IN THE SUPREME COURT OF SEYCHELLES

PAULe GITANNE WELCH
(formerly Adam)

Vs

MARIE ANGE WAYE-HIVE

Civil Side No: 36 of 2008

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Mr. Chang Sam for the plaintiff
Mr. C. Lucas for the defendant

JUDGMENT

Renaud, J

A Plaint was entered on 13th February, 2008 whereby the Plaintiff prayed this Court for various orders on the ground that the Defendant has encroached on her property.

The Defendant entered her Statement of Defence which included a counterclaim. She prayed this Court to dismiss the Plaint and to allow her counterclaim.

Plaintiff's case

It is the case of the Plaintiff that without her permission or consent the Defendant has entered on her properties and grown bananas and other trees and built thereon, and that she is now using and enjoying those parts of her properties on which she has entered, cultivated and built as if they belong to her.

The Plaintiff also alleged that the Defendant, her employees and agents and other persons residing with the Defendant or acting under her instructions dumped and are dumping rubbish and burned and are burning used motor vehicle tyres on her properties thus causing inconvenience to the Plaintiff, members of her family and her tenants.

In the circumstances, the Plaintiff claimed that the said acts of the Defendant and those of her employees, agents and other persons residing with her, constitute a trespass to and an encroachment on her properties.

The Plaintiff pleaded that the Defendant has failed and refused and continues to fail and refuse to stop trespassing and encroaching on the Plaintiff's properties as averred above despite all attempts made by the Plaintiff, including causing her lawyer to write to the Defendant on the 27th November, 2007.

As a result of the trespass and encroachment averred hereinbefore that Plaintiff has suffered **moral damages** for inconvenience, stress, prejudice for which she claims **SR100,000.00**.

Defendant's case

On the other hand, the **Defendant** averred that she is entitled to **easements, rights and servitudes,** acquired by deed, long usage and by consent and/or approval of the predecessors in title namely Boris Adam and Gervais Adam for the reasons set out.

The Defendant maintained that she does not intend to give up, abandon or forfeit her rights and interests acquired by prescription, permission, operation of law and by deed as successor in title of Mrs. Therese Wheeler.

Defendant's Counterclaim

The Defendant entered a Counter-claim contained in 14 paragraphs. All except one of the averments contained therein are denied by the Plaintiff.

I have not ventured to set out the pleadings of the counterclaim in its lengthy details but will address them in this judgment. These averments highlight the deep antagonism that exists between the parties and the extent the parties

expect this Court to go in resolving their respective bitter and antagonist situations.

However, I do not find it necessary to dissect each one of the allegations pleaded by the parties and to make findings one way or the other, unless this is required of me in order to address the fundamental issue or issues.

The issues

I find that the fundamental issues arising out of the pleadings of the parties are:

(a) Has the Defendant in any manner encroached on the Plaintiff's properties Title No.H573 and/or H2107.

(b) If it is established that the Defendant has indeed encroached on Plaintiff's properties, had or has she any legal right to do so, if not;

(c) Is the Plaintiff entitled to the orders prayed for;

(d) Are the counterclaims of the Defendant sustainable, if so:

(e) Is the Defendant entitled to the remedies sought?

Findings

The parties and there respective witnesses adduced evidence before the Court. Plans and other documents were also produced and exhibited. The Court visited the site on two occasions. From these, the Court made the findings which follow.

At all material times the Plaintiff was and is the Executrix and Fiduciary of the land comprised in Title Nos.**H2107** and **H573,** hereinafter referred to as Plaintiff's properties. These properties belonged to the late Boris Gervais Adam and the late Marie Raymonde Adam. Following their death on the 23rd October, 1999 and 24th February, 2002, respectively, the land became and is vested in the Plaintiff as Executrix and Fiduciary, by virtue of her appointment by the Supreme Court in respect of the estate of Boris G. Adam, on 3rd December, 1999 and in respect of the estate of Marie R. Adam on the 23rd May 2002 **(Exhibits P8 & P9).**

The Defendant is and was at all material times the owner of the land comprised in Title No.**H225,** hereinafter referred to as the Defendant's property **(Exhibit P4)** having bought the property from one Mrs. Therese Wheeler on 29th April, 1985 who had herself purchased it from the late Mr. Boris Adam on 17th November, 1971 **(Exhibit P6).**

In the case of land Title No.**H2107**, the common boundary line between the parties runs between beacons MA490 and MA489 and in the case of Title No.**H573**, the common boundary line is between MA490 and MA491.

Exhibit P7 is a letter dated 12th November, 2007 from the Development Control Officer of the Planning Authority to the Plaintiff making reference to a site visit on the properties in issue on 15th October, 2007. The letter *inter alia* states –

> *"It was observed and established by both parties that there may be encroachments by the owner of parcel H225 on parcels H2107 and H573.*
>
> *It was therefore concurred by the same parties concerned that the services of a land surveyor should be retained to assess the possibility, and if so the degree of the encroachments. Furthermore it was agreed that if there should be any encroachments the latter would be removed by the responsible party.*
>
> *It was also brought to the Planning Authority's attention that the motorable access used by the owner of parcel H225 is an acquired interest gained from the vendor of the latter plot, as dictated in the transcription 53 No. 352 dated November 1971 for the sale of the land parcel H225.*

This letter serves to confirm the agreement reached on site by the concerned parties, and to shed light on the subject of the authenticity of the access drive."

The Plaintiff caused a Land Surveyor to locate all beacons and drew up a plan (**Exhibit P16**) showing all possible encroachment by the Defendant. The correctness of the content of that **Exhibit P16** remained unchallenged. I find that the Defendant is currently using part of property parcel H573 as a motorable driveway to reach the upper part of her property parcel H225. That driveway covers an area of about 14.8 metres by 5.9 metres. From the same exhibit I find that on parcel H2107 there is a building, a wall and a water tank belonging to the Defendant which covers an area of about 11.9 metres by 5.8 metres.

On the basis of that plan, on 27th November, 2007 **(Exhibit P 10**) the Plaintiff caused her lawyer to write to the Defendant formally setting in detail the encroachments and trespass complained of and requested the Defendant to forthwith demolish and remove all structures etc over her land within 15 days.

In the final analysis I find that the Defendant has indeed encroached on the Plaintiff's properties to the extent I have set out.

The Defendant is still using and enjoying those parts of the Plaintiff's properties on which she has encroached

The Defendant contends that she has acquired legal right to continue to use and enjoy those parts of the Plaintiff's properties because since 1985 she has been given permission to carry on back-garden activities on the Plaintiff's land by Boris Adam, the predecessor in title, and, that thereafter the Mr. Boris Adam's son Gervais Adam endorsed his father's consent and agreed that the structures be built and that part of the land be occupied without consideration.

It is stated in the first Sale Agreement of 17th November, 1971 (**Exhibit P6)** between Mr. Boris Adam and Mrs. Therese Wheeler that – "*the said sale further includes a motorable access road from the public road to the portion hereby conveyed through the existing drive on the remainder of the vendor's land.*" The right of way is attached to the property, therefore, when Mrs. Wheeler sold that property to the Defendant that right passed on to the Defendant. That part of the motorable access abuts the main road and runs over the lower part of parcel H573 and then leads onto the Defendant's property parcel H225. It was originally earthen as claimed by the Defendant and has now been concreted. For this reason I find that the Defendant has a motorable access from the public road to her property parcel H225. I also however find that this part of the driveway is not in issue in the present suit.

The encroachment complained of by the Plaintiff in the instant suit is the driveway which is on the upper part which starts from the Defendant's property H225 going over the Plaintiff's property H573 and veering back onto the

Defendant's property H225. I find that that part of the driveway is not covered by the right granted in the original Sale Agreement mentioned earlier.

According to the Defendant that driveway on the upper part existed at the time that she purchased her property from Mrs. Wheeler but at that time it was an earthen access road and it was with the authority and/or permission of the late Gervais Adam that she concreted it.

Could it be established that during the period 29th April, 1985 to 27th November, 2007 the Defendant had indeed used that access albeit in its original state, continuously, without interruption ? It is now for this Court to make a finding on that issue. I can only do so on the basis of the evidence before the Court.

The Plaintiff *inter alia* testified that the late Gervais Adam had been a sick person for some years before he died on 23 October, 1999. When she left for New Zealand neither the concrete drive nor any building had been constructed. It was after she came back that she noticed those encroachments.

The Plaintiff's witness, Mrs. Gendron, *inter alia* testified that she lived in the Flats on parcel H2107 from 1988 to 1992 and she did not observe the existence of the driveway on parcel H573.

On 12th March, 1993 the late Mr. Gervais Adam received planning approval to extend Flats on parcel H573 as shown on **Exhibit P15** drawn up by Architect Mr. Gilbert F Frichot (PW2). On that approved plan a proposed access drive leading from the existing access on parcel H573 not far from the public road, across parcel H2112 and onto parcel H595 is shown. The access drive to the Flats is not shown on Exhibit P15. There is no indication on that approved plan (Exhibit P15) that the existing drive from the Defendant's property continued onto parcel H573 and veered back onto the upper part of Defendant's property parcel H225. Mr. Frichot confirmed that if there was to be a continuation of Defendant's driveway up to the Flats he would have drawn it on Exhibit P15 as that access would need to be approved too. Mr. Frichot in his testimony also stated that when he personally visited the site in connection with the extension of the Flats he did not find any construction of the driveway or any building on parcel H2107. Had the driveway already been constructed it would have been shown on the plan **(Exhibit P15).**

The Defendant *inter alia* testified that the driveway was there at the time she purchased the property, although not motorable and had been used by herself as well as other people who lived on the upper part of the property. With the permission and authority of the previous owners, namely Mr. Boris and/or Mr. Gervais Adam she first laid two concrete strips on that driveway and thereafter full concreting was laid over. Similarly, she was authorised by them to locate the water tank, the covered area referred to as the building as well as the wall, by those same persons.

Mr. Ernesta, the 35 years old son of the Defendant, testified that as far he could remember as a young boy, there was a driveway there and even produced photographs **(Exhibits D7 and D8)** taken sometime in 1997 during his younger days, clearly showing the driveway. He corroborated the evidence of her mother with regard to the laying of concrete strips and eventual full concreting.

Mr. Jude Laurence, 52 years old, testified that he lived on the property adjacent to that of the Defendant for the past 46 years. He recalled the driveway that was earthen and which always existed and which was used by other people living on the upper part of the Adam property. It started from the main road and went up to right behind the existing house of the Defendant. That driveway was later concreted.

Mr. Deven Antoine testified being the person who took and thereafter processed the photographs **(Exhibits D7 and D8)** sometime in 1997.

I bear in mind that the Plaintiff did not have much to do with the overseeing of the property in issue until after the death of her husband in 1999.

It could possibly be that Mrs. Gendron did not notice the concrete driveway at that time, however, I am hesitant to admit her evidence regarding the non-existence of the driveway as being conclusive as I hold the view that she was not necessarily concerned with such matter because that was not an issue at the time.

With regard to the evidence of Mr. Frichot I note that he came on site in 1993 when he was in the process of designing the Flats of the late Gervais Adam but he did not conclusively testify with regard to the driveway.

Having considered the evidence of the Plaintiff and her witnesses Mrs. Gendron and Mr. Frichot on the one side as well as the evidence of the Defendant, her son Michael Ernesta, Mr. Antoine and Mr. Laurence on the other side, I find on a balance of probabilities that the driveway in issue was always in existence although originally earthen and that the Defendant later concreted it, in two strips and then in full, in order to make it useable during the rainy season.

Article 690 of CCSey states that continuous and apparent easements are acquired by documents of title or by possession for twenty years. Is that second part of the drive way covered by the provision of Article 690 on the basis of twenty years prescription? A twenty year period starting from date she purchased the property from Mr. Wheeler that is 29th April, 1985.

I further find that the Defendant had been using that part of the driveway since she purchased her property in 1985 and had been so openly using it continuously, without interruption for over 20 years.

In the circumstances I find that the Defendant had acquired a prescriptive right over that part of parcel H573 where the driveway is situated as depicted by **Exhibit P16**.

I make a similar finding with respect to the retaining wall as there is no sufficient evidence that indicate otherwise than what the Defendant stated - that this wall existed at the time she purchased the property.

I will now address the issue of the construction of a water tank on pedestal and a covered building.

At the time of the Locus in Quo, I noted that the water tank appeared to have been there earlier than the building. The latter appeared to be newer of the two constructions. The water tank is on a pedestal and can easily be seen from a distance. Likewise the other covered building can also be seen from a distance. Any person standing where the Flats are located on parcel H573 which is on a higher level, and looking in the northern direction towards parcel H2107 can easily see the water tank and the covered building. By its built I have no doubt that these must have taken time to complete. These are in the open and not deliberately hidden. If these were constructed during the lifetime of Mr. Boris Adam, he would have surely seen these and he would have obviously raised objection and failing to do so would mean that he acquiesced to their constructions as claimed by the Defendant. However, I take note that Boris Adam passed away on 29th April, 1986 about 14 months after the Defendant purchased her property from Mrs. Wheeler. In February, 1978 when Mr. Boris Adam gave permission to one Mr. Pilate to build a house on his property, he drew up a written document to that effect and had it transcribed and registered. That goes to establish that Mr. Boris Adam knew that the granting of “permission to build”

on his property by a third party must be drawn up in writing. In my view, it logically follows that if Mr. Boris Adam had granted any such concession to the Defendant he would have put it in writing, which he did not do.

In the light of my reasoning above, I conclude and find on a balance of probabilities that the late Mr. Boris Adam during his lifetime did not give any written permission to the Defendant to carry out any of those constructions on his property.

If these constructions were carried out at a latter date, that is, after the passing away of Mr. Boris Adam in 1986 it would have taken place during the lifetime of the wife of Mr. Boris Adam who was alive until 2002, as well as during the tutelage of the son, the late Gervais Adam, from 1992 when he came to live on Mahe up to his death in 1999. Had these constructions indeed taken place after 1992 led to three possibilities – either such constructions were not carried out during the period that Gervais Adam was actively overseeing the property or secondly he saw the constructions and acquiesced to these or thirdly the constructions took place after his death in 1999. In the second case it would amount to an implied permission to build.

Although it is in evidence that Gervais Adam was sick from 1992 and continued to be so until his death in 1999, however, during the earlier part of that period he

was able to oversee his parents' properties and was able to undertake projects like engaging Mr. Frichot in 1993 to carry out certain construction projects on the property. The project was to take place in the vicinity where one could easily see constructions of the sort undertaken by the Defendant on his parents' property.

If the constructions took place after the passing away of Gervais Adam in 1999 then it must have been constructed during the tutelage of the present Plaintiff.

The Plaintiff alleged that the driveway on parcel H573; the covered building; the wall and the water tank were all constructed during the time that she was away in New Zealand after the death of her husband. Having already made my findings in respect of the concrete drive and the wall, I will now proceed to consider the issue of the water tank and covered building.

A letter dated 14th January, 2008 from Public Utilities Corporation **(Exhibit P13)** made reference to a site visit made by them on the site on 9th January, 2008 and *inter-alia* stated that –

> "*Upon our site visit we found that a new building has been built under our low voltage electricity line. We would like to point out that we did not receive any planning application for this newly-built or renovated building for our comments…..*"

Although it makes reference to a “new building” it could not serve as conclusive evidence as to approximately when that building was constructed.

The weight of the evidence of the Defendant that she obtained the permission of the previous owner Mr. Boris Adam, in my considered view, is minimal because at the time of the death of the Boris Adam in 1986, I doubt if she could have built any of those constructions on either Parcel H573 or H2107 since she had only purchased the property barely a year before.

Upon my careful analysis of the evidence before this Court I come to the conclusion that the Defendant had not built any building on part of parcel H2107, during the lifetime of Boris Adam or Gervais Adam.

For reasons stated above, I find on a balance of probabilities, that the constructions of the water tank and the covered building did not take place during the “active” lifetime (when he was not bed-ridden) of Gervais Adam and that these constructions must have taken place on parcel H2107 as depicted by Exhibit P16, sometime during the period 1999 to 2007, without the permission, authority and consent of the owner(s) thereof.

In the circumstances I hold that the Defendant has not acquired any prescriptive right on parcel H2107 belonging to the Plaintiff in respect of that part of the Plaintiff's property where her water tank and the covered building are located and that the Plaintiff has thus satisfied this Court that the Defendant has indeed encroached and trespass on parcel H2107 to the extent alleged and that the Defendant is consequently liable in law to the Plaintiff.

Exhibit P14 is a letter dated 13th February, 2008 from the Division of Pollution Control & Environment Impact of the Department of Environment of the Ministry of Environment, Natural Resources and Transport which states that here was only burning of papers and leaves in an empty drum and that waste being generated as a result of the car hire business of the Defendant was confirmed to being dumped at Providence landfill. The allegation of the Plaintiff that the Defendant, her employees and agents and other persons residing with the Defendant or acting under her instructions dumped and burned used motor vehicle tyres on the Plaintiff's properties is not supported by evidence and is accordingly dismissed.

The issue of requiring the Defendant to forthwith remove and clear the Plaintiff's Properties of all rubbish dumped by the Defendant, her employees, workmen and other persons as complained of by the Plaintiff was not subsisting anymore and neither was the issue of banana plantation as the Defendant had ceased such activities if these indeed existed. The Plaintiff appeared not to be pressing those

issues during the hearing. I consider these to have been abandoned in the circumstances.

What is the position in law with regard to unauthorized construction by a party on the property of another?

In the light of my finding, it is my judgment that **Article 555-2** is applicable in the present circumstances.

Articles 555-2 states that:

> *"If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expenses 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"*.

It is my judgment that the Defendant has not acquired **any rights and occupation** by **long usage** of any easements and of the land of the Plaintiff and the Defendant is therefore not entitled to any "***droit de superficie***" on parcel H2107 belonging to the Plaintiff's.

Whether as a result of the trespass and encroachment by the Defendant, the Plaintiff has suffered moral damages is a matter that would be addressed after the consideration of the defence and counter-claim of the Defendant.

Defendant's Counterclaim

It is my judgment that the matters complained of in the counter-claim arose on the one hand out of the actions of the Plaintiff in her endeavour to redeem her right which the Defendant by her trespass and encroachment on parcel H2107 had usurped, and, on the other hand by the Defendant's desperation to maintain what she believed she possessed as a right in the circumstances.

Having made my findings on the pleadings in the Plaint and Statement of Defence and having pronounced my judgment on the issues raised therein I do not find any further necessity to address matters raised in the counter-claim as I have already done so. The Counterclaim of the Defendant is dismissed except to the extent that I have found in her favour.

I find that, in the circumstances as contained in my judgment, the Defendant has not established any basis to claim moral damages and as such I dismissed her claim for moral damages against the Plaintiff.

By this judgment the Defendant is entitled to continue using those parts of the driveway on parcel H573.

The Defendant is not entitled to easements, rights and servitudes, other than the concrete driveway on the upper part of parcel H573 as found by this Court on the basis of long usage with the implied consent and/or approval of the predecessors in title and the part of the driveway on the lower part of parcel H573 as she acquired by deed.

The Defendant has not established to the satisfaction of this Court on a balance of probabilities that since 1985 she has been given permission to carry on back-garden activities on the Plaintiff's land by Boris Adam, the 1st predecessor in title, and that thereafter the 2nd predecessor in title, Gervais Adam endorsed the consent and agreed that the structures be built and that part of the land be occupied without consideration. This averment is dismissed.

Has the Defendant, as a result of her trespass and encroachment caused the Plaintiff to suffer moral damages? My answer to this question is in the affirmative and the quantum of which I have to decide.

The Plaintiff is claiming SR100, 000.00 but has not set out the basis as to how she reached that figure. In my considered judgment I believe that it is true that she morally suffered upon her finding that the Defendant had built on the property under her tutelage. She confirmed that after engaging the services of a Surveyor

and eventually that of a Lawyer in order to redress those anomalies from November, 2007 culminating with the instant case in Court until 2010. She had to handle all these in addition to her normal responsibilities in life as a wife, mother and employee. The Plaintiff has won a substantial part of the case she will be awarded costs. The Defendant has also won part of her claim. Taking all these factors into consideration I assess the moral damage at **SR30,000.00.**

Conclusion

I accordingly enter judgment in favour of the Plaintiff as against the Defendant and make the following orders:

(a) I hereby order and require the Defendant to forthwith demolish and remove the water tank and covered outbuilding built by her, her employees, workmen or other persons staying with her or acting on her instructions on the Plaintiff's property parcel H2107.

(b) I hereby order and require the Defendant to forthwith reinstate the Plaintiff's property parcel H2107 to the state it was in before the trespass and encroachment as found by this Court.

(c) I hereby grant an injunction restraining the Defendant by herself, her employees, servants or agents or otherwise howsoever from remaining on and trespassing and encroaching on the Plaintiff's property parcel H2107.

(d) I hereby make an order requiring the Defendant to pay the Plaintiff the sum of SR30,000.00 in damages with interest.

I award 60% cost of the case to the Plaintiff as the Defendant has partly won on her counterclaim.

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B. RENAUD
JUDGE

Dated this 1 March. 2013