

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA36/2014

Appeal from Magistrates Court Decision 25/2013

[2016] SCSC 134

JOYCE VILLENEUVE

Appellant

versus

SIMON HOAREAU

Respondent

Heard:

Counsel: Mr. Rajasundaram for appellant

Mr. G. Ferley for respondent

Delivered: 3 March 2016

JUDGMENT

Renaud J

[1] The Appellant, the Plaintiff in the suit in the Magistrate Court, was and is the owner of land parcel H988 located at Mare Anglaise, Mahe. The Respondent, the Defendant in the suit in the Magistrate Court, was and is the owner of land parcel H5748 which is adjacent to that of the Appellant.

- [2] In November, 2012 the Respondent encroached on and damaged the Appellant's property. The Appellant sought compensation from the Respondent for the encroachment and removal of earth.
- [3] The Respondent admitted to the encroachment thereby causing damage to the Appellant by his illegal act. He, however, did not agree to pay SR200,000.00 as the total amount of compensation sought by the Appellant. The case before the Magistrate Court was therefore basically on the issue of quantum.
- [4] In its judgment the Learned Magistrate awarded the Appellant the sum of SR28,000.00 as damages with interest and costs.
- [5] The Appellant being aggrieved by the decision of the Learned Magistrate delivered on 11th August, 2014 appealed against the whole of that decision on the following grounds:
1. The Learned Magistrate failed to appreciate the sum of SR28,000.00 being the value for encroachment is baseless and amounts to a total disregard to the proportion of the size of the encroachment committed by the Respondent and the resultant loss.
 2. The Learned Magistrate erred in his wrong legal interpretation as to the issue of arriving at the size of the encroachment committed by the Respondent.
 3. The Learned Magistrate ought to have struck a balance between the values of claims raised by the Appellant and that of the Respondent through their respective professional Quantity Surveyor. The reliance of just one report of the Respondent by the Learned Magistrate by totally ignoring the valuation of the Respondent is an error.
 4. The Learned Magistrate ought to have considered the real size of the encroachment and it is respectfully submitted that he failed to consider the size of the encroachment but unilaterally concluded the size based on the report filed through the Respondent's Quantity Surveyor. The findings of the Learned

Magistrate that absence of pleadings as to the size of the encroachment is contrary to the principle of not to adduce evidence in the pleadings.

5. The Learned Magistrate failed to take note of the Respondent's admission that he had wanted to buy that portion of the land from the Appellant much prior to the admitted encroachment and the mental agony caused to the Appellant as a result of the encroachment, while he refused to award any sum for moral damages claimed in the sum of SR100,000.00
- [6] At the hearing before the Learned Magistrate the Appellant adduced the evidence of a Land Surveyor who established that the encroachment was to the extent of 80 sq. m. The Appellant also adduced evidence from a Quantity Surveyor who estimated the value of the encroachment at SR80,000.00.
- [7] The Respondent testified that he had encroached only on 40sq. m of land. He did not adduce the evidence of any Land Surveyor to establish that fact. The Respondent adduced the evidence of another Quantity Surveyor who valued the encroachment at SR40,000.00 on the basis of the Respondent's claim that he had encroached on only 40 sq. m. .

Grounds 1, 2, 3 and 4

- [8] These four grounds of appeal can be convenient taken together.
- [9] Learned Counsel for the Appellant submitted that the Learned Magistrate completely disregarded the evidence of the professional witnesses of the Appellant when assessing the quantum. According to the testimony of Land Surveyor Ah Kong, who testified on behalf of the Appellant, the total area encroached was 80 square metres. Quantity Surveyor Allain Jean testified that he valued the encroachment of 80 sq. m at SR85,000.00.
- [10] The Respondent adduced the evidence of only a Quantity Surveyor Gerard Renaud who, basing on the assertion of the Respondent that he had only encroached on an area of 40 square metres, valued the encroached area at SR28,000.00. He also valued an estimated

70 tons of earth that had been removed at SR10,430.00, thus making a total of SR38,430.00. That valuation was, however, not based on any measurement made by a Land Surveyor.

- [11] The wide disparity in the valuation of the two professional valuers are due mainly to the fact that one valuer based his valuation on a 40 sq. m encroachment and whereas the other valuer based his valuation on an 80 sq.m encroachment.
- [12] The valuations made by both Quantity Surveyors (QS) are based on the principle of diminution of market value of the main property caused by the encroachment.
- [13] I find that the average cost per sq.m. as found by the QS of the Appellant is SR1,062.50, and that of the QS for the Respondent is SR960.75. Both the valuation appears reasonable and as such if it is averaged out it would come to SR1,012.00 per sq. metre.
- [14] Whether the encroachment is 80 sq.m or 40 sq. m is a matter of fact that ought to be determined. This can only be done on the basis of professional evidence of Land Surveyors.
- [15] The only Land Surveyor who testified in this case was Mr. Ah Kong who stated that the total area he found to have been encroached was 80sq m. The Defendant contended that the area of 80 sq.m.as found by the Land Suveyor Ah.Kong included a road. Mr. Ah Kon agreed to that.
- [16] Mr. Ah Kong admitted under cross-examination that the encroachment included a area comprising a road that was encroached prior to November, 2012 to the extent of 16 sq.m.
- [17] At paragraph 3 of his Plaint the Appellant pleaded that –

“The Defendant in or about November, 2012 cut earth from the Plaintiff’s portion of land and further caused damage to the Plaintiff’s land.”
- [18] The Appellant, by his pleadings referred to the encroachment that took place in November, 2012 and he did not make any reference to previous encroachment. He is therefore bound by his pleadings.

- [19] It was open to the Respondent to adduce evidence as to the area he encroached. Unfortunately he chose not bring any evidence of another Land Surveyor to challenge that of Mr. Ah Kong. Therefore the evidence of Mr. Ah Kong remained substantially unchallenged.
- [20] A list of documents was stated in the Plaint upon which the Appellant was to rely on in support of his claim. The Respondent at no stage of the pleadings requested for “further and better particulars.”
- [21] The Appellant did not specifically plead the area encroached and rightly so as he is not required to plead evidence in his Plaint. If the Respondent had wanted to focus on specifics, he was entitled to seek further and better particulars as to the exact extent of the encroachment the Appellant was referring to. This, the Respondent did not do.
- [22] By his Statement of Defence the Respondent pleaded that –
- “Save that it is admitted that the Plaintiff (sic) had, inadvertently, caused earth to be removed from the Plaintiff’s land thus causing a minor encroachment, all the averments as contained in paragraph 3 of the Plaint are denied. The Defendant avers that he had contracted an excavator operator to cut a terrace on the (sic) his property, parcel H5748, but unfortunately due to him not supervising the operator at all times the operator had overstep his boundary and encroached slightly on the adjoining parcel H988 belonging to the Plaintiff. The area encroached on is around 40 metres (sic) in area and at its widest is 3 metres and that portion of land, because of its topography could not be put to any use for the benefit of the Plaintiff or any other use whatsoever.”*
- [23] I find that these grounds of appeal have merits. For the purpose of the case, I find that the net area encroached by the Respondent in November, 2012 is therefore 64 sq.m.
- [24] As a consequence of my finding, I conclude that the judgment of the Learned Magistrate ought to be set aside to the extent that his finding that only 40 sq.m was encroached ought to be substituted for 64 sq. m as established by the evidence of the Land Surveyor. The average value of the two Qs is found to be SR1,012.00 per sq. m – making the total value of the encroachment to be SR64,768.00.

Ground 5

[25] This ground of appeal refers to the award of moral damage. I do not find on record any evidence that the Appellant suffered any moral damage. The Appellant lived overseas and did not adduce any evidence before Court. Award of damages, in such case as the instant one, carries the further element of bearing interests. The Appellant will be also entitled to costs.

[26] I do not find merit in this ground of appeal and it is accordingly dismissed. The Appellant shall instead be awarded interest.

[27] In the final analysis and for reasons stated above, I make the following orders:

- (i)** I hereby set aside the judgment of the Learned Magistrate.
- (ii)** I enter judgment in favour of the Appellant as against the Respondent in the sum of SR64,768.00 with interest at the legal rate from the date of this judgment.
- (iii)** I award costs to the Appellant in both this Court and the Court below.

Signed, dated and delivered at Ile du Port on 3 March 2016

B Renaud
Judge of the Supreme Court