

# **IN THE SUPREME COURT OF SEYCHELLES**

1. EILEEN LOUANGE
2. DANNY LOUANGE

**PLAINTIFFS**

VERSUS

IRENA NOELLA HERVIEU

**DEFENDANT**

Civil Side No 154 of 2005

Miss K. Domingue for the Plaintiffs

Mr. B. Adeline for the Defendant

## **JUDGMENT**

**Perera ACJ**

The plaintiffs are the owners of a Parcel of land bearing no. C. 3429 at Au Cap, while the defendant is the owner of the adjoining land Parcel C. 3430. The plaintiffs aver that the defendant has encroached on their property and constructed part of her house, and also planted banana trees, placed a device for drying clothes, and also dumped rubbish. The plaintiffs therefore seek an order of this Court ordering the defendant to remove the said encroachments and also to pay Rs.53.500 as damages.

The defendant admits the encroachment, but avers that part of the house was constructed on the plaintiff's land as a result of a mistake caused by the contractor who constructed her dwelling house. She further avers that on a balance of hardship, it would cause less harm to the plaintiff if they are compensated for the encroachment than if she demolished the part of the dwelling house. She also avers that the encroachment does not affect the enjoyment or use of the property of plaintiffs.

The 1<sup>st</sup> plaintiff testified that Parcel C. 3429 was purchased by her and the 2<sup>nd</sup> plaintiff, her husband jointly on 4<sup>th</sup> March 1996 (P1). Thereafter they went to Singapore for studies. When her husband came to Seychelles on a visit in the year 2000, the defendant had cleared her own land. Subsequently in the year 2003, when they wanted to build the house, they found an encroachment. They surveyed the land in March 2004, and found that the defendant's house had encroached on their land by 3.8 Sq meters. (exhibit P4). The plaintiff further testified that the encroachment has depreciated the value of her land and hence claimed Rs.25,000 as damages.

She also stated that her land was only 740 sq meters in extent and that she will not be able to plan the location of a house properly, as the encroachment is at the narrowest part of the land. She therefore sought an order on the defendant to remove the encroachment as well as pay the damages claimed in the plaint. She was however agreeable to a settlement if the defendant paid adequate compensation acceptable to them. She also agreed to the defendant finding an alternative piece of land acceptable to her, so that Parcel C. 3429 could be transferred to the defendant, thus enabling her to purchase the alternative land from the proceeds. Both these options had been pursued but without success. The 2<sup>nd</sup> plaintiff, the husband of the 1<sup>st</sup> plaintiff a Medical Doctor corroborated the evidence of the 1<sup>st</sup> plaintiff on all material particulars. He stated that the encroachment was about 1/3<sup>rd</sup> the extent of the land and that only a room and toilet could be constructed in the balance portion. He further testified that the defendant ought to have checked the survey plans before the construction was made, and that she could not aver that it was a mistake made by her Contractor. He therefore sought the removal of the encroachment, and also the payment of damages by the defendant. He however stated that although an order to demolish would be most appropriate, he would leave the matter to Court.

Michel Leon, Land Surveyor produced the plan showing the encroachment (P4). He stated that the encroachment inside Parcel C. 3429 was 1.9 meters. He also stated that the overhang from the wall of the building would be a further half a meter. The encroached area was 3.8 sq meters in extent. He opined that even if the plaintiffs had wanted to construct a house, the Planning Authority would have required them to have a buffer area between the boundary and the construction, and hence that construction could not have extended to the encroached area. A similar regulation should have applied to the defendant.

The defendant testified that she purchased her land Parcel C.3430 in the year 2001. She constructed a two bed roomed house thereon, upon obtaining planning permission. She learnt about the encroachment from a neighbour only after the construction. Thereafter she waited until the adjoining landowner came and complained. After that, when the plaintiff's lawyer sent her a letter, she contacted Mr Pragassen, Land Surveyor who prepared plan (D1) showing the encroachment. She was prepared to pay for the encroachment as she does not have the financial means to demolish and reconstruct. However, such payment would be in monthly instalments.

The defendant maintained that the encroachment occurred due to the mistake made by her building contractor. She however stated that she did not involve him in this matter as he did not have money. She further stated that the encroached area is a portion of the guest room. She also stated that if the Court decides against her, she will demolish the encroached portion.

Claude Hervieu, the husband of the defendant testified that in June 2003, he and his wife came to know that they had built the house encroaching the property of the plaintiffs. He too blamed the contractor for the mistake, but accepted part of the blame for trusting a very young person to do the work. He agreed to compensate the plaintiff in a sum of about Rs10,000 to Rs12,000 for the encroached area. He further stated that he was prepared to demolish the encroached portion without paying compensation in a sum of Rs25,000 to the plaintiff. In the alternative he agreed to pay s25,000 provided that encroached area was not demolished.

Admittedly, the defendant constructed her house partly on the plaintiff's land without consent or approval. The Architectural plan approved by the Planning Authority (D2) clearly showed the boundary of the plaintiffs land, and that the proposed house should be constructed at least 2 meters away from that boundary demarcated as beacons TA. 505 to AN8. Michel Leong, the Land Surveyor stated that the only beacon which was missing, was beacon TA 503 on the south western boundary which was replaced. Hence, beacons TA 505 and AN8 being intact, the defendant ought to have been more diligent to ensure that her Contractor complied with the site plan as approved by the Planning Authority. In the case of **Charles William v. Michel Dogley** C.S. 61/05, the Court held that as the defendant had been aware of the encroachment, the encroached portion should be demolished. Damages in a sum of Rs1000 was also awarded to the plaintiff. So also in the case of **Roy Behary v. S. Finesse** C.S. 52 of 1996, this Court ordered the demolition of a boundary wall which encroached on the plaintiff's land. Damages were not awarded due to lack of evidence.

In the present case, the Court cannot accept that the defendant, and her contractor were mistaken about the boundary. It was basic that they verified the boundary before commencing work. In these circumstances, it is clear that the defendant had made the encroachment deliberately with the object of stealthily gaining as much advantage as possible from the neighbour's land which was lying undeveloped for over 5 years without any action being taken by the plaintiffs who were away in Singapore. An order for demolition of a building or structure on another's land depends on the circumstances of each case.

The plaintiffs in the present case rely on Article 555(1) and (2) of the Civil Code and seek the removal of the portion of the house by the defendant without compensation. In addition they claim damages and costs of action.

The defendant and her husband urged the Court to consider the balance of hardship in ordering a demolition. They were however not averse to an order for demolition of the portion of their guest room, but without an order for payment of compensation as claimed.

In considering the hardship caused to the parties, the Court has to be mindful that the existence of the defendant's portion of the building necessitates the plaintiffs to construct their house at least 2 meters away therefrom, and also prevent them from building a boundary wall. These are however dependant on the decision of the Planning Authority. Hence the depreciation of the value of the plaintiff's land may be more than the cost that the defendant will have to bear in demolishing and reconstructing the encroached portion of the house.

Further, it is a Constitutional Right of every person to own and peacefully enjoy property purchased in this country, subject to limitations provided in Article 26(2) of the Constitution. No one has the right to interfere with that right outside these limitations. The plaintiffs are entitled to utilize their land to the fullest extent. The defendant has not only violated that right, but also contravened the Planning Regulations. In these circumstances, if the Court merely orders the defendant to pay compensation for the encroached portion, the Court would be condoning a Constitutional violation as well as a breach of Planning Regulations. Hence the proper order this Court should make is an order on the defendant to demolish the 3.8 sq meters encroachment, leaving the Planning Authority to decide on the course of action to be taken as regards the violation of the Regulation.

As regards moral damages claimed, the Court is satisfied that the plaintiffs have been inconvenienced by the act of the defendant, and that they suffered financial loss having to travel from Singapore frequently to seek a just remedy. However, considering the expenses that the defendant, and her husband, who are pensioners have to bear by the demolition, I award nominal damages in a sum of Rs1000, and a further sum of Rs3200 paid to G&M Surveys for location of boundaries and demarcation of the encroachment.

Accordingly, order is hereby made ordering the defendant to demolish the encroached portion of her building 3.8 sq meters in extent and to remove all debris, plants and erections at her own expense within three months from the date hereof. If she fails to do so within that period, the plaintiffs are hereby authorized to have the said demolition done by a competent Contractor causing no further damage than necessary, and to recover the demolition charges from the defendant. The defendant should however be given prior notice of such demolition.

The plaintiffs will also be entitled to a total sum of Rs.4200, together with interest and costs of action

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A.R. PERERA

**ACTING CHIEF JUSTICE**

Dated 28<sup>th</sup> day of January 2008