

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 59/2012

[2016] SCSC 171

ANNE PILLAY

Plaintiff

versus

THEOPHILLE PILLAY

Defendant

Heard: 16 March 2016
Counsel: Mr. B. Hoareau for plaintiff
Mr. B. Georges for defendant
Delivered: 16 March 2016

JUDGMENT

Karunakaran J

[1] The plaintiff is the owner of a parcel of land *Title H8368* with a residential house situated thereon at Ma Constance, Mahé, wherein the plaintiff is living with her family. The defendant, who is none else than the brother of the plaintiff, is the owner of an adjoining parcel of land *Title H856* with a residential house thereon, wherein the defendant is also living with his family. The defendant's property is located on the higher level of terrain,

whereas the plaintiff's property is lying on a lower level. Both parcels have a common boundary across the sloppy terrain between two common beacons namely, ME144 and ME150.

[2] The defendant has built a retaining wall on his property along the common boundary line between the said two parcels of land. This retaining wall was built by the defendant to protect his house from possible collapse, if soil movements occur due to natural disasters or heavy rainfalls. According to the plaintiff, the defendant has illegally and intentionally encroached onto the plaintiff's parcel of land by constructing part of the said retaining wall in 2009 crossing the common boundary line of the properties close to beacon ME150. Hence, the plaintiff has entered the instant suit seeking the Court for a judgment to:

(i) declare that the Defendant has illegally constructed part of a wall on parcel H8368;

(ii) issue a mandatory injunction compelling the Defendant to demolish part of the wall illegally constructed on parcel H8368;

(iii) order the Defendant to pay cost to the Plaintiff; and

(iv) make any other order this Court deems fit and necessary in the circumstances of the case.

[3] On the other side the defendant does not dispute any of the material facts except the allegation of illegal and intentional encroachment. According to the defendant, it is true that there is a slight encroachment of a few square centimeters by the retaining wall on one end of the boundary line near beacon ME150. But, it is very slight and negligible encroachment that has occurred due to technical error in ascertaining the exact location of beacon ME150 as it had been in dispute. The slight unintentional overlapping though technically called encroachment, happened accidentally as there was a slight variation by a few centimeters in the original location of the beacon at the time of the construction of the wall in 2009. The problem originated from a small discrepancy between two surveys dated 1973 and 1975 by the survey division. According to the defendant, he constructed the retaining wall in good faith and the negligible encroachment was not deliberate but

was done as per the then location of the beacon ME150 that was unascertainable at the time of constructing the wall.

[4] In any event, it is the case of the defence that the alleged encroachment is *de Minimis*, and was accidental rather than deliberate. Besides, the defendant's estranged sister, the plaintiff always had an acrimonious relationship with him and his family. They were not in speaking terms for many years. Therefore, she has brought this action in 2012 against him for a "de minimis" that had occurred in 2009 asking the court to order demolition of part of the wall out of malice, *abusing her rights* as owner of the adjoining property. This mala fide act of the plaintiff amounts to "*abus de droit*" in law. For these reasons, the defendants urged the Court to dismiss the suit with costs.

[5] At the hearing of the case, after the plaintiff had started to give her testimony, both parties agreed not to call further evidence since all relevant facts and the alleged encroachment are admitted. On 11th January 2013, the surveyor Mr. D. Barbe conducted the resurvey of the property in dispute and submitted the report to Court. However, the said survey report with a sketch plan was produced from the bar and admitted in evidence - in exhibit P1 – with the consent of both parties. This report, which was commissioned by the Court, depicts the encroachment and the wall in question built on parcel H856, which slightly encroaches onto parcel H8368. Therefore, both counsel invited the Court to consider only the points of law and their written submission presented to Court. Since the fact of encroachment is based on the discrepancy on the location of a common beacon ME150, the Court has to completely rely and act only on the expert report on facts in this matter. Indeed, it is important here to rehearse the entire contents of the report, which reads (in verbatim) runs thus:

[6] **“Overview**

The parcel in question is located at Ma Constance in an area known to have numerous boundary issue, most of which had been attended to in the past by the Survey Section. The source of the problem originated from a small discrepancy between two surveys dated 1973 and 1975 respectively. The results obtained from survey in 1975 were used to correct the inconsistency but not all boundary beacons values were adjusted accordingly.

[7] On site observations and Solution

It was observed that there were two sets of beacons at both MEt44 and ME150, with close proximity to each other. The correct assumption at this point was not to adopt any one as the correct boundary beacons as we had no knowledge of how their position on the ground was determined, given the past history of the area.

In such cases, the best solution is to use sets of beacons from original surveys, in that case that of the 1975 survey, to determine the correct position of the beacons in question. Field work was carried out to that effect and checks carried out on all four beacons found on the ground.

[8] Findings

- From the two beacons found on the ground at the location of where ME144 is supposed to be, only one beacon yields the correct value as per the survey plan of both Parcels. The other beacon, which was off by 20 cm was removed and disposed of.*
- From the two beacons found on the ground at the location of where ME150 is supposed to be, only one beacon yields the correct value as per the survey plan of both Parcels. The other beacon which was off by 25 cm was removed and disposed of.*
- Small encroachments by the retaining wall was observed and mapped (see attached site layout)*

[9] Recommendations

At the time of writing there is only one beacon on the ground which denotes the exact position of ME144 and one beacon for ME150. Both have been accurately checked and comply with the laws governing position fixing of boundary beacons in regards to established boundaries (approved parcel diagrams).

I therefore recommend that the current position of ME144 and ME150 as per the findings be adopted as the correct position of the boundary between H8368 and H856.”

[10] I meticulously perused the entire pleadings and the documentary evidence including the exhibits on record. I carefully went through the written submissions presented by counsel on both sides and also examined the relevant provisions of law as well as the case law applicable to the issues on hand. To my mind, following are the fundamental questions, which require determination in this matter:

1. *Does the cause of action namely, the alleged encroachment in the instant case fall within the scope of de Minimis in law?*
2. *Does the action of the plaintiff seeking demolition of the retaining wall amount to abus de droit or abuse of right in law?*
3. *Is the application of French doctrine “abus de droit” in our jurisdiction inconsistent with or in derogation of the Fundamental right to property guaranteed under Article 26 of the Constitution of Seychelles? and*
4. *What relief is the plaintiff entitled to in the entire circumstances of the instant case?*

[11] The material facts relevant to the issues in this matter are not in dispute. The parties are sister and brother. Admittedly, there is family hostility and bitterness between them. The Defendant has built the retaining wall on the boundary between the two parcels in 2009. It has been built along the northern boundary of parcel H856, on the line between beacons ME144 and ME150. At either end, the wall is within the boundary of the Defendant's parcel; in the middle it bulges slightly into the Plaintiffs parcel H8368. At its maximum the encroachment is about 22 cm (less than a foot) into the Plaintiff's land. The extent and the nature of encroachment is negligible covering a small triangular area of a few square centimeters. The minimal nature of the encroachment is supported by the surveyor's report, which reveals onto the part of the plaintiff's unusable terrain there is a small unintentional encroachment. This report also reveals that this might have occurred due to inaccurate positioning of the beacons on the ground in previous surveys. These discrepancies had given rise to numerous boundary issues in the past. On a balance of probabilities, it could be the only reason why the wall along the boundary between the

two parcels has strayed into parcel H8368 in its middle section. Obviously, this retaining wall has been built by the defendant in good faith with intent to protect his house from possible collapse, if soil movement occurs due to natural disasters such as heavy rainfalls, mudslide etc. This wall will also protect the plaintiff's property from consequences of such disasters. In any event, as I see it, this negligible encroachment will in no way affect the use, occupation and enjoyment of the plaintiff's property in any manner whatsoever, nor will it reduce its value in the market.

[12] Now, the Plaintiff is so adamant that the encroachment should be removed simply because she has the legal right to do so, whatever be the consequential loss or detriment her brother, the defendant may suffer or the balance of justice demands. This adamancy will definitely entail demolishing the wall and rebuilding it 22 cm back breaking the wall in the middle. The cost of this will obviously, be significant. On the other hand, I also note that the Plaintiff indeed, benefits from having a wall on the southern boundary of her parcel H8368. This wall secures that boundary and supports the land above that boundary. The survey plan produced by the surveyor shows clearly that the Plaintiff's dwelling house built on parcel H8368 is located at a distance relatively far away from the wall in question. Therefore, as submitted by Mr. Georges - learned counsel for the defendant - it cannot be said that the encroachment reduces the use by the Plaintiff of her land as it would, for instance, if the encroachment were reducing the ability to access the plot, or causing a nuisance of a permanent nature. Considering the entire facts and circumstances of the case, I find that the Plaintiffs instant action seeks less to vindicate a right to property than to cause the Defendant to spend money to remedy an insignificant wrong. Besides, I note that any loss to the Plaintiff of a negligible area of land at one end of her plot is compensated by the security of the boundary and retaining wall in question.

[13] To my mind, it is clear from her demeanor and deportment in Court that the plaintiff is only trying to settle an old score with the defendant by instituting the instant action and seeking a legal remedy for a *de minimis*. In my judgment, the common law principle of *de minimis non curat lex* is wholly applicable in this case. Incidentally, this principle applies to all civil, criminal and even to constitutional claims, and its function is to place outside the scope of legal relief the sorts of injuries that are so small that they must be accepted as the price of living in society peacefully sharing our resources with our

neighbour for a common good, rather than making a litigation out of it. In my view, judges will not and should not sit in judgment of extremely minor transgressions of the law particularly, when it is committed by one family member to the other - as it has happened in the instant case - for the sake of administering mere technicality of the law unless justice demands otherwise. Law ought to be steered towards the administration of justice rather than the administration of the letter of the law. In doing so, the Courts cannot remain oblivious to the moral roots of the law, equity and good conscience and resort to mechanical application of the law simply focusing on its niceties and technicalities. Any reasonable man, who is not connected to the law but to equity and good conscience would deem cases of this nature an utter waste of time and resources for all concerned.

[14] As rightly submitted by Mr. Georges, the Plaintiff may even be seen guilty of abusing her right to obtain a remedy for a triviality that would amount to committing a fault in terms of article 1382(3) of the Civil Code, even if it appears to have been done in the exercise of a legitimate interest.

[15] Needless to say, the plaintiff's action alleging encroachment by the defendant in essence based on the concept of fault. Hence, the principles of law applicable to this case are that which found under Article 1382 (2) & (3) of the Civil Code of Seychelles. This Article reads thus:

(2) "Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be a positive act or omission"

(3) "Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest" (underline mine)

[16] In fact, this article incorporates a subtle definition of *abus de droit* or abuse of rights. The Seychelles Court of Appeal in the recent case of **Mancienne v Ah-Time [2013] SLR 165** has clearly formulated the law regarding encroachments thus:

[17] Article 555 of the Civil Code only applies to constructions entirely erected on someone else's property. It has no application where constructions are partly built on someone else's property. Article 545 applies to such cases of partial encroachments. The encroached owner can insist on the removal of the encroachment and the court must accede to this demand and cannot force the encroached owner to accept damages in lieu. Good faith or mistake do not excuse an encroachment and the court cannot take these into account.

[18] Where grave injustice will result from an order for demolition, the court will not so order, so long as the encroacher can show that he acted in good faith and within the law. Instead, the court will order damages commensurate with the encroachment. If the encroached owner insists on demolition in such a case, the encroacher may plead abuse of right on the part of the encroached owner and seek an order that the encroached owner be compensated in damages for the encroachment.

[19] The foregoing formulation of the law is well set out in the judgment at Pages 175/6 as follows:

“This Court in Nanon v Thyroomooldy SCA 41 of 2009 has attempted to bridge a gap in our law so as to bring our jurisprudence in line with what obtains in this area in comparable jurisdictions. It has done so by developing further - to Art 545 of the Civil Code - a doctrine of abus de droit which already exists in our law: namely, art 1382-3 of the Seychelles Civil Code and art 54 of the Commercial Code, labour law etc, largely influenced by the dire need of the particularities of our social and historical set up and the insight of Justice Souzier.”

[20] In Post-Nanon, the exception to the rule that demolition should be ordered in all neighbour boundary encroachments may be stated to be as follows:

“Where the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, account taken of the negligible extent

of the encroachment compared to the gravity of the hardship to the encroacher, the Court should, as an exception mitigate the consequences by an award of damages instead of a demolition. Nothing short of that would suffice. For the encroacher to escape the guillotine of article 545, he should show that, in refusing a compensation for the negligible encroachment and insisting on a demolition order in all the circumstances of the case, the owner is making an abus de droit.”

- [21] Applying the above yardstick of case law to the facts of the case on hand, I find that the nature and extent of the encroachment falls within the scope of *de minimis or negligible* as enunciated in Mancienne supra. I also find that the demand of the Plaintiff for demolition of a high stone retaining wall to resolve an encroachment at the base of the wall for a couple of centimeters amounts to a clear abuse of right as subtly defined in article 1382(3) of the Civil Code. The Plaintiff cannot be in need of the small strip of encroached area for any practical use and enjoyment. Rather, her dominant purpose in seeking the removal of the negligible encroachment by requiring the demolition and rebuilding of the wall, which serves as a protective boundary of part of her land, can be none other than to cause harm to the Defendant.
- [22] As rightly pointed out by Mr. Georges, there is no cogent and practical benefit which the Plaintiff can obtain through demolition and reconstructing the retaining wall back by a few centimeters. Her motivation in insisting on her right must therefore be to cause the Defendant to spend money for little benefit to anyone.
- [23] On the strength of the reasoning in Mancienne (supra), I also note that this court can make an order that the encroachment be compensated in damages as opposed to demolition.
- [24] I therefore, uphold the contention of Mr. B. Georges and endorse the position of case law, which he cited pertaining to *abus de droit* and on the application of the common law principle “*de minimis*” in matters of this nature.
- [25] Now, what is the argument on the other side? Only this: that our law is no good. Mr. Basil Hoareau, learned counsel for the plaintiff argued that this Court should depart from the precedents and the case law relied upon by the defendant in this matter pertaining to

“*abus de droit*” and “*de minimis*” because according to him, they are bad precedents and not making good law.

[26] It is the case of the plaintiff that the decision of the Court of Appeal in Mancienne (*supra*) based on our jurisprudence grown on our own soil, is not good law. For, it is in conflict with the source of French jurisprudence. According to Mr. Hoareau, the French Civil Law has clearly established that when it comes to property, the doctrine of “*abus de droit*” is not applicable. In support of this proposition, he cited some excerpts from the book entitled “Les Biens” Droit Civil by Philippe Malaurie and Laurent Aynes and also from Dalloz” 702 edition (2003). Hence, Mr. Hoareau urged this Court to deviate from “*stare decisis*” of our jurisprudence as it is in direct conflict with that of the French and therefore, invited the Court to follow the latter.

[27] With due respect to Mr. Hoareau, the source of our civil law shall be the Civil Code of Seychelles and other laws from time to time enacted - vide Article 4 of the Civil Code of Seychelles. This obviously, includes our home grown jurisprudence. Since we repealed the French Civil Code and enacted our own Civil Code in 1975, we have been developing our - own-indigenous jurisprudence in order to meet the changing and challenging needs of our time and Seychellois society. Our Civil Code is tailor-made for Seychelles by altering the French one to fit our size, frame, peculiarities and specificities. In the process, we have simply altered and ironed out the creases without changing the French material with which it was woven. Consequently, our indigenous jurisprudence has evolved over several decades from precedent to precedent to suit our special needs and peculiarities. Our own jurisprudence has adapted to the changing social opinion and necessities and thus has adopted and extended the application of “*abus de droit*”, to property rights over many years, through the growth of judicial exposition nurtured by the insight of Justice Souzier as rightly observed by the Court of Appeal in Mancienne (*supra*). Obviously, this Court is duty bound to accept and apply the principles grown in our own soil of indigenous jurisprudence, even if they are or appear to be in conflict with that of the French. When our growth leads to conflicts with our past, let us embrace growth with equanimity without labeling it as not good law. Old order changes new to come and bridge the gap in our law so as to advance our jurisprudence in line with the advancements taking place in the rest of the legal world.

[28] Assimilation and unquestionable acceptance had been the ideological basis of French colonial policy in the Seychelles of the 19th and 20th century but no longer now in the Sovereign Seychelles of the 21st century. Should we continue to remain stagnant with colonial jurisprudence of the past or should we grow? Mr. Hoareau's argument that our case law is no good because it was neither approved by the French nor adopted in the past, does not appeal to me in the least. Stagnancy is a sign of death, whereas growth a sign of life. Which is to be preferred?

[29] Mr. Hoareau also submitted that this Court can depart from the precedents as Article 5 of the Civil Code provides that judicial decisions shall not be absolutely binding upon a Court but shall enjoy a high persuasive authority from which a Court shall only depart for good reason. With due respect, I do not find any good reason to depart from them and so I completely, reject his submissions in this regard.

[30] Furthermore, it is the submission of Mr. Hoareau that the only constitutional or legal limitation on the right to private ownership of property is that it can be compulsorily acquired by specific law, through a specific procedure and for a public purpose. This is the rationale behind the rule that demolition of an encroachment is the proper order to be made and *abus de droit* cannot be used to infringe the right to property of an individual guaranteed by Article 26 of the Constitution.

[31] It is trite to say that right to property guaranteed in the Charter is not an absolute right. Whatever be the provisions of law contained in the Civil Code and other legislations relating to ownership of an immovable property, the fact remains that the Constitutional provision under Article 26 of the Constitution, the supreme law of the land supersedes all other laws. This Article reads thus:

Right to property

26. (1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

(2) The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society-

- (a) in the public interest;
- (b) for the enforcement of an order or judgment of a court in civil or criminal proceedings;
- (c) in satisfaction of any penalty, tax, rate, duty or due;
- (d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;
- (e) in respect of animals found trespassing or straying;
- (f) in consequence of a law with respect to limitation of actions or acquisitive prescription;
- (g) with respect to property of citizens of a country at war with Seychelles;
- (h) with regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity; or
- (i) for vesting in the Republic of the ownership of underground water or unextracted oil or minerals of any kind or description.

[32] It is evident from Article 26 (2) (b) above, that the exercise of one's right to property is subject to limitations as may be prescribed by law and necessary in a democratic society. In my considered view, the concept of "abus de droit", which is subtly defined as a fault and incorporated in Article 1382 (3) of the Civil Code (vide discussion supra) is one among such limitations prescribed by law as contemplated by the framers of our constitution and found necessary in a democratic society. In my judgment this is the current and correct position of *abus de droit* vis-à-vis the Fundamental right to property guaranteed by our Constitution. This position has been well set by case law through judicial exposition in our jurisdiction. This concept has indeed, been repeatedly applied in deserving cases with equity and good conscience and enforced by the judgment of the Courts in civil proceedings posing limitations to the exercise of one's right to property as the Courts normally do in matters of right of way in terms of Article 681-685 of the Civil Code. In my considered view, the application of the French doctrine "abus de droit" is in

line and consistent with Article 26 of the Constitution. Hence, I decline to agree with the contention of Mr. Hoareau to the contrary in this respect.

[33] Besides, Mr. Hoareau has in his final submission, raised issues alleging that the defendant has failed to comply with the procedural rules in respect of pleadings in the written statement of defence on material facts and on the lack of evidence in support of the line of defence taken by the defendant.

[34] Indeed, when the plaintiff was giving evidence in chief, half way through hearing, both counsel mutually agreed on all factual issues and jointly invited the Court only to determine the questions of law based on our case law and jurisprudence. Hence, both counsel agreed to halt further proceedings, and adduction of evidence and requested the Court to determine only the two points of law canvassed by the defendant in the statement of defence. This agreement in court between parties in my considered view, constitutes a *contrat Judiciare*, which is binding upon both parties and counsel. With due respect, the plaintiff's counsel is now estopped from reopening such issues in his final submission to the surprise of all. Hence, I decline to entertain any fresh issue/s factual or procedural raised in the submission of Mr. Hoareau, in breach of the said agreement.

[35] For the reasons stated hereinbefore, I find answers to the fundamental questions in the same numerical order (vide supra) as follows:

1. *Yes; the cause of action namely, the alleged encroachment in the instant case falls within the scope of de Minimis in law.*
2. *Yes; the action of the plaintiff seeking demolition of the retaining wall amount to an abus de droit or abuse of right in law.*
3. *No; the application of the French doctrine "abus de droit" in our jurisdiction is not inconsistent with or in derogation of the Fundamental right to property guaranteed under Article 26 of the Constitution of Seychelles or any other law.*
4. *The plaintiff is entitled to have a minimal compensation from the defendant proportionate to the nature and extent of the loss and damage if any, suffered by the plaintiff having regard to the entire circumstances of the case on hand.*

[36] Then, what should be the measure of compensation? Undisputedly the encroachment is de minimis. It is equally clear that the encroachment was as a result of unclear beacons in the area of the encroachment. There had been no bad faith behind the accidental encroachment. Hence, I hold that quantum of compensation awarded should be of a token nature. In my considered assessment the sum of Rs2000/- would be just, reasonable, and proportionate to the nature and extent of the encroachment.

[37] In the final analysis, the court enters judgment as follows:

- (a) The Court declines to grant any relief of declaration or demolition order as sought by the plaintiff in the plaint.

- (b) The defendant is ordered to pay compensation to the plaintiff in the sum of Rs2000/- and

- (c) The defendant shall also pay the costs of this action to the plaintiff.

Signed, dated and delivered at Ile du Port on 16 March 2016

D Karunakaran
Judge of the Supreme Court