

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: MA 111/2016**  
**(arising in CS30/2016)**

**[2016] SCSC 677**

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**SABRINA JULIENNE**  
Applicant

versus

**JEAN CLAUDE WOODCOCK**  
Respondent

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Heard: 20 July 2016  
Counsel: J. Camille for applicant  
D. Lucas for respondent  
Delivered: 28 September 2016

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**RULING**

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**Dodin J**

- [1] The Applicant applied to this Court for an order restraining the Respondent from undertaking any interference with an access road on land parcel C517 situated at Pointe Au Sel, Mahe pending the final determination of the suit filed by the Applicant in respect of the same issue. The Applicant further seeks an order ordering the Respondent to

remove all obstructions erected and an order not to erect any further proposed obstructions on the said access road.

- [2] The Applicant's who is the owner of an adjoining plot of land namely C519 claims in suit No. 30/16, is that she has a *droit de passage* on the property belonging to the Respondent. The Applicant further claims that herself and her family have been using a motorable access road on land parcel C517 for over 20 years, continuously, legally, quietly and peacefully and that that the same access is the only convenient access to her property from the public road.
- [3] The Applicant further averred that the Respondent has on the 7<sup>th</sup> April 2016 threatened, restrained or prevented her and her family from having access to her house by starting the erection of a gate onto his property C517, thereby threatening to deprive her and her family, with motorable access to her house. She maintains that the erection of the proposed gate will gravely affect her access to her property and thereby cause grave prejudice to her and her family.
- [4] It is on that basis that Applicant states that she is desirous to have an order of the Court to declare the said access road the lawful right of way on land parcel C517 and thereby pending the determination of Case No. 30/16, that an interim injunction is granted as prayed directing the Respondent to remove all obstructions erected and or not to erect any proposed obstructions on the said motorable access road on land parcel C517 and thereafter to refrain from any interference with the same access road, pending the full determination of the suit filed in this matter.
- [5] Learned counsel for the Applicant submitted that in considering the grant of an injunction, the Court must be guided by 3 considerations, namely;
- (i) Whether there is a serious question to be tried;
  - (ii) Inadequacy of damages to either side; and
  - (iii) The balance of inconvenience.
- [6] Learned counsel referred the Court to the case of *Techno International v Georges SSC 147/2002*, in support of the Applicant's application, maintaining that the preparatory

works of the Respondent by digging the two holes at the perimeter of an existing wall, being the entrance of the Applicant to her house, must be an action in itself pointing to the severity of the matter, the result of which if left unabated by the Court, could result in real hardship to the Applicant by denying her access to her property.

[7] Learned counsel invited the Court to consider the close proximity of the adjoining properties and contended that any obstruction by the Respondent is likely to adversely affect the Applicant. He submitted that on that basis the balance of inconvenience is tilted very much in the Applicant's favour in comparison to the Respondent. Hence on that basis, the Court must consider exercising its discretion in favour of the Applicant.

[8] Learned counsel further referred the Court to the case of Dhanjee vs Electoral Commissioner SCA 20/2011, submitting that it was held that under the balance of inconvenience test, the Court must consider;

- (a) Whether more harm will be done by granting or refusing the injunction;
- (b) Whether the risk of injustice is greater if the injunction is granted than the risk of injustice if it is refused; and
- (c) Whether the breach of the Applicant's right would outweigh the rights of others in society.

[9] Learned counsel hence moved the Court for an interlocutory injunction pending the hearing of her claim for a *droit de passage*, on the Respondent's land.

[10] The Respondent objected to the Notice of Motion and the application on the grounds, inter alia, that the Plaintiff is not by law entitled to and does not have a right of way over parcel C517 to access parcel C519 and that on the facts, the Plaintiff has not used the access over parcel C517 for a continuous period of 20 years as is averred. Further that the Respondent is engaged in an on-going tourism development which such an order would gravely and adversely impact. Such an order would put at risk the huge amount of capital expended by the Respondent in preparing the site and constructing thereon. Hence in considering the balance of convenience an interlocutory order would do more harm than good.

- [11] Learned counsel for the Respondent further submitted that in any event, the Applicant cannot, in law, claim a right of way by reason of usage over 20 years period and hence there is no valid cause of action before the Court upon which the Applicant can safely rely upon as the basis for the interim injunction. Usage, even over time immemorial, does not entitle or give the Applicant the right to claim or establish a right of way over an adjoining property. If the Applicant does not have a cause of action the Court cannot and should not entertain or enter the restraining order being sought by the Applicant.
- [12] Learned counsel submitted that granting the order would create a public way, accessible to and by third parties, between the house of the Defendant on parcel C2184 and his tourism development on C517, creating social and economic difficulties and hardships to the Respondent. Learned counsel referred the Court to the cases of Waye Hive vs Welch and Techno International vs Georges in support of his submission.
- [13] Learned counsel further submitted that the averment that the area of parcel C517 running adjacent to parcels C2183, C2184 and C519, is burdened by a right of way, namely a motorable access from the public road, is not supported by any documentation, registered or otherwise. By law, no right of way on the area running adjacent to parcels no. C2183, C2184, to C519 is recorded, registered or in existence. Documentations show that the various properties, from the public road running towards the mountainside, are accessed by an “estate road” which comprises of 3 metres right of way over the boundaries of various properties (from parcels C753, C517, C2183, C2182 etc), running from the roadside direction to mountainside. No right of way is otherwise recorded against parcel C517.
- [14] Learned counsel for the Respondent further submitted that as per the Affidavits in support of the Respondents response the situation which exists are thus:
- (a) William Woodcock (deceased) owner of parcel C519, since 1990, accessed his property through the ‘estate road’, then over the right of way created by Bibianne Woodcock over parcel C2183 to the

boundary of parcel C2184. From there on a footpath was used to access his property on parcel C519. At no time do the various documentations and evidence disclose that there was an access over C517 running adjacent to the boundaries of C2183 to 2184 and on to C519. The only right of way over the C517 is a registered right of way which formed part of the "estate road". The area of C517 running along the boundaries of C2183, C2184 to C519 were inaccessible by motor vehicles or otherwise until around 2008 when that area was, at great expense to the Defendant and nil contributions by the owner of C519, backfilled and made motorable.

- (b) When William Woodcock's health was failing, he started using and accessing parcel C2184 (belonging to the Defendant) to access his parcel C519 and was personally allowed to do so until around 2008-2009 when the Defendant with Planning permission extended his veranda. This resulted in parcel C2184 becoming inaccessible. William Woodcock, in the absence of the Defendant started using the backfilled portion on C517 along the boundary of C2184 to access parcel C519.
- (c) After William Woodcock passed away, the Plaintiff without the permission of the Defendant, who was residing in Mauritius started using the access on C517 although she had not contributed and had not offered to contribute to its creation.
- (d) The Defendant has invested in a tourism project and has taken out various loans. Three cottages and a swimming pool which would be right next to the access 3 meter road access, has already been constructed. The tourism plan calls for a fourth building to be erected and this will be situated opposite parcel C519. The only possible site for the location of same, the septic tank and soak-away of the fourth building will be on or in the vicinity of the alleged three metre access. Further, irrespective of whenever the Plaintiff avers that she came onto parcel C519, the Plaintiff would have been at all material times, an invitee and could not claim any rights over any adjoining property until such time as she acquired rights over parcel C519, that is, after the passing away of William Woodcock (deceased). The Plaintiff or the evidence and documentations filed, has not, as an adjoining property owner accrued 20 years usage of a motorable access over parcel C517.

- [15] Learned counsel submitted that granting the order would effectively split the Defendant's properties C2184 and C517 and would create a "public" road accessible by third parties and the Plaintiff's invitees, between the Defendant's house on C2184 and his tourism project on C517. This would lead to social and economic imbalance, difficulties and hardship. For the reasons, on a balance of convenience, the Notice of Motion and Application should be dismissed with costs.
- [16] Courts have taken the position that it is proper to consider the balance of convenience or relative hardship which would result from granting or denying an interim injunction. In determining whether an injunction should be granted to compel an adjoining landowner to remove an encroachment, the Court must consider several issues. The legal test most employed by the Court is the well known tripartite test set out by Lord Diplock in American Cyanamid Co v Ethicon Ltd [1975] AC 396 :

*"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from him having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."*

- [17] The grant of interim injunction, is hence governed by three basic principles, namely, that a prima facie case has been made; the balance of convenience favours granting the same; and irreparable injury would be caused if it is not granted.
- [18] In general terms, when exercising its discretion to issue an injunction, the Court will need to be persuaded that there is a good reason why the Respondent's rights should be restricted before the court knows whether the Applicant will succeed at the trial. The Applicant does not have to prove its underlying claim at the injunction hearing, but it must show that it has a good arguable case. The Court cannot pre-judge the litigation, but must be persuaded that there is a serious question to be considered. If this is established

then the Court has the discretion to grant the injunction after considering the principles set out above.


- [19] An important factor in this balancing exercise is whether any potential injustice could be adequately compensated for by damages. If the adverse effect of the injunction on the Respondent is measurable in financial terms then the Court should be more content to grant the injunction while seeking an undertaking from the Applicant to pay financial compensation if it turns out that the injunction was wrongly granted. Similarly, if the Applicant's inconvenience in failing to obtain the injunction could be adequately compensated by damages after the trial then the Court will be more likely to refuse the injunction.
- [20] Having considered the submissions of learned counsel and read the affidavits in support of each party's contentions, I am satisfied that the Applicant has set out what appears to be a prima facie case for a right of way but at this stage such contention is not supported by any documentation as contended by the Respondent. A proper hearing on the merits is therefore necessary to determine the real issue in contention.
- [21] The question now is whether on balance of convenience an interim injunction should be granted, considering also whether either party would be able to compensate the other in the event that the determination of the case on the merits goes against the order granting or refusing the injunction.
- [22] Considering that the Respondent is in the process of undertaking tourism developments on parcel C517, into which project he is putting considerable financial investment any order putting a stop, even a temporary halt to the development would cause delay, financial and economic loss to the Respondent. On the other hand if the developments go ahead, the Applicant may not be able to use the Respondent's land as a motorable way to her house, but is likely to suffer no or negligible financial or economic loss. Furthermore, should the Court eventually give judgment in her favour, the Respondent would only have to comply with the relevant Court decision with regard to the right of way and it is unlikely that any serious loss or damage that cannot be compensated would have occurred.


[23] I am satisfied that the balance of convenience tilts heavily in favour of the Respondent and that a greater injustice is likely to be caused if the interim injunction is granted than if it is not granted.

[24] Consequently, this motion and Application is dismissed.

[25] Cost is reserved until the determination of the main suit.

Signed, dated and delivered at Ile du Port on 28 September 2016

  
G Dodin  
Judge of the Supreme Court

The seal of the Seychelles Supreme Court is an oval emblem. It features a central circular design with a tree and a bird, surrounded by the text "SEAL OF THE SEYCHELLES SUPREME COURT" and a small star at the bottom.