IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] SCCA 44 (25 August 2023)
SCA 06/2022
(Arising in CS 100/2017)

THAILAMAI KARPAGAM SENTHIL KUMAR **Appellant**

(rep. by Mr. Somasundaram Rajasundaram)

And

JAMES LOW-KION LOW-HANG **Respondent**

(rep. Mr. Frank Elizabeth)

Neutral Citation: *Kumar v Low-Hang (*SCA 06/2022) [2023] SCCA 44 (25 August 2023) (Arising in CS 100/2017)
Before: Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza, JJA
Summary: Civil trespass- article 1382- damages
Heard: 10 August 2023
Delivered: 25 August 2022

ORDER

The appeal is partly allowed. The judgment award of the court *a quo* is reduced as follows: SCR 10,000 is granted for damages as a result of obstruction to the land and SCR 5,000 for moral damages. The same with interest from the date of the Supreme Court judgment. The costs order of the court below is affirmed.

JUDGMENT

DR. M. TWOMEY-WOODS JA

(Robinson and Dr. Tibatemwa-Ekirkubinza JJA concurring)

Background

[1] I state at the outset that this appeal concerns a delictual action based on *faute*, instituted before the Supreme Court in October 2017. There is neither a claim for encroachment nor abuse of right pleaded. There is also no claim for a breach of a constitutional right. I find it necessary to make these statements from the outset because of the confusion caused both by the head note of the judgment from the court *a quo* which refers to a breach of Article 545 (encroachment), and paragraphs 10, 18, 20, 21 of the judgment which refer to encroachment, unjust enrichment, and a breach of the constitutional right to property of the Respondent by the Appellant.

[2] In short, the facts of the case are that the Respondent, Mr. Low-Hang, the absentee landowner of Parcel V18154 at Plaisance, Mahé, filed a Plaint in which he averred that his adjoining neighbour, the Appellant, Mrs. Kumar and owner of Parcel V3644 had trespassed onto his property. He further averred that she had caused concrete slabs to be laid down on his land and the erection of a gate at one end of the property, which gate was padlocked, resulting in him being unable to access his property and enjoying the same. He testified that he had witnessed this situation in 2011. He further submitted that this constituted a *faute* for which Mrs. Kumar was liable in the total sum of SCR1,000,000.

[3] Mrs. Kumar denied laying the slabs and erecting the padlocked gate in her Statement of Defence. She maintained that Parcel V18154 was a laneway attracting vermin and thieves and that the Environmental Authorities had taken mitigating action to redress the situation.

The decision of the court *a quo*

[4] The learned trial judge's decision was to the effect that despite her denials both in her pleadings and her evidence, Mrs. Kumar had encroached on Mr. Low-Hang's land, erected a gate and put a padlock on it. He further found that she had 'reclaimed' Mr. Low-Hang's land, resulting in his losing his sea frontage. He further noted that Mr. Low-Hang's "constitutional and civil right (sic) to dispose of Parcel V18154 was taken away by [Mrs. Kumar's] action as [Mr. Low-Hang] was prevented to sell it for a good offer…and that Mrs. Kumar had enriched herself by her action whilst Mr. Low-Hang had been impoverished."

[5] Ultimately, the learned trial judge, the Chief Justice, found that Mrs. Kumar had committed a *faute*, that there was a causal relationship between the *faute* and the damages caused and ordered her to pay SCR 100,000 for trespass, SCR 100,000 for obstruction to the property, SCR 100,000 for loss of use and enjoyment of property, SCR 100,000 for the inconvenience and mental anguish and SCR 100,000 for emotional distress and misery to Mr. Low-Hang - a total of half a million rupees.

The appeal before us

[6] Mrs. Kumar has appealed the decision of the court *a quo on* the following grounds:

1. "The learned Chief Justice grossly failed to outweigh the evidence of the Appellant as against the Respondent on all issues of liability in faute in that the learned Chief Justice approached on wrong, rational assumptions and adjudicated the appellant liable for faute.

2. The learned Chief Justice erred in his findings in not looking into the ratio decidendi propounded by the Seychelles Court of Appeal on the elements of good faith and other circumstances.

3. The Appellant's reliance on oral and documentary evidence on her exercise based on statutory rights on constructing concrete slabs has been ignored by the learned Chief Justice and his inference is erroneous without any legal footing.

4. The learned Chief Justice, despite the commission of the locus in quo, failed to take cognizance of the land in question as just a lane in its nature and not land in real perspective.

5. The learned Chief Justice ultra petita declared the Appellant liable on the principles of unjust enrichment.

6. The learned Chief Justice, however, finds a causal relationship between the faute and damages but failed to justify the quantum of SR, 100,000 on each head of the claim for the total sum of SR 500,00 awarded against the Appellant; thus the award is not only unjustifiable but also grossly excessive as the Respondent at all times was not at all in the Republic of Seychelles for his alleged claim of loss of use, enjoyment, emotional distress, inconvenience, obstruction, etc., besides the fact that the Respondent was not the rightful or lawful owner of the title V18154 at the material tie of the purported trespass."(sic)

[7] I have had some difficulty discerning the Appellant's exact grievances with the Chief Justice's judgment as expressed in the grounds above. In this respect, we have continuously

emphasised the need to articulate clear, intelligible grounds of appeal, failing which parties are subject to the court's interpretation of the grounds which may or may not address the specific complaint being canvassed. Worse, if the ground is so poorly worded as to make it "vague or general", as stated in rule 18 (7) of the Seychelles Court of Appeal rules, the Court need not entertain it. The Respondent raised the issue of the grounds' vagueness but did not pursue it at the hearing. For these reasons, I feel I have sufficiently admonished Counsel for the Appellant and will not make any further findings on this issue.

[8] I can also deduct from the judgment *a quo* and the submissions before this court that there needs to be a better understanding of the law of civil trespass in Seychelles and hope in the discussion below to address this.

[9] In the circumstances, we deal with these grounds as we understand them and proceed in the appropriate order.

Submissions and Discussion

Grounds 1, 2, and 3 – 'faute' by the appellant in entering the respondent's land.

[10] Mr. Rajasundaram learned Counsel for Mrs. Kumar, has submitted that Mrs Kumar has not committed the *faute* of trespass. He lists several reasons for this: she had a legal right to enter Mr. Low-Hang's land, as the Planning Authority had authorised her to do so, she had no intention to cause damage, she was mitigating environmental issues on the land, and in any case, there is no evidence she caused any damage to the land.

[11] There is a further submission by Mr. Rajasundaram that has merits - he puts forward the proposition that at the time of the alleged trespass, Mr. Low-Hang was not the owner of Parcel V18154. Neither for that matter was Mrs. Kumar, the present owner of Parcel V3644. An examination of the documentary evidence produced at trial reveals that Parcel V18151 was owned by Mr. G. Sivashanmugam until 2017, and Parcel V18154 was owned by Heirs Hosane Low Hang until 2017. However, the documents produced are not title deeds but certificates of official search. A definitive finding of the dates of transfer of the properties to the respective parties would have to be ascertained from the title deeds.

[12] The Plaint was filed on 4 October 2017. In this respect, it would appear that Mr. Low-Hang did not have standing to bring the case and that an action against the alleged trespass was prescribed. However, we do not find that this ground was raised either in the pleadings or in the proceedings in the court *a quo*. Therefore, for these reasons, although it is raised in the submissions, this Court cannot consider it.

[13] In response to the Appellant's first three grounds of appeal, Mr. Elizabeth learned Counsel for Mr. Low-Hang, has submitted that the Planning Authority had no power to grant Mrs. Kumar access over Mr. Low Hang's land and that she entered the land "by greed" to enrich herself as "rightfully found" by the learned trial judge and is therefore liable.

The Seychellois law of civil trespass

[14] As I have alluded to above, it is necessary to set out the law of civil trespass in Seychelles at this juncture. While English common law developed the law of trespass from a limited approach linked to its unique procedural, writ-centered history to constitute tortious liability in specific and nominate torts such as negligence, detinue, and nuisance, French law developed broad and general provisions of liability through the concept of fault on the part of the tortfeasor. Hence, the nominate torts of negligence, trespass or nuisance are not specifically provided for in the Civil Code; instead, they are encapsulated in the general delict provisions under Article 1382.

[15] The complication arising from our laws of trespass is the often-misunderstood connection between the definition of ownership as contained in Article 544, the principles of delictual liability in Article 1382 and those of neighbourhood obligations as developed in Seychellois jurisprudence (see *Albert & Anor v Vielle*[1], *Green v Hallock*[2], *and Desaubin v United Concrete Products (Seychelles) Limited* [3]).

[16] I pause to observe that Seychelles has developed its own principles and regime of *troubles du voisinage* within the framework of Article 1382 and not as a separate cause of action derived from French jurisprudence as stated in the case of ***Sunset Beach (Pty) Ltd v Dorsi***

[1]SCA 7 of 2018) [2020] SCCA 14 (21 August 2020).
[2] (1979) SCAR 141.
[3] (1977) SLR 164.

Raihl & Anor[4]. The Mauritian jurisprudence cited in *Sunset Beach* on this issue only serves to illustrate the obligations of neighbours towards each other and standards for permissible inconveniences.

[17] While these principles and obligations cannot be conflated, a fair summary of how they interface with each can be stated as follows: the rights established by Article 544 of the Civil Code are limited by the obligation not to cause harm to others, but when such damage is caused one can obtain redress under the regime of Article 1382.

[18] To succeed in such an action, the claimant has to prove fault, damage and a causal link between the tortfeasor and the damage. Specifically, the rules regarding trespass are derived from the Roman *actio negatoria*, an action to protect property rights.

The application of the law to the facts in this case

[19] At the beginning of this appeal, I asked Mr. Elizabeth, learned counsel for Mr. Low-Hang, what the cause of action was in this case. He stated that it was fault under Article 1382. The pleadings support this. In his Plaint, Mr. Low-Hang avers that Mrs. Kumar "without prior permission, consent or authorisation trespassed on [his] property, constructed some concrete slabs thereon and put a gate at the entrance of the said property which is permanently locked."

[20] He goes on to aver that: "the action of [Mrs. Kumar] constitutes a "faute' in law for which [she] is liable to make good to [Mr. Low-Hang]."

[21] Insofar as the evidence is concerned, there is no doubt that an act of trespass was indeed committed by the entry on Mr. Low Hang's land for laying concrete slabs to pave the roadway and erection of a gate. While Mrs. Kumar denies being the trespasser in her Statement of Defence, she does admit in evidence that she or her predecessor in title obtained permission from the Planning Authority to enter neighbouring land to carry out

[4] (Civil Suit 176 of 2011) [2012] SCSC 39 (16 November 2012).

reclamation works in front of her land. She states that they had tried to find the landowner to no avail.

[22] The Planning Authority could not permit a person to enter third-party land. Mr. Elizabeth is correct in pointing out that it had no statutory power to do so; in this respect, there was no valid permission to enter the land, and any entry amounts to trespass. Grounds 1, 2 and 3 of the appeal therefore fail.

Ground 4 – damages for trespass

[23] Mr. Rajasundaram has submitted that in assessing damages for the faute, the learned trial judge, despite a visit to the *locus in quo* and observing that the respondent's land was essentially a laneway between buildings, awarded substantive damages for the trespass.

[24] Mr. Elizabeth has contended that the ground is so poorly drafted that he finds it impossible to understand it to state anything in reply. I empathise.

[25] I can only observe that the act of trespass is not actionable per se. Hence while I would agree that no evidence of damage has been brought, if anything, improvement to the laneway is the result of the act of trespass, the erection of the gate, although protecting Mr. Low Hang's land from further trespassers, would have caused him some inconvenience in that he could not freely access his land. That act is indemnifiable in damages - but not substantial damages as awarded. But more about this later. Therefore this ground of appeal partly succeeds.

Ground 5 - the finding of unjust enrichment

[26] Mr. Rajasundaram has submitted that the learned Chief Justice erred in finding unjust enrichment, which in turn inflated the damages awarded when he concluded that the actions of Mrs. Kumar denied Mr. Low-Hang the opportunity to sell his property and that she had been enriched by constructing sea frontages to her property and causing Mr. Low Hang to lose frontage to his property. Mr. Elizabeth has submitted in reply that the learned trial judge's finding was 'en passant' and did not contribute to the inflation of damages awarded.

[27] I have examined the relevant part of the judgment on this issue: the learned trial judge states:

> *"20. It appears that this was not the only thing that happened to worsen the situation; the constitutional and civil right to dispose of parcel V18154 was taken away by the Defendant's action as the Plaintiff was prevented to sell it for a good offer. This, according to the Plaintiff, denied him a fair opportunity to sell his property to a willing buyer, who as a result became disinterested.*
>
> *21. I note further that the Defendant has enriched herself by her action whilst the Plaintiff has been impoverished. This is so because as a result of her using her latter's property in the way she did she managed to construct two sea frontage to two properties, one in which she holds propriety interest V5318 and another belonging to herself V3644 and she built a building on those properties. Whilst the Defendant lost out by losing a sea frontage and was effectively locked out from his land, making him lose an offer to purchase."*

[28] I agree that these findings are *ultra petita*. Unjust enrichment is not pleaded in the plaint. However, I further opine that the findings are particularly troubling for various reasons. There is no evidence that anyone lost a sea frontage. Reclaiming land from the sea and in front of property abutting the high-water mark increases the land area but does not lose its sea frontage. If anything, such action would have heaped benefits onto the property owner – its land area would have increased. However, it was noted by both parties that although Mrs. Kumar had reclaimed land in front of her property, she had not encroached onto Mr. Low Hang's property to reclaim land in front of his property- she has not interfered with his sea frontage. This was a clear case of the learned Chief Justice misdirecting himself on the facts.

[29] In any case, this matter had not been pleaded, and no claim was made in this respect. The learned Chief Justice's finding is therefore misconceived. In consequence, this ground of appeal has merit.

Ground 6 – the damages awarded: quantum and rationale

[30] Mr. Rajasundaram has submitted that there was no intentional damage done and that Mrs. Kumar had not acted in bad faith. She had tried to ascertain the whereabouts of Mr. Low-Hang and, failing to find him, had gone to Planning Authority to obtain permission to

enter his land. In any event, he further submits that both the claim and the award is manifestly excessive and lacks basic rationale. The installation of the concrete slab improved the nature of the road. Mr. Low Hang has not been deprived of the use of his land as he does not live in Seychelles. Finally, he submits that the learned trial judge needs to explain how he arrives at the figure he awards under the different heads.

[31] Mr. Elizabeth has submitted that the awards were made after the acts of trespass were appreciated by the learned trial judge. Further, the quantum is justifiable as Mrs. Kumar has benefitted from reclaiming land while Mr. Low Hang has not, and his land has lost market value.

[32] I have already said that there is no claim for loss of value due to the reclamation. In any case, it was not established that the land directly in front of Mr. Low Hang was reclaimed by Mrs. Kumar or at all.

[33] I also agree with Mr. Rajasundaram that the quantum of damages awarded and their apportionment in terms of the different heads under which they are claimed are misconceived. With regard to damages, I note at the outset that an appellate court should not interfere with the damages awarded by a lower court, even if it would have arrived at a different result. Only in exceptional circumstances will an appellate court overturn the trial judge's analysis of the quantum and type of damages awarded.

The Seychellois law with respect to damages

[34] In *Philoe and Another v Ernesta*[5], the Court of Appeal stated that the general principle in the assessment of damages is that it is pre-eminently a matter within the discretion of the trial judge and an appellate court must be reluctant to upset such judgment unless there was a considerable disproportion in the quantum of damages awarded and/or such damages have been awarded on an improper basis or for a wrong purpose.

[5] (unreported) SCA 17 of 2004.

[35] With regard to the type of recoverable damage, this Court has, in several cases, drawn attention to the provisions of Article 1149 of the Civil Code which sets out the permissible types of awards in delictual actions. Article 1149 provides in relevant form:

"(1) Subject to this article, damages due to a creditor cover, in general the loss the creditor has sustained and the profit of which the creditor has been deprived.

(2)Damages are also recoverable for any injury to or loss of rights of personality, including pain, suffering, aesthetic loss, and the loss of any of the amenities of life, which cannot be quantified in financial terms. (Emphasis added)

[36] In the case of *Barbe v Laurence*[6], the Court clarified that there are ultimately three heads of damages in delictual cases. These heads are corporal damage, material damage and moral damage. The difference between these heads was discussed by the Court as follows:

'*The corporal damage or injury is the bodily injury caused to the victim… In some cases it can be the death of a person. These damages are meant to compensate for the diminution in the enjoyment of life of the victim. It includes the physical pain and suffering of the victim.*

The material damage can be the destruction of things caused by the delict but also economic damage brought about by the inability of the victim to work or make a living.

The moral damage reflects the moral and/or psychological suffering, pain, trauma and anguish suffered by the victim as a result of the delict.'[7]

[37] With regard to moral damage in particular, the court observed in *Sullivan Magnan & Anor*[8]

"that pain, suffering, anxiety and distress – all non-pecuniary losses should be recovered under one head only – moral damage."

[38] It referred to *Adonis v Ramphal*[9], in which Egonda-Ntende CJ endorsed Dickson J's view in the Quebecois case of *Andrews v Grand & Toy Alberta*[10] that:

[6] (CS 118/2013) [2017] SCSC 408 (17 May 2017).
[7] ibid at para 16-18.
[8] (CS 134 of 2011) [2016] SCSC 491 (8 August 2016).
[9] (2013) SLR 387.
[10] [1978] 2 SCR 229.

"It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that the losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses.[11]

[39] In the present case, the *Particulars of Loss and Damage* are set out in the Plaint as follows:

"a. Damages for trespass to Plaintiff's property	*SCR200, 000*
b. Damages for obstruction to Plaintiff's property	*SCR200,000*
c. Damages for loss of use and enjoyment of property	*SCR200,000*
d. Moral damage for inconvenience and mental anguish	*SCR 200,000*
e. Moral damage for emotional distress and misery	*SCR 200,000."*

[40] In light of Seychellois law, the damages, as particularised, are problematic on many levels. First, one's right to ownership or privacy makes any unjustified entry to one's property theoretically a trespass, even if no damage occurs. However, as trespass is pursued as a delictual claim, the three elements of delict must be proved, namely: fault, damage, and a causal link between the tortfeasor and the damage. While fault and the causal link have been established in the present case, there is scant evidence of the damage. The case of *Gresle v Sophola & Or*[12] is highly instructive on this point and relevant to the present case. Perera J as he then was stated:

"As regards "trespass to land", not every entry upon the property of another, gives right to a delictual claim. Delictual liability is based on damages caused by the act or omission of a person. Hence, mere entry for a lawful purpose is not actionable. So also, is entry with notice or with express or implied authority. Trespass is an invasion of privacy or of proprietary rights over property. However, if the dominant purpose of the entry is to cause harm or damage to the property, even if it appears to have been done in the exercise of a

[11] Ibid p. 264.
[12] (2002) SLR 139.

legitimate interest, it would constitute a fault within the meaning of Article 1382 (3) of the Civil Code."

[41] Therefore, the first head of damage (trespass) is not allowable as it is not a permissible head of damage. A court is likely to award only nominal damages for mere unauthorised access. For more substantial damages, a claimant would have to show that damage was caused by the trespass and claim for that damage. This is where the heads of material and moral damage come in.

[42] The second head of damage claimed is for obstruction. That is allowable, but Mr. Low Hang, on his own admission, was only in Seychelles in 2011 on a visit and on only one occasion, could not access his land. Damages are allowable on the circumstances but of the nominal kind – I am of the view that SCR ten thousand would be appropriate. The last three heads can all be categorised as moral damages and only one award can be made. Again, as there is scant evidence of what distress it caused, I can only award nominal damages – in this case SCR five thousand would be adequate.

Decision and Order

[43] For all these reasons, the appeal is partly allowed. The following orders are substituted for those of the learned Chief Justice: The appellant, Mrs. Thailamai Karpagam Senthil Kumar, is ordered to pay Mr. James Low-Kion Low-Hang:

1. SCR 10,000 for damages as a result of obstruction to his land
2. SCR 5,000 for moral damages.
3. Interest from the date of the Supreme Court judgment.
4. The costs order of the court below is affirmed.

Signed, dated and delivered at Ile du Port on 25 August 2023.

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Dr. M. Twomey-Woods, JA.

I concur

F. Robinson, JA

I concur

Dr. L. Tibatemwa-Ekirikubinza JA