IN THE SUPREME COURT OF SEYCHELLES

1. **MARIE THERESE MELANIE GILBERT ZIALOR**
2. **ROBERT WIRTZ** **PLAINTIFFS**

VERSUS

1. **PETER ZOE**
2. **MARIE HELENE ZOE**

DEFENDANTS

Civil Side No 235 of 2003

Mr. F. Elizabeth for the Plaintiffs

Mrs A. Amesbury for the Defendants

JUDGMENT

Perera J

The 1st and 2nd plaintiffs, represented by Gilberte Melanie, their daughter are the owners of Parcel V. 1741 at Plaisance. The 3rd plaintiff is the owner of an adjoining land bearing title No. V. 1739. The defendants are the owners of Parcel V. 10223, which is on a lower level than that of the plaintiffs.

The plaintiffs aver that their lands are enclaved and that they have used a footpath on the edge of the defendants' land for over 20 years. The 1st and 2nd plaintiffs aver that they are elderly and disabled and that the said footpath is the only convenient and shortest way to access the Public road. Allegedly, that footpath has been blocked by the defendants.

They therefore seek a declaration of this Court that they are entitled to the said footpath as a right of way, and also claims Rs.50,000 as moral damages.

The 1st and 2nd defendants deny that the plaintiffs' land is enclaved and aver that, as per the Survey Plan, they have a 1.5 metre wide right of way over Parcel V. 1737 and V.1740 paved from a motorable secondary road at Plaisance away from Parcel V. 10223. The defendants further aver that to their knowledge, the 1st and 2nd plaintiffs were allowed to pass over their land to visit their daughter Gilberte Melanie who was also living on a lower level, as that was a convenient "*short cut".* The defendants further aver that they obtained planning permission to fence their property, and that no such permission would have been granted had there been a right of way as alleged. The defendants admit the age and disability of the 1st and 2nd plaintiffs, but deny that they have a right of way as averred.

Gilberte Melanie (PW1) testified that she had used the footpath for over 40 years even as a child of 5 years. That footpath belonged to the Zoe family. The 1st and 2nd plaintiffs were her parents who were both handicapped persons and when they needed medical treatment, they have to be carried on a stretcher and transported to hospital by an ambulance which has to be parked on the public road at the bottom of the footpath. The defendants blocked that footpath with sand bags. That was the reason for instituting the present action on 3rd September 2003. Consequent to an application for an interim injunction being filed by the plaintiffs to compel the defendants to remove certain obstructions placed by them on the footpath, the Court visited the *locus in quo* on 3rd September 2003 and observed that the 1st and 2nd plaintiffs were handicapped persons and that their property was on a higher level than the property of the defendants. The footpath in dispute was blocked with corrugated iron sheets placed vertically, and bags of sand or solidified cement also placed in a way to obstruct the passage. The Court accordingly granted an injunction compelling

the defendants to remove the obstruction and restore the *status quo* pending the disposal of the case.

However, subsequently, the plaintiffs filed a motion averring that the defendants had not complied with the order of Court. The Court visited the *locus in quo* the second time on 17th December 2004. It was observed that the defendants had cleared the corrugated iron sheets and sand bags, but there was evergrown vegetation and banana trees which made it difficult to have easy access. In my notes, filed of record, I stated "If the plaintiffs are able to establish their case, this would be the shortest and most convenient route to the Public road". The Court also visited an alternative route from the Plaisance area, which the plaintiffs were using through a garage of one Gonzague Elizabeth. When the car is parked, the access area is very narrow at the point of the garage which is built over a river. Thereafter, the footpath leads to a steep flight of steps leading to the house of the plaintiffs. Gilberte Melanie stated that this was most inconvenient to her parents.

Gilberte Melanie, testifying further in the case, stated that the defendants themselves are using a portion of her land to access their house. However, that was irrelevant to the present proceedings which is a dispute between her parents and the defendants. The plans of Parcel V.1741 (D1) (belonging to the 1st and 2nd plaintiffs) and Parcel V. 1739 (D2) belonging to the 3rd plaintiff) were shown to her by Counsel for the defendant. It was put to her that there is a 1.5 metre right of way marked on those plans between the two lands. She stated that although it was on paper, yet it did not exist as it has been obliterated by heavy rain and floods. She further stated that the 3rd plaintiff has given temporary permission to use a 1.5 meter concrete road built by the Plaisance District Council, which serves the property of her parents as well. She however maintained that the footpath claimed over the defendants' land was the one which her parents had used for 42 years. To a suggestion made by Counsel for the defendant that, that was not an approved right of

way, she stated-

> "It is supposed to be a right of way here, but later on, Government, when I purchased the land with SHDC, *they cancelled the right of way over there behind my house, and put it in front where it is now, and then that is why your clients, they do not have a right of way".*

Gilberte Melanie further stated that there was a plan to build a road connecting the secondary road over the 3rd plaintiff's land to her parents property, but after she purchased her own land, that plan was abandoned. She stated that her parents had used that road for 42 years, but when she built her house they started to use the footpath along the defendant's land. At that time they were on good terms. She stated that the dispute arose when she started to build her house. She further stated that during the 42 years her parents were using the footpath, there were small shacks made of corrugated iron sheets and that there were no retaining walls. There were no specific footpaths, and so everyone crossed each other's land to get to the public road. The secondary road was built by the District Administration so that all those people could use one common road but the 1st and 2nd plaintiffs are claiming a right of way along the boundary of the defendants' land, which has no direct bearing on the secondary road constructed by the District Administration.

Robert Wirtz, the 3rd plaintiff, the owner of Parcel V. 1739 testified that when he purchased the property in 1977 he used the La Louise road through the footpath on the defendant's property. However, after the defendants obstructed that footpath, he now uses the right of way from Plaisance over Gonzague Elizabeth's property. This same access is available to the 1st and 2nd plaintiffs as well.

The witness further stated that when he built his house, there was nobody on the land now occupied by the defendants. So they passed through that land. But when the defendants came on that property, the 2nd defendant built a wall, but left space to go through. He admitted that there is no demarcated right of way there, but stated that that was the shortest and the most convenient way to get to his property.

Margaret Sophola of the Land Registration Office produced the Title Deed of the defendants (P8) wherein one Marie Zoe had transferred Parcel No. V. 10223 for a sum of Rs.5000 on *28th January 2000*. She also produced the Title Deed of Robert Wirtz dated 10th November 1977 (P7). Gilbert Donald Zialor, the 2nd plaintiff purchased Parcel No. V. 1741 from the Frichot family on 11th February 1977. (P6). Hence the plaintiffs, and the predecessor in Title of the 1st and 2nd defendants were owners of their respective properties since 1977.

Gonzague Elizabeth, the owner of Parcel V.1738 stated that he purchased the property on 19th June 1976. He stated that the present right of way from his land to the land of the plaintiffs was not in existence at that time. It was built about 18 to 19 years ago. The plaintiffs were using a pathway behind the house of one Dona, a neighbour. He further stated that when he purchased the property, there was a right of way demarcated on his plan and the plans of the plaintiffs. There was however no road. When he constructed the bridge across the river, that right of way became usable. He produced plan (P9) which shows the 1.5 meter right of way along his land leading to Parcel V. 1741 belonging to the 1st and 2nd plaintiffs. He stated that he did not object to the plaintiffs using that right of way as it was on his Survey Plan. The defendants used the entrance from the La Louise road. The witness, who was testifying on 9th December 2004, stated that about 3 months before that date, the 2nd plaintiff used the right of way over his land as that was a more

convenient route for a handicapped person like him. He further stated that until he built the bridge, the plaintiffs passed behind Dona's house, which was on Parcel V. 1733.

Robert Melanie, the son of the 1st and 2nd plaintiffs, and the brother of Gilberte Melanie testified that he too owned a Parcel of land among the lands of the plaintiffs and the defendants. After the defendants blocked the passage, his parents, sister and Mr Wirtz, went over his land. He stated that the distance from his house to that of Gonzage Elizabeth was about 10 metres and to the house of his parents, about 3 to 4 metres. To the house of the defendants, it was about 2 to 3 metres. He admitted that before the bridge was built by Elizabeth, all of them used a passage behind Dona's house. That house adjoined his land and that of his parents.

As regards the passage from La Louise road, he stated that the footpath *was behind the house of Gilberte Melanie, his sister*. He however stated that that house was not built over that footpath.

Marie Zoe, the mother of the defendants, was called by the plaintiffs to testify. She stated that she purchased the property from the Frichot family in 1978. Before the bridge over the La Louise approach road was constructed about 3 years ago, a footpath was used to enter her property. The 1st and 2nd plaintiffs were using a footpath behind the present house of Gilberte Melanie. There was no road over her property. In 1978, the plaintiffs were using the Plaisance road over Mr. Gonzague Elizabeth's property. They also used the footpath behind their daughter's present house, but never over her land. She stated that the portion of land over which the plaintiffs were claiming was used by her to store building materials when constructing her house. There was no road or passage for anyone to pass over it. The passage was on a lower level behind the house of Gilberte Melanie. That land was originally reserved for cultivation purposes, as it was rocky and was unsuitable for construction. However, Gilberte Melanie purchased it, and built the house

over the footpath. Those who were using that footpath had to gain access through the Plaisance road over Mr. Elizabeth's property.

The 1st defendant, Peter Zoe testified that he, and his sister the 2nd defendant are the owners of Parcel V. 10223 which is a subdivision of Parcel V. 2121 owned by their mother. He corroborated the evidence of his mother as regards the right of way used by the plaintiffs over Gilbert Melanie's present land, and denied their claim that they used part of his land as a footpath for over 40 years. He stated that the plaintiffs' lands are not enclaved as there has always been an alternative road from the Plaisance road. As regards the alleged obstruction, he stated that when constructing the house, the gravel had to be kept there. He further stated that according to the plan, steps had to be constructed on that area (D5) . He stated that when his mother purchased the property in 1978, the land was steep and had a big boulder, and hence a wall had to be constructed to retain the soil. There was no demarcated footpath for use by the plaintiffs. He also stated that when he got planning permission to construct the wall, Planning Authority was aware that there was no right of way. That portion is being used for cultivation. He further stated that the Government built the bridge to cross the river at the La Louise end near his house for exclusive use of his family and Gilberte Melanie who was also living there. That was not to be a part of a Public road to access other lands.

The 2nd defendant, Marie Helene Zoe, adopted the evidence of Peter Zoe. On being cross examined she stated that the house built by her mother is now a duplex, one for her brother Peter and one for her. She is presently passing through the verandah of Peter. She has obtained a plan to build a flight of steps to have separate entrance. These steps will be on the area the plaintiffs are claiming a right of way. That plan has still not been approved. She further stated that the Melanie family and Wirtz used a footpath below her land and not along her land. It was behind the present house of Gilberte Melanie. She however stated that they were allowed to pass over the Zoe property as neighbours, without acknowledging

any right.

Mrs. Ivy Edmond, the Plaisance District Administrator for the past 10 years, and also the member of the National Assembly for 5 years, testified that the Frichot Family sold all their lands in that area. There was a right of way between the plaintiffs land and the land of Zoe for 40-45 years. It was "*like a Public road".* However when constructions started, the Government decided to construct a concrete road to serve all the landowners. She stated that she herself has used that footpath and that was the most convenient access for Gilberte Melanie to visit her crippled mother, as her father, (the 2nd plaintiff) died pending the disposal of this case. She further stated, that at least on humanitarian grounds, the daughter should have access to her sick mother through this area as it is the shortest and the most convenient route.

Jason Dine testified that he is living at La Louise since 1982. He lives on a lower land than that of the Melanie's. He helped to build the house of Marie Zoe. He stated that that house was built over a footpath which had been in use and that hence she herself blocked her own right of way. On being cross examined, he stated that he is married to another sister of Peter Zoe. He also stated that the passage claimed by the plaintiff existed only for about 8 years, after the previous right of way, which was used for over 40 years was obliterated when Gilberte Melanie built over it. He stated that Mrs. Edmond would have used the old footpath. He maintained that there was no recognized right of way over Zoe's land.

Apart for the claim for moral damages, the basic claim is for a declaration of a right of way *in law,* over Parcel V. 10223 belonging to the defendants. There are several ways in law how a right of way can be claimed. The 1st and 2nd plaintiffs have pleaded that their land is enclaved and that they have been using a footpath on the edge of the defendant's land for over 40 years. The 3rd plaintiff avers that same reason, but avers that he had been

using that footpath for 20 years. In addition the 1st and 2nd plaintiffs aver that they are elderly and disabled and that hence the said footpath is the most convenient and shortest way to access the Public road.

First, are the lands of the plaintiffs enclaved?

Article 682 -1 of the Civil Code provides that –

> "The owner whose property is enclaved on *all sides, and has no access or inadequate access on to the Public Highway, either for the private or for business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause".*

In the present case, according to the evidence, the properties of the plaintiffs are not enclaved on all sides. They are presently using the Plaisance route through Gonzague Elizabeth's property which is adequate to access the Public Highway.

Secondly did the plaintiffs use a footpath over the defendants land for over 20 years?

Article 685-1 of the Civil Code provides that –

> "The position and the form of the right of way on the ground of non-access are ***determined by twenty years*** *continuous use. If at any time before that period the dominant tenement obtains access in some other way, the owner of the servient tenement shall be entitled to reclaim the right of way on condition that he is prepared to return such a proportion of any compensation received under paragraph 1 of Article 682 as is reasonable in the circumstances".*

In the case of **Roy Norah & Ors v. Berthe Otar 1983) S.L..R 58,** the plaintiffs were owners of separate Parcels of land which formerly were a part of a large estate that had been subdivided and sold. They sought a declaration of a right of way over the defendants land along a footpath which they alleged had been used by them to gain access to the Public road. Admittedly the plaintiff's land was enclaved and had no access to the Public road. The defendants denied continuous user of the footpath by the plaintiffs and alleged that they had alternative access, but through the lands of others.

On the basis of the evidence, the Court held that there was no evidence of continuous user for 20 years, and that hence no conclusion could be drawn that the position of the right of way was fixed by user. The Court however held that as the plaintiffs land was enclaved, they were entitled to a right of way under Article 682.

In the present case, as I have already held that the lands of the plaintiffs are not enclaved as envisaged in Article 682-1, the other consideration is 20 years continuous usage. In that respect, the evidence of Gonsalves Elizabeth is relevant. As is seen in Plan P9, there was a 1.5 metre right of way to the lands of the plaintiffs when Elizabeth purchased his property in 1976. But there was no road. Hence the plaintiffs passed behind one Dona's house. When he built the bridge over the river to construct the garage about 20 years later, they started to use that route. He was testifying in December 2004. In addition to these routes, the plaintiffs had used an access through the La Louise end. The evidence revealed that until a bridge was built by the Local Government Department, the plaintiffs and the defendants had crossed that river to gain access to their respective properties. Mrs. Ivy Edmond testified that the plaintiffs passed through a passage between their land and that of the defendants. However the evidence of Marie Zoe, the mother of the two defendants, although called by the plaintiffs to testify, was that that passage was where Gilberte Melanie built her house. This was corroborated by the defendants and their

witness Jason Dine. The 2nd defendant Marie Helene Zoe testified that access was given over their property to the plaintiff but not acknowledging any right on their part. That was when the parties were on good terms. However, it was in evidence that there arose some dispute with Gilberte Melanie regarding ducks straying on to the defendant's land, and that it was then that they obstructed. The legality of such obstruction is not relevant for present purposes. On a consideration of the evidence on this issue, the Court is satisfied that the plaintiffs have not established that they have been in continuous use of that footpath for 20 years, as required by Article 685-1, for a conclusion to be drawn that the position of the right of way was fixed by user.

Article 683 provides that –

> *"A passage shall generally be obtained from the side of the property from which the access to the Public Highway is nearest. However account shall also be taken of the need to reduce any damage to the neighbouring property as far as possible".*

This article applies when there is a finding that the dominant tenement is enclaved and there arises the need to demarcate the point of access in the servient tenement. In the present case, in view of the finding that the lands of the plaintiffs are not enclaved, this issue does not arise for consideration. However, as was held in the case of **Azemia v. Ciseaux (1965) S.L.R. 199,** *"the Rule that the distance must be the shortest, is not absolute, but a mere guide*". Hence although a right of way over the defendant's land would be shorter than the one from the Plaisance end, yet that alone is insufficient for the plaintiffs to claim a "*right of way in law*".

Mrs Ivy Edmond, in her capacity as the District Administrator of the area recommended that Gilberte Melanie, the daughter of the 2nd plaintiff be permitted to visit her ailing mother

using a footpath over the defendant's land. According to the evidence, Robert Melanie, the son also lives on a higher level about 3-4 meters away from the house of the parents. Undoubtedly he would also be in a position to look after the welfare of his mother, as his father, the 2nd plaintiff *(Gilbert Zialor)* has now passed away. Subsequent to Mrs. Edmond's evidence, the parties sought to settle the case on the basis that the defendants would permit a right of way limited to the lifetime of the 1st plaintiff who is now about 70 years old, feeble and crippled. However that did not materialize. The plaintiffs have sought a declaration of a right of way in law, and hence the Court cannot make any order in equity, which in any event can be done only where no sufficient legal remedy is provided by law.

In these circumstances, the plaintiffs' action is dismissed with costs.

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A. R. PERERA

JUDGE

(Pursuant to Article 132(3) of the Constitution

Dated this 22nd day of July 2009