

IN THE SUPREME COURT OF SEYCHELLES

CHARLES WILLIAM

Plaintiffs

DAMIENNE FONDAUMIERRE

VS.

MICHEL DOGLEY

Defendant

Civil Side No.61 of 2005

Mr. Bonte for the Plaintiffs

Mr. Derjacques for the Defendant

JUDGMENT

Gaswaga, J

The plaintiffs are co-owners and fiduciaries for themselves of parcels H 2554 and H 2555 at Quincy village, Mahe which land is adjacent to parcel H 547 owned by the defendant herein. In this suit the plaintiffs pray the Court to order the defendant to remove the encroachment on their said land. In his statement of defence dated 11th October, 2005, the defendant denies any encroachment thereof.

It is averred on behalf of the plaintiffs that the said encroachment is by way of concrete wash basins, a temporary shed and water tank and other facilities for washing clothes owned by the defendant and partly built, erected on, and or standing over and above a portion of the plaintiff's land. That portion is located between boundary beacons MB 303 and MC 81 while beacon QX 96 is right under

and covered by the wash basins. See survey plans, Exhibits **P1 A** and **B** drawn by Gerald Pragassen (PW2).

The defendant testified that he bought parcel H547 in 1975 and started living on it in 1976. That the structures complained of were constructed in 1977 before the plaintiffs acquired their land in around the year 1987 and subsequently asking him to remove the alleged encroachment in 2003. The water tank is used for storing water while under the outside kitchen or shed there are wash basins, a concrete on which to clean fish and also prepare food for the dogs. He also stated that the water does not smell nor spill over to the plaintiff's land and that his activities have not in any way inconvenienced or caused harm to the plaintiffs and they have never complained.

Later on during the hearing Mr. Derjacques moved Court and submitted that the constructions (encroachments) complained of were made by the defendant who honestly believed that portion of the land to be his and as such he should be compensated. He relied on Article 555 of the Civil Code and the authority of **La-Y-La (Pty) Ltd Vs. Lionel Adelaide CS. No. 185 of 2000** which he said is on all fours with the facts of the case at hand.

Article 555 provides thus:-

“When plants are planted, structures erected, works carried out by a third party with materials belonging to such party, the owner of land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them.”

First of all, it is imperative to interpret this provision of the law before determining whether it is applicable to the present facts. I find that the concrete wash basins and other encroachments affixed on the land fall under the category of ‘structures’

referred to in Article 555 and should therefore be considered as such while the words “third party” should be viewed conceptually to mean “any other party” that is other than the owner of the land. Normally, the phrase “third party” presupposes the existence of parties to an agreement or transaction and of one who is not a party to such an agreement or transaction but who claims a right or interest under the agreement. Article 555 would then apply notwithstanding that there are only two parties involved viz: the owner of the land and the person who has erected a structure thereon with his own materials. **See Cupidon & Anor Vs Florentine & Ors. (1978) S.L.R. 46 and Samson Vs. Moushe (1977) S.L.R. 158.** But in these circumstances can the defendant be assimilated to a “*tiers de bonne foi*” under Article 555?

In the case of **Elina Pirame Vs. Jeanine Simeon CS. No. 365 of 1995** the Court found that the defendant lived in a house and undertook substantial repairs, renovation and extension thereto in the bonafide, although erroneous belief that she was renting the house from the landowner who consented or had granted her permission to do so. The defendant had an option to remove the constructions and additions that she had made to the house or leave them and claim compensation, for the value of the materials and costs of labour or the payment of an indemnity equivalent to the value given to the land. As for the **La-Y-La (Pty) Ltd Vs. Lionel Adelaide CS.No.185 of 2000** case Court ordered the defendant who had undertaken rebuilding works on his house constructed on the plaintiff’s land without permission to vacate the said land and remove his house thereupon within six months and with costs. The defendant could not be assimilated to a “*tiers de bonne foi*” because the issue of compensation had not been pleaded. Further, in **Coelho vs. Collie (1975) SLR 78**, the defendant erected a building on the land of another in the bona fide although erroneous belief that her grandmother’s joint proxies had the power to grant her permission to build on the land. The Court held that the defendant was assimilated to a “*tiers de bonne foi*”. Additionally, in **Dubignon & Or vs. Germain & Or (1985) SLR 78**, the first

defendant built his house on the plaintiff's land in the erroneous belief that he had permission to do so from the consent of the usufructory which consent was not within the power of the usufructory to give. The Court held that the first defendant was assimilated to a "*tiers de bonne foi*".

With due respect it cannot be said that the facts in the **La-y-la** case are similar to those of the current one which is a clear case of encroachment as submitted by Mr. Bonte. The facts of **Pirame** are those of a lessee who honestly believed had permission of the landowner to effect repairs. In the **La-y-la** case the defendant's parents had been granted possession by the previous owners to construct the house on the said property. Further, the facts show that the defendant's mother renovated the said house wherein she granted the defendant permission to reside. Worthy noting and of relevance to us is the Court finding that the defendant had no permission to rebuild the house although he claimed he believed to have such authority since there was no one for him to ask. The renovations started in 1970's at a period of time when Mrs. Fontaine, who could have granted any permission or authorisation, had already died in 1968. The facts show that the defendant and his parents originally had permission to build the house and subsequently effect repairs on it but in the case at hand there was no such or any permission granted at any one point in time to the defendant.

Further, unlike in the prior authorities where the element of 'erroneous belief' existed, in the pleadings and evidence of the present case the defendant was aware of and alive to the encroachment as no permission whatsoever had been sought and or obtained for him to erect any structures on the plaintiff's land. It was deposed by Mr. Pragassen and corroborated by both plaintiff's PW1 and PW2 as was also clearly stated in the surveyor's report Exhibit (P1) dated 2/2/2004 that during and after the field (site) visit by the surveyor, and in the presence of all the parties Mr. Pragassen pointed out the alleged encroachment to the defendant. Subsequently, letters dated 21/10/2004 and 25/10/2004 to that effect and warning

of an imminent Court action in case of noncompliance were sent to the defendant by the plaintiff's lawyer. Indeed a plaint was lodged to which the defendant filed a statement of defence dated 11/10/2005 denying any encroachment.

This evidence shows that the defendant was aware of the encroachment as brought to his notice well in time before the filing of the suit. There is nothing to suggest any 'erroneous belief' for the encroachment like in the cases cited. This being so, I find that the defendant cannot be assimilated to a "*tiers de bonne foi*" under Article 555 of the civil code.

The following orders are sought in the plaint:-

1. *To remove the encroachment on the plaintiff's portion of land,
To award a sum of RS. 25, 000/- as moral damages
And such other reliefs as this Honourable Court deems fit and proper.*

Article 555 (2) of the civil code further states that:-

"If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of land."

The plaintiffs noticed the encroachment not long before 2004 when the surveyor was called upon to relocate the boundaries and beacons. The first plaintiff stated in cross-examination that her house is located far away from the said encroachment and that although that portion of land is not used now she intends, in the near future, to construct a perimeter wall around her said property to run through the encroachment. Further, that that portion has been given to her daughter whose loan to construct a house thereon has now been approved. Obviously the plaintiffs could not have suffered any inconvenience before knowing that the encroachment existed. Mr. Bonte submitted that encroachment

per se is actionable. However the plaintiffs have not demonstrated how the encroachment inconvenienced them to warrant or justify the moral damages of SR. 25,000/- claimed. It is however noted that prior to coming to Court the plaintiffs laboured to communicate to and convince the defendant to ameliorate the encroachment in vain. More stress was suffered when services of a lawyer had to be engaged and paid for to prepare and file this case. I find a sum of SR 1, 000/- to be suitable as moral damages.

Judgment is accordingly entered in favour of the plaintiff. The defendant is to remove the structures forming the encroachment herein above within a period of two (2) months from the date hereof at his own expense. The plaintiff is also awarded moral damages of SR. 1, 000/- and costs of the suit.

D. GASWAGA

JUDGE

Dated this 30th day of May, 2007.