ignore the Respondent's evidence that her property in relation to that of the Appellants is at a higher elevation.

14. In his skeleton heads of argument, learned Counsel for the Respondent contended that the then learned Chief Justice did not err in the conclusions she arrived at in her judgment as there was ample evidence of the Appellants trespassing onto the Respondent's property and to support the Respondent's claim that she was threatened violently. We consider the submissions of Counsel for the Respondent in support of the contentions raised in his skeleton heads of argument with respect to these grounds of appeal at the point where I will resolve the issues raised by the grounds and the submissions.

15. Considering the evidence in *toto*, we do not accept the submissions of learned Counsel for the Appellants that the then learned Chief Justice erred in the conclusions she arrived at in her judgment. As submitted by learned Counsel for the Respondent, the Appellants admitted to committing acts of trespass on the Respondent's property. They testified that they had accessed their home through the Respondent's property until she had stopped

them from doing so by building a retaining wall on her parcel V7259. According to the evidence, the Appellants reached their home by the same access road over Mr Hoareau's parcel V7258 and then onto the Respondent's property onto the first Appellant's parcel V6298. Importantly, the evidence of the Chief Executive Officer of the Town and Country Planning Authority, Mr Joseph Francois, showed that the Appellants have separate access to their property provided by the Government of Seychelles on parcels V17619 and V9118. The first Appellant testified that she could use this access to reach her home. Also, Mr Michel Leong, a land surveyor, testified that parcels V7258 (Mr Hoareau's parcel), V7259 (the Respondent's parcel) and V7260, subdivisions of parcel V4953, enjoy a right of way delineated on the southwest corner of parcel V4953.

16. Next, concerning the contention of learned Counsel for the Appellants that there had been no encroachment onto the Respondent's property as testified by Mr Oniare, we accept the submission of learned Counsel for the Respondent that this evidence is irrelevant as the Respondent's pleadings do not raise any encroachment issue. We hold that the then learned Chief Justice was correct to ignore the evidence of Mr Oniare on the issue of the alleged encroachment.

17. The contention raised in ground five is devoid of merit. We state that whether or not the Respondent's property in relation to that of the Appellant is at a higher elevation is irrelevant. As explained above, there is ample evidence of the illegal acts found to have been committed by the Appellants, as concluded by the then learned Chief Justice in her judgment.

18. In light of the above analysis, we see no basis to interfere with the conclusions the then learned Chief Justice arrived at in her judgment. Hence, we dismiss grounds one, two and five of the grounds of appeal.

Ground three of the grounds of appeal

19. Ground three raised the issue of the effect of non-registration of a right of way, which the Appellants claimed had been created on the Respondent's property to benefit the first

Appellant's property. The Appellants contended that the right of way had been demarcated on the survey plan. Learned Counsel for the Appellants referred to exhibits P1 and P4, cadastral plans of parcels V6528 and V6298, which he claimed showed the said right of way.

20. As we understand it, learned Counsel for the Appellants suggested that an easement is a registrable right. However, he submitted that it is through no fault of the Appellants that the said right of way had not been registered.

21. Learned Counsel for the Respondent submitted that an easement is a registrable right and that, in any event, the first Appellant's property is served by a right of way on parcel V9118 and not served by any right of way on the Respondent's property as alleged.

22. Having considered the submissions of Counsel for the Appellants, we conclude that they are devoid of merit. We set out the reasons for our view that the then learned Chief Justice was correct in her conclusions that there is ample evidence of the illegal acts found to have been committed by the Appellants.

23. We remark that the question of whether or not an easement is a registrable right does not arise for consideration. We find ample evidence to show that the Appellant's property is not served by a right of way on the Respondent's property as alleged by them. Messrs Leong and Oniare testified that the Appellant's property is served by a right of way on parcel V9118. Hence, the Appellant's challenge to the finding of the then learned Chief Justice in her judgment that the right of way has not been registered is irrelevant.

24. We mention in passing that this Court, in the case of *Aglae v Robert SCA74/2018* (judgment delivered on 13 August 2021), held that an easement is a registrable right and is required to be created in a specific form.

25. For the reasons stated above, we dismiss ground three of the grounds of appeal.

Ground four of the grounds of appeal

26. Concerning ground four of the grounds of appeal, learned Counsel for the Appellants contended that the then learned Chief Justice erred in relying on evidence from a criminal case to prove that the second Appellant had been convicted of the offence of threatening violence to the Respondent. He went on to submit that the then learned Chief Justice wrongly ignored the evidence of the second Appellant that he pleaded guilty to the offence of threatening violence on the instruction of his Counsel of record. We remark that learned Counsel for the Appellants neither substantiated these submissions in his skeleton heads of arguments nor at the appeal.

27. Hence, we cannot consider this ground of appeal, which stands dismissed.

Grounds six and seven of the grounds of appeal

28. Counsel for the Appellants has combined grounds six and seven of the grounds of appeal in his skeleton heads of argument. We consider these grounds of appeal in the same order.

29. Concerning these grounds, learned Counsel for the Appellants argued that the then learned Chief Justice erred in relying on the photograph exhibits to conclude that there had been no encroachment. He contended that the then learned Chief Justice should have instead relied on the testimony of Mr Oniare. We find this contention to be without any merit. The conclusions we have arrived at under grounds one, two and three also apply to these grounds.

30. Moreover, as submitted by learned Counsel for the Respondent, photograph exhibit P14 (2) showed the Appellants' illegal acts of erecting the barrier with others preventing the Respondent from accessing her home. The Appellants admitted in evidence to erecting the said barrier. The said barrier obstructed the Respondent's only motorable access to her property for seven months, as the then learned Chief Justice found on the evidence. We also refer to photograph exhibit P18, which showed the Appellants' illegal acts of trespass

and cutting vegetation on the Respondent's property. The first Appellant in evidence also admitted to the acts of trespass onto the Respondent's property and cutting vegetation.

31. For the reasons stated above, we find that there is no basis for us to interfere with the conclusions of the then learned Chief Justice. Hence, we dismiss grounds six and seven of the grounds of appeal.

Ground eight of the grounds of appeal

32. Ground eight of the grounds of appeal questioned the assessment and award of damages made by the then learned Chief Justice against the Appellants.

33. It is trite law that an appellate court will not alter damages awarded by a trial court merely because it thinks it would have awarded a different figure, but rather the appellate court would interfere with the amount of damages awarded only if: *(i)* the trial court acted on the wrong principle; or *(ii)* the amount of damages is extremely high or extremely low so as to make it an erroneous estimate: see, for example, *Michel & Ors v Talma & Ors (SCA 22/10) and Government of Seychelles v Rose (SCA14/2011)*.

34. The skeleton heads of argument essentially submitted that the then learned Chief Justice erred in awarding damages against them in that the award of damages ran afoul of the principle that damages in delict are compensatory and not punitive. He also contended that the then learned Chief Justice had not justified the award of damages. We observe that learned Counsel for the Appellants did not substantiate these contentions in his skeleton heads of argument. Also, he did not provide closing submissions about comparable damages awarded in similar cases in the Court below.

35. The then learned Chief Justice had in mind some cases concerning comparable damages at the time of assessment and making of the award, namely *Isidore v Quilindo (61 of 2007)[2008]SCSC15 (15 October 2008)* Renaud J made an award of SCR15,000 for trespass; *Thyroomooldy v Nanon (60 of 2008)[2009] SCSC 3 (08 November 2009)* the then learned Chief Justice Egonda-Ntende awarded the sim of SCR15,000 for trespass; *Frichot v Otar (CS93/2016) [2019] SCSC 665 (02 August 2019)* Andre J made an award

of SCR15,000 for trespass; in *Albert & Anor v Etheve & Ors* (CS 31/2016) [2020] SCSC 139 (19 February 2020) she awarded SCR2,500 for trespass and SCR5,000 for moral damages.

36. Considering the approach taken by the learned Chief Justice, we hold that she violated no principle in assessing and making the award of damages and the award of damages was far from being manifestly high or excessive. In the final analysis, we hold that there is no basis for us to interfere with the award of damages in this case.

37. Hence, ground eight of the grounds of appeal stands dismissed.

DECISION

38. For the reasons stated above, we dismiss the appeal in its entirety and uphold the orders of the then learned Chief Justice.

39. With costs in favour of the Respondent in the Supreme Court and the Court of Appeal.

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F. Robinson, JA

I concur

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Dr. L. Tibatemwa-Ekirikubinza, JA

I concur

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S. Andre, JA

Signed, dated and delivered at Ile du Port on 16 December 2022