

## COURT OF APPEAL OF SEYCHELLES

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**Reportable**

[2023] SCCA 22 (26 April 2023)

SCA 24/2021

(Arising in CS 19/2014)

**Cyril Payette**  
(rep. by Mrs Domingue)

Appellant

and

**Joan Nicette**  
(rep. by Mr Rajasundaram)

Respondent

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**Neutral Citation:** *Payette v Nicette* (SCA 24/2021) [2023] SCCA 22 (Arising in CS 19/2014) (26 April 2023)

**Before:** Fernando President, Robinson, Tibatemwa-Ekirikubinza, JJA

**Heard:** 12 April 2023

**Summary:** Encroachment and illegal constructions — Extinctive prescription — Acquisitive prescription. Appeal is dismissed in its entirety. No order as to costs

**Delivered:** 26 April 2023

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### ORDER

The appeal is dismissed in its entirety.

- A. I uphold the order of the learned Chief Justice declaring that the Appellant has illegally constructed the structures on part of parcels V1184 and V2297, namely part of a dwelling house, a septic tank and a boundary wall (parcel V1184) and the retaining wall (parcel V2297).
- B. I uphold the order of the learned Chief Justice issuing a mandatory injunction compelling the Appellant to demolish part of the dwelling house, a septic tank and a boundary wall on parcel V1184. The plan of the extent of the encroachments is shown on exhibit P4 and attached to this judgment.

- C. For the avoidance of doubt, the learned Chief Justice did not order the demolition of the retaining wall on parcel V2297.
- D. I uphold the order of the learned Chief Justice issuing a — *"prohibitory injunction against the Appellant, personally and against his agents or any person authorised by him whomsoever from trespassing or encroaching on Parcel V1184 and V2297."*
- E. I make the following orders hereunder.
- F. I quash the order made by the learned Chief Justice that the Appellant shall demolish the encroached structures within six months from the date of the Supreme Court judgment.
- G. For the order of the learned Chief Justice, I make an order that the Appellant shall demolish the encroached structures within eight months of the date of this Court of Appeal judgment.
- H. In case the Appellant fails to take the above steps within the period of eight months from the date of this Court of Appeal judgment, the Respondent is authorised to carry out the demolition of the encroachments and all incidental works and shall claim the costs for the works from the Appellant as duly certified by a quantity surveyor.
- I. With no order as to costs.

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## JUDGMENT

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### **Robinson JA**

(Fernando President, Dr. L. Tibatemwa-Ekirikubinza JA concurring)

### **The background**

1. This appeal comes before the Court of Appeal from a judgment of the learned Chief Justice delivered on the 28 June 2021, in case reference CS19/2014.

2. It is undisputed that the Appellant owns parcel V1215, situated at Mont Buxton, Mahe, which adjoins the Respondent's (then Plaintiff's) parcels V1184 and V2297, situated at Mont Buxton, Mahe.
3. The main issues before the learned Chief Justice and in this appeal are (i) whether or not the Respondent's action is time-barred, and (ii) whether or not the Appellant (then Defendant) had possession of part of parcels V1184 and V2297 on which the encroachments are located of the required quality to entitle him to become the owner of part of parcels V1184 and V2297 by acquisitive prescription.
4. The Appellant admitted the encroachments on part of parcels V1184 and V2297.
5. The background facts leading to this appeal are as follows.

#### **The case for the Respondent and the Appellant**

##### *The Respondent's action*

6. The Respondent brought proceedings against the Appellant for illegal construction on parcels V1184 and V2297.
7. It is undisputed that the Respondent was and is at all material times the fiduciary of parcels V1184 and V2297 and a residential house situated thereon. The parcels V1184 and V2297 and the house situated thereon are co-owned by the Respondent and her four children, namely Randolph Dilip Serge Nicette, Sheryl Norline Therese Nicette, Danielle Chantale Nicette and Rene Thomas George Nicette.
8. The paragraph [4] of the plaint claimed that the Appellant has illegally and without the necessary consent partly built and/or caused to be built on parcel V1184 part of a dwelling house, a septic tank and a wall.
9. The paragraph [5] of the plaint claimed that the Appellant has illegally and without the necessary consent built a retaining wall on parcel V2297.

10. The Respondent averred that the Appellant, by a letter dated 4 October 2011, written by Attorney-at-Law Karen Domingue, acknowledged the right of her late husband, Eugene George Brian Nicette and that of herself to parcels V1184 and V2297 as being the co-owners of the said parcels of land. The Respondent also averred that the Appellant, by the said letter acknowledged the encroachments on parcels V1184 and V2297.
11. The Respondent wants the Appellant to demolish all the encroached structures referred to at paragraphs [4] and [5] of the plaint (referred to at paragraphs [8] and [9] hereof) built on parcels V1184 and V2297. The Respondent asked the learned Judge to make the following orders in her favour —
  - (i) *declare that the Defendant has illegally constructed the structures referred in paragraph 4, on parcel V1184 and that referred in paragraph 5, on parcel V2297;*
  - (ii) *issue a mandatory injunction, compelling the Defendant to demolish all the said structures;*
  - (ii) *order the Defendant to pay cost to the Plaintiff;*
  - (iv) *make any other order this Honourable Court deems fit and necessary in the circumstances of the case."*
12. For his part, the Appellant raised two pleas in *limine litis* in his amended defence that the Respondent's action is time-barred; and that he has acquired part of parcels V1184 and V2297 by way of acquisitive prescription.
13. Concerning the merits, save for the admitted facts, the Appellant denied the Respondent's claims.
14. The paragraph [2] of the amended defence averred — "[...] *that his father bought parcel V1215 in October 1974 and after he passed away the said Parcel was transferred on his father's heirs who were represented by his mother as executrix of the estate of his late father. The Defendant avers that he became owner of Parcel V1215 in 1989 after having purchased the same from his mother and siblings. At the time, and before 1974, there was already an existing family home on the said Parcel. However, in 1993 the Defendant*

*demolished part of the existing house and re-built a house where the existing family home was built. At the same time the Plaintiff added a wall to secure his property."*

15. The paragraph [4] of the amended defence denied that the Appellant built illegally on the Respondent's property, as contended at paragraph [4] of the plaint. He averred that the house and the septic tank were built over twenty years ago; and that he rebuilt part of the house and the wall in 1993.
16. The paragraph [4] of the amended defence claimed that the Appellant has been in continuous, uninterrupted, peaceful, public and unequivocal occupation of part of parcel V1184, an approximate area of 100 square metres, for more than twenty years.
17. With respect to the Respondent's allegation that the Appellant has illegally and without the necessary consent built a retaining wall on parcel V2297, paragraph 5 of the amended defence averred as follows — "[p]aragraph 5 is admitted insofar as the defendant did not obtain the Plaintiff's permission to build a retaining wall and the reason for that was because the Defendant was unaware that the retaining wall would fall partly on V2297. The rest of the averments in Paragraph 5 is denied and the Defendant repeats paragraphs [4] and [5] above".
18. He accepted to have acknowledged by a letter sent to the Respondent that part of his structures was built on the Respondent's property. He averred that the Respondent did not reply to his letter.
19. For the reasons stated in the pleas in *limin litis* and amended defence, the Appellant "*objects to his structures being demolished*".

*The Appellant's action*

20. The Appellant asserted his ownership of an approximate area of 100 square metres of parcels V1184 and V2297 by acquisitive prescription.
21. The paragraphs [8], [9] and [10] of the counterclaim read as follows —

- "8. *The Defendant repeats all the averments made in paragraphs 1 to 7 of the Defence and the Plea in limine litis above.*
9. *The Defendant avers that he has been in occupation and possession of that part of Parcels V1184 and V2297, an approximate area of 100 square metres, for more than 20 years. The Defendant avers that his possession has been continuous, uninterrupted, peaceful, unequivocal and that he has acted in the capacity of owner of Parcels V1184 and V2297, which is adjacent to the Defendant's parcel of land, namely V1215.*
10. *The Defendant is desirous that the Court declares that he has acquired that part of Parcel V1184 and V2297 by way of acquisitive prescription and that he is declared its rightful legal owner."*

22. The Appellant asked the learned Chief Justice to make the following orders in his favour

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- "a. *An order that the Plaint of the Plaintiff is time-barred, thus dismissing the Plaintiff's Plaint with costs.*
- b. *An order declaring that the defendant is the rightful owner of part of Parcels V1184 and V2297, of the extent of 100 square metres, in that the Defendant has acquired that part of Parcels V1184 and V2297 in the capacity of owner for more than 20 years.*
- c. *Any other orders that this court deems fit and proper in the circumstances of this case."*

23. In reply to the counterclaim, the Respondent averred in the amended defence to the counterclaim that the Appellant has not been in continuous, uninterrupted, peaceful, public and unequivocal possession of part of parcels V1184 and V2297, which adjoin parcel V1215, and that he has not acted in the capacity of the owner of the said part of parcels V1184 and V2297.

24. The Respondent further averred that (i) the Appellant, in a letter dated the 4 October 2011 written by Attorney-at-Law Karen Domingue for and on his behalf, acknowledged the right of the Respondent and the late Mr Brian Nicette as the owners of parcels V1184 and V2297 including the part of the said parcels on which the encroachments are located, and (ii) the acknowledgement made in the letter of the 4 October 2011 interrupted the running of the prescription.

## The trial court's analysis and determination

25. In light of the pleadings, the evidence and the written submissions of the parties, the learned Chief Justice considered whether or not the Appellant has acquired part of parcels V1184 and V2297 on which the encroachments are located by acquisitive prescription and whether or not the Respondent's action is time-barred.
26. After considering the evidence *in toto*, the learned Chief Justice concluded *inter alia* that the Appellant has not effected the possession of part of parcels V1184 and V2297 in the capacity of an owner as he had acknowledged the right of the Respondent as the owner of parcels V1184 and V2297, including part of the said parcels on which the encroachments are located.
27. For his conclusion, the learned Chief Justice relied *inter alia* on two letters (i) the letter dated 4 October 2011, written by Attorney-at-Law Karen Domingue, for and on behalf of the Appellant, exhibit P3 and (ii) exhibit D1, a letter dated 2 December 2011, written by Attorney-at-Law Karen Domingue, for and on behalf of the Appellant. The letter, exhibit P3, acknowledged the right of the Respondent and the late Brian Nicette as the owners of parcels V1184 and V2297, including part of parcels V1184 and V2297 on which the encroachments are located.
28. The learned Chief Justice also concluded that the acknowledgement interrupted the running of the prescription. In the words of the learned Chief Justice — "*the effect of this admission stopped the time running against the Plaintiff as of the 4<sup>th</sup> October, 2011, leaving him short of 20 years occupation*", at paragraph [27] of the judgment.
29. The exhibit P3, reproduced verbatim in the judgment, stated —

*"4<sup>th</sup> October 2011*

*Mr Robert Hoareau*

*Reef Estate*

*Anse Aux Pins*

*Mahe*

*Dear Sir, I act for Mr. Cyril Payette.*

*My client is the owner of parcel V215 which is adjacent to parcels V1184 and V2297 which belongs to your sister Mrs Joan Nicette and her late husband Mr. Brian Nicette. Following a search done on these 2 parcels of land it appears that you are still the fiduciary for these 2 parcels of land and it is in this capacity that I am instructed to send you this letter.*

*I am instructed that after the death of your parents, Mrs Joan Nicette and her late husband bought all the shares which belonged to the heirs and they became the sole owners of parcels V1184 and 2297 in May 2011. After the purchase of the properties I am instructed that a survey of the properties was commissioned by Mr. and Mrs Nicette. This survey was conducted in the presence of my client. The conclusion of the survey was that my client had encroached by building a retaining wall, part of his house, septic tank and water tank on Mr and Mrs Nicette's property.*

*My client instructs me it was only on the day of the survey that he knew for the first time that he had encroached on Mr and Mrs Nicette's property. I am instructed that my client made a genuine and bona fide mistake as had he known he would never have taken the risk of building on someone else's property. In fact my client has obtained planning permission and he has built his house since 1992. My client has never been approached and told that he had encroached on parcels V1184 and V2297.*

*My clients instructs me that he wishes to find an amicable solution to this matter. Consequently, my client would wish to have a meeting with the owner of the property and yourself, as fiduciary, in order to try to resolve this matter. My client understands fully that there will be a need for compensation and he is ready and willing to discuss this and any other relevant issues. In the spirit of good neighbourliness, I am instructed to request that you and/or Mrs Nicette contact me within fourteen (14) days of the date hereof.*

*In the event that I do not hear from either of you within this time period I will have no option but to advise my client that you do not wish to settle this matter amicably and I shall advise my client on his other legal remedies. I trust it will not come to that and I look forward to us being able to settle this matter in an amicable and speedy manner.*

*Yours faithfully,*

*Karen Domingue".*



30. Given his conclusions, the learned Chief Justice considered whether or not to order the demolition of the encroachments based on Article 545 of the Civil Code of Seychelles and the principles set out in *Mancienne & Another v Ah-Time & Anor* (SCA9/2010) [2013] SCCA8 (3 May 2013) and *Nanon v Thyroomooldy* SCA41/2009 (29 April 2011), which deal with boundary encroachments.
31. I pause here to point out that the Appellant claimed in his written submissions before the trial court that it should refuse the Respondent's demand for demolition because it would cause great injustice; and that he had acted in good faith.
32. The learned Chief Justice considered the Appellant's submissions in light of the following principles set out in **Mancienne & Anor** [supra] —

- "1) *If one builds on someone else's property a structure which entirely stands within the boundaries of that property, it will be art 555 of the Civil Code of Seychelles under which the fate of the structure and the indemnity, if any, to be paid will depend.*
- 2) *However if one builds partly on one's property and the structure goes over the neighbour's boundary encroaching on his land, art 555 finds no application.*
- 3) *In such a case, the neighbour can insist on demolition of that part of the construction which goes over the boundary and the Court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment.*
- 4) *The fact that the encroachment was done in good faith or brought about by mistake as to the correctness of the boundary would have no effect on the Court's duty to order demolition: see Cour de Cassation, D1970.426 (Civ 3°, 21 no. 1969); "Grands Arrêts de la Jurisprudence Civile" by Henri Capitant for French law; *Tulsidas & Cie v Cheekhooree* 1976 MR 121; *Boodhna v Mrs R R Ramdewar* 2001 MR 116; *Lowtun v Lowtun* 2001 Int Court 1; *Thumiah Naraindass v Thumiah Avinash Chandra* 2009 Int Court 82, for Mauritian law; article 992 of the Civil Code of Quebec and *Micheline Pinsonnault v Maurice Labrechque* [1999] R.D.1 113 (C.S.) cited in *Boodhna v Mrs R R Ramdewar* [supra] for the law of Quebec.*
- 5) *But where grave injustice may result in certain exceptional cases: for instance, for a small area of land encroached upon, part of a huge*

*building would have to be demolished causing damage out of proportion to the value of the land encroached upon, the justice of the demolition will have to be tempered with mercy.*

- 6) *In such a case, the encroacher would need to show additionally that he acted in good faith, within the rules of construction, did not otherwise break any law and the demolition would cause great hardship.*
- 7) *In such a case, the Court would not order demolition and would allow damages and compensation commensurate with the extent of the encroachment.*
- 8) *Where the owner of the land insists on a demolition order in such a case of grave injustice, the encroacher may plead abus de droit as against the owner and insist on compensating him in compensatory damages for the encroachment.*

[...]

[11] *The decision of Nanon goes on to explain the reason why demolition is the rule. Any lesser sanction would fly in the face of art 545 of the Civil Code which provides:*

*No one may be forced to part with his property except for a public purpose and in return for fair compensation."*

33. Having analysed the evidence in light of the legal principles, the learned Chief Justice concluded that —

*"[33] The court has gone in locus which has given it an accurate view of the extent of the encroachment. Exh D8 (C) shows this relevant area when it comes to the wall and part of the boundary wall. the part of the house which is buttressed by the boundary wall consists of a covered patio, the house can exist structurally without this extension. Moreover, the septic tank is now in disuse. As for the retaining wall on parcel V2297, it is clearly retaining parcel V1184 rather than parcel V1215, though it is built by the Defendant*

*[34] Accordingly, I find that no great injustice would be caused to the Defendant to order him to demolish the boundary wall and part of his house consisting of the patio which encroaches on parcel V1184 which I find were built in bad faith. [...] As to the retaining wall on parcel V2297, as it is beneficial to V1184, there would be no need to order its removal subject to the defendant ending his unlawful occupation."*

34. Hence, the learned Chief Justice issued a — *"mandatory injunction compelling the Defendant to within six months herewith demolish any the boundary wall; the septic tank and part of his house described in this judgment and highlighted on Exh P4, failing which the Plaintiff can have them removed at the Defenadnt's cost."*
35. The learned Chief Justice also issued — *"a Prohibitory Injunction against the Defendant, personally and against his agents or any person authorised by him whomsoever from trespassing or encroaching on Parcel V1184 and V2297."*

### **The appeal**

36. The Appellant has challenged the judgment on the following grounds —

*"1. The learned Chief Justice failed to pay heed to the fact that the Appellant's house and wall was built in 1993 thus over 20 years ago. As a result, the learned Chief Justice failed to appreciate the fact that no action was filed by the Plaintiff or the previous owner of Titles V1184 and V2297 thereby indicating that the encroachment was done in good faith as both parties did not know of the encroachment.*

*2. The learned Chief Justice erred in disbelieving that the Appellant had made a genuine and bona fide mistake in encroaching on Titles V1184 and V2297. The Learned Chief Justice should have addressed his mind to the fact that the Appellant attempted to settle the matter amicably with the Respondent after he found out, following a survey of the property, that he had encroached on the Respondent's properties. The attempt at settlement made by the Appellant corroborates the Appellant's plea of good faith and mistake.*

*3. The Learned Chief Justice failed to completely address the evidence of the Surveyor, Mr Michel Leong, who stated that the Appellant could have been misled as to the extent of his property when one considers the site plan and the different beacons on the plan. Similarly, the Appellant testified to his mistake, and the Learned Chief Justice erred in not addressing this part of the Appellant's evidence.*

*4. The Learned Chief Justice erred in stating that he chose to believe "the Plaintiff ... her father did relentlessly contest the Defendant's unlawful constrictions on his properties but was rebuked by the latter." (Paragraph 27 of the Judgment) With respect, this finding of the Learned Chief Justice is not supported by any evidence.*

5, *The Learned Chief Justice erred in stating that the Appellant, "...knew that he intentionally constructed the boundary wall; the septic tank and part of his house on V1184 and not the retaining wall on V2297." (Paragraph 30 of the Judgment) This statement is not supported by any evidence.*

6. *The Learned Chief Justice erred in not taking into account, as illustrated on the plan, Exhibit P4, tendered by the surveyor, Mr Michel Leong, that part of the Appellant's house, and not just the patio would need to be demolished and that the demolition would cause several prejudice to the Appellant and the Appellant's house would be structurally affected.*

7. *Based on the above grounds of Appeal the Learned Chief Justice erred in ordering demolition of the Appellant's structures rather than payment of compensation to the Respondent."*

#### *THE LAW*

37. Acquisitive prescription by possession is a means of acquiring ownership under Article 712 of the Civil Code of Seychelles. Acquisitive prescription by possession, whether or not the party claiming the benefit of such prescription can produce a title or not, requires possession for twenty years under Article 2262 of the Civil Code of Seychelles, which stipulates —

*"The prescription of Twenty Years Article 2262*

*All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not."*

38. Article 2229 of the Civil Code of Seychelles stipulates the characteristics required by law for possession to lead to acquisitive prescription as follows —

*"[i]n order to acquire by prescription, possession must be continuous and uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of an owner."*

39. I state that the court is not required to examine all the characteristics required by law for possession to lead to acquisitive prescription in the absence of a challenge relating to each of them<sup>1</sup>.

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<sup>1</sup> This decision of the "*Cour de Cassation*" reproduced verbatim hereunder clarifies this point (Article 2229[2] of the French *Code Civil* is in similar terms to the Seychellois Article 2229) —

40. Note 35 of **Dalloz Répertoire de Droit Civil (2e édition) Tome V Possession Art. 3. — ETENDUE ET PREUVE DE LA POSSESSION. § 1er.** — **Etendue de la possession**, instructs that possession of a thing/"*chose*" that is divisible extends only to the area which has actually been possessed<sup>2</sup>.
41. **Mazeaud, Leçons de Droit Civil, Obligations Théorie Générale, Biens Droit De Propriété Et Ses Démembrement 2e Ed., t.2, no 1482** defines acquisitive prescription or *usucapion* as follows —

"[...] : l'acquisition, par le possesseur d'une chose, du droit de propriété ou d'un autre droit réel sur cette chose, par l'effet de la possession prolongée durant un certain délai".

**Mazeaud** [supra] nos 1483 et s. enumerates the three general conditions required of all usucapion, which I quote in part — "1483. — *Enumération.* — *Trois conditions sont exigées de toute usucapion : une chose susceptible de possession, une possession non viciée, l'accomplissement d'un délai.*

— *CHOSSES SUSCEPTIBLES DE POSSESSION*

1484. — [...]

B. — *POSSESSION NON VICIÉE*

1485. — « *Animus* », « *corpus* », *absence de vices.* — *L'usucapion suppose une possession véritable, impliquant le corpus et l'animus*

*La nécessité du corpus a été affirmée par la cour de cassation (Civ. Civ. 13 déc. 1948, supra, 67e leçon, Lectures), qui exige des actes matériels sur la chose.*

*La nécessité de l'animus domini écarte le détenteur; un simple détenteur – locataire ou fermier – ne parvient jamais à usucaper, sauf s'il justifie d'une interversion de titre; il aura alors cessé d'être détenteur pour devenir possesseur,*

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"Attendu qu'ayant relevé, par motifs propres et adoptés, appréciant souverainement les éléments de preuve soumis à son examen, que les conditions de la prescription étaient acquises au bénéfice de Mme X... par l'effet de son occupation, depuis 1969, des terres objet du litige, la cour d'appel, qui n'était pas tenue de relever spécialement l'existence de tous les caractères requis par la loi pour que la possession puisse conduire à la prescription acquisitive en l'absence d'une contestation portant sur chacun d'eux, a légalement justifié sa décision ; PAR CES MOTIFS : REJETTE le pourvoi ;" Cour de cassation, 4 février 2014, No. de pourvoi: 12-24068".

<sup>2</sup> "35. La possession de partie d'une chose indivisible équivaut à la possession de tout. Mais, si la chose est divisible, la possession d'une partie ne s'applique qu'à cette partie. Ainsi l'exploitation d'une carrière par une seule tranchée n'implique pas la possession du banc tout entier (Nîmes, 11 mars 1874, D. P. 75. 2. 56. — Contra : Montpellier, 4 juill. 1867, D. P. 70. 1. 22).

*et le délai d'usucapion ne commencera à courir que le jour de cette interversion de titre, cf. supra, nos 1428 et s.).*

*L'animus domini s'apprécie à l'origine de l'occupation, sauf interversion de titre, et cette appréciation est faite in abstracto (Poitiers, 24 mai 1945, Gaz. Pal. 1945. 2. 53). L'animus domini est toujours présumé (cf. supra, no 1427).*

*Un copropriétaire peut usucaper contre ses coindivisaires s'il possède à titre exclusive le bien indivis (cf. infra, Lectures I).*

*La possession doit être sans vice. Les vices d'équivoque ou de discontinuité empêchent la possession de conduire à l'usucapion, aussi bien que les vices de violence ou de clandestinité. Quand un copropriétaire prétend usucaper, on lui opposera souvent le vice d'équivoque (cf. infra. Lectures I). L'absence de vices est toujours présumée.*

#### *c. — DÉLAI*

*1486. — Nécessité d'un délai. — L'usucapion nécessite un certain délai. Il est, en effet, nécessaire de donner au propriétaire le temps de s'opposer à la possession du tiers, et de revendiquer sa chose. En raison du délai imposé, l'usucapion ne joue, en pratique, que contre le propriétaire négligent qui s'est désintéressé de sa chose pendant un long espace de temps; voilà pourquoi on lui préfère le possesseur. [...]."*

42. *By Article 2248 of the Civil Code of Seychelles — "[t]he prescription shall also be interrupted by an acknowledgement by a debtor or a possessor of the right of the person against whom the prescription was running."*
43. *By Article 545 of the Civil Code of Seychelles — "[n]o one may be forced to part with his property except for a public purpose and in return for fair compensation. The purpose of acquisition and the manner of compensation shall be determined by such laws as may from time to time be enacted."*

#### *APPLICATION TO THE FACTS*

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

*Grounds one, two and four of the grounds of appeal*

45. Counsel for the Appellant has combined grounds one, two and four of the grounds of appeal in her skeleton heads of argument.
46. The contentions raised by these three grounds of appeal are that the learned Chief Justice erred —
  - (i) in not considering the Appellant's plea that the Respondent's action was time-barred;
  - (ii) in making the factual findings he did regarding the Appellant's occupation of the contested part of parcels V1184 and V2297;
  - (iii) in not finding that the encroachments were by mistake and *bona fide* as explained in the letter dated 4 October 2011, exhibit P3.
47. In support of her submissions, learned Counsel submitted that the Appellant had possession of part of parcels V1184 and V2297 on which the encroachments are located of the necessary quality to entitle him to become its owner by acquisitive prescription.
48. She submitted that the house had been built over twenty years; and that the house and the septic tank have remained on the same site since his father bought the property in 1974. At the hearing of the appeal, learned Counsel appeared to suggest that prescriptive acquisition started to run in October 1974, when the Appellant's father bought the property. She also submitted that the Appellant and his mother, Mrs Payette (DW-2), believed that the beacon demarcating Title V1215 was beacon B1 rather than D1, as depicted in exhibit P4.
49. She clarified at the hearing of the appeal that it was on this basis that she was claiming that the learned Chief Justice erred in not finding that the Appellant has been in occupation of part of parcel V1184 for over twenty years as if he was the owner.
50. I find Counsel's arguments to be misconceived. The Appellant has pleaded in his amended defence and counterclaim that he had possession of part of parcels V1184 and V2297 on which the encroachments are located of the required quality to entitle him to

become the owner of part of parcels V1184 and V2297 by acquisitive prescription. He also averred in his amended defence that — “[...] in 1993 [he] *demolished part of the existing house and re-built a house where the existing family home was built.*”. Additionally, the Appellant testified to the effect that he started construction in 1993 after receiving permission from the Town and Country Planning Authority.

51. I conclude that the learned Chief Justice was entitled to come to the conclusion he did on the evidence before him, especially exhibit P3, that the Appellant acknowledged the right of the Respondent and the late Mr Brian Nicette, as the owners of parcels V1184 and V2297, including part of parcels V1184 and V2297 on which the encroachments are located. I also find that the learned Chief Justice was correct to conclude that the acknowledgement made in the letter dated 4 October 2011, exhibit P3, interrupted the running of the prescription. Hence, I have no qualms with the conclusion of the learned Chief Justice that — *“the possession was interrupted and not continuous”*; and that the Appellant has not acted in the capacity of the owner of part of parcels V1184 and V2297 on which the encroachments are located.

52. In the case of *Hurhangee v Ramsawhook and others [2021] UKPC 25, Privy Council Appeal No. 0049 of 2018*<sup>3</sup>, the Board opined, at paragraph [25] of the judgment —

*“[w]here there is a dispute about property rights and there is a claim of prescription of title, it is for the parties in their pleadings to frame the ambit of the dispute and the matters which require determination by the court. It is for the court to determine the dispute as so defined in accordance with the standards of fairness. It would not be fair for a court to decide a case on a basis which has not been raised by either party. In some situations, a court might, in the course of a hearing, raise questions for the parties to consider; but it would be obliged to ensure that each was given a fair opportunity to address such questions before it would be permissible for it to decide the case by reference to such matters.”*

53. For the reasons stated above, grounds one, two and four stand dismissed.

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<sup>3</sup> (from the Supreme Court of Mauritius, 4 October 2021)



Grounds six and seven

54. The contention raised by grounds six and seven of the grounds of appeal is that the learned Chief Justice erred in granting the Respondent's prayer for demolition of the encroached structures as the evidence supported the grant of an order for compensation.
55. In support of this contention, Counsel for the Appellant submitted in her skeleton heads of argument that the learned Chief Justice should have declined the request for demolition as demolishing the encroachments would result in grave injustice; and that the Appellant had acted in good faith and by mistake.
56. Counsel for the Appellant relied on the following items of evidence in support of her submission that demolishing the encroached structures would cause grave injustice; and that the Appellant had acted in good faith and by mistake —
- (i) the Appellant's evidence is that "*part of the encroachment is the corner of his house*";
  - (ii) the Appellant's evidence is that the septic tank he had built is now in disuse;
  - (iii) the Appellant's evidence is that the encroachment was *bona fide* and by mistake;
  - (iv) that bad faith cannot be attributed to the Appellant as the plans to renovate the house and build the security wall, as depicted on the plan, exhibit D3, were drawn up by Jean-Glaude Waye-Hive, a draughtsman;
  - (v) the evidence of the Appellant is that, as the Respondent's parents and himself were on very good terms, he told them he would build a wall for their privacy. After he had built the wall, the Respondent's parents did not tell him that it encroached on the contested part of their property;
  - (vi) the evidence of Mr Michel Leong is that "*one of the encroachments is a residential building*".

57. For his part, Counsel for the Respondent submitted essentially that the Appellant has not proved that grave injustice would be caused to him.
58. Suffice to state that the submissions offered on behalf of the Appellant are misconceived for the following reasons.
59. The following findings from *Nanon v The Estate of the Late Janine Thyroomooldy SCA05/2020*, [2022] SCCA 37 (19 August 2022) find application in this case —
- "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 [...] 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 [...]. We endorse these findings, and if we apply Article 545 to the present appeal, *Chetty* will prevail to have it dismissed."
60. Based on the principles set out in **Chetty**, supra, which **Nanon**, supra, has endorsed, I state that the learned Chief Justice was wrong to take the approach he did in this case. I find the question of whether or not to order the demolition of the encroached structures, which the learned Chief Justice decided, was raised by himself without the pleadings being amended. In my view, he was not entitled to take such a course. The Appellant's amended defence pleaded that he had encroached on parcels V1184 and V2297 co-owned by the Respondent and her four children. The Appellant did not plead that the demolition of the encroached structures he had built would result in grave injustice; and that he had

built in good faith. I also find the submission of Counsel for the Respondent to the effect that the Appellant had not proved that grave injustice would be caused to him is misconceived in light of the abovementioned legal principles.

61. *In Gallante v Hoareau [1988] SLR 122*, the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

*"[t]he function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this reason that section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action".*

62. In *Tirant & Anor v Banane [1977] 219*, Wood J, made the following observation —

*"[i]n civil litigation each party must state his whole case and must plead all facts on which he intends to rely, otherwise strictly speaking he cannot give any evidence of them at the trial. The whole purpose of pleading is so that both parties and the court are made fully aware of all the issues between the parties. In this case at no time did Mr Walsh ask leave to amend his pleadings and his defence only raised the question of plaintiff's negligence.*

63. In *Re Wrightson [1908] 1 Ch. at p. 799* Warrington J. stated —

*"[t]he plaintiff is not entitled to relief except in regards to that which is alleged in the plaint and proved at trial"*

64. In *Elfrida Vel v Selwyn Knowles Civil Appeal No 41 and 44 of 1988*, the Court of Appeal held —

*"[i]t is obvious that the orders made by the trial judge was ultra petita and have to be rejected. It has recently been held in the yet unreported case of Charlie v Francoise (1995) SCAR that civil justice does not entitle a court to formulate a case for a party after listening to the evidence and to grant a relief not sought in the pleadings. He was of course at pains to find an equitable solution so as to do justice to the Respondent but it was not open to him to adjudicate on the issue in particular re-conveyance which had not been raised in the pleadings".*

65. In *Lesperance v Larue SCA 15/2015 (7 December 2017)*, the Court of Appeal reiterated the fact that a court cannot formulate the case for a party. At paragraphs 11, 12 and 13 of

the judgment, the Court of Appeal quoted with approval the decisions of the English Court and the principle enunciated by Sir Jack Jacob in respect of pleadings —

*"11. In his book "The Present Importance of Pleadings" by Sir Jack Jacob, (1960) Current Legal Problems, 176; the outstanding British exponent of civil court procedure and the general editor of the White Book; Sir Jacob had stated: "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice ...".*

66. In *Blay v Pollard and Morris* (1930), 1 KB 628, Scrutton, LJ stated that: *"Cases must be decided on the issues on record, and if it is desired to raise other issues they must be placed on record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course."*

67. In the case of *Farrel v Secretary of State* [1980] 1 All ER 166 HL at page 173, Lord Edmund Davies made the following observation

*— "It has become fashionable these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been many times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions ... for the primary purpose of pleading remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable to take steps to deal with it."*

68. In the case of *Nandkishore Lalbhai Mehta VS New Era Fabrics Pvt. Ltd. & Ors.* [Civil Appeal No 1148 of 2010, the Supreme Court of India said that —

"[t]he question before the court was not whether there is some material on the basis of which some relief could be granted. The question was whether any relief could be granted, when the Appellant had no opportunity to show that the relief proposed by the court could not be granted. When there was no prayer for a particular relief and no pleadings to support such a relief, and when the Appellant had no opportunity to resist or oppose such a relief, it certainly led to a miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief". *Emphasis supplied*

69. For the reasons stated above, I dismiss grounds six and seven of the grounds of appeal.

70. This is enough to dispose of this appeal.

### **The decision**

71. The appeal is dismissed in its entirety.

72. I uphold the order of the learned Chief Justice declaring that the Appellant has illegally constructed the encroached structures on part of parcels V1184 and V2297, namely part of a dwelling house, a septic tank and a boundary wall (parcel V1184) and the retaining wall (parcel V2297).

73. I uphold the order of the learned Chief Justice issuing a mandatory injunction compelling the Appellant to demolish part of the dwelling house, a septic tank and a boundary wall on parcel V1184. The plan of the extent of the encroachments is shown on exhibit P4 and attached to this judgment.

74. For the avoidance of doubt, the learned Chief Justice did not order the demolition of the retaining wall on parcel V2297.

75. I uphold the order of the learned Chief Justice issuing a — *"prohibitory injunction against the Appellant, personally and against his agents or any person authorised by him whomsoever from trespassing or encroaching on Parcel V1184 and V2297."*

76. I make the following orders hereunder.

77. I quash the order made by the learned Chief Justice that the Appellant shall demolish the encroached structures within six months from the date of the Supreme Court judgment.
78. For the order of the learned Chief Justice, I make an order that the Appellant shall demolish the encroached structures within eight months of the date of this Court of Appeal judgment.
79. In case the Appellant fails to take the above steps within the period of eight months from the date of this Court of Appeal judgment, the Respondent is authorised to carry out the demolition of the encroachments and all incidental works and shall claim the costs for the works from the Appellant as duly certified by a quantity surveyor.
80. With no order as to costs.

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F. Robinson JA

I concur:-

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Fernando President

I concur:-

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Dr. L. Tibatemwa-Ekirikubinza JA

Signed, dated and delivered at Ile du Port on 26 April 2023.