



wall to prevent erosion caused by his unauthorised use of the land and to pay damages in the sum of SR1, 664,105.00

- [2] The Plaintiffs in their Complaint stated that the Defendant had encroached on their land for over 17 years, building a brick store and a concrete drain thereon and had carried out farming activities on their land without their permission. They further stated that the Defendant had removed beacons demarcating their property and had excavated the land between the two beacons which had caused the creation of an escarpment at a 90% slope. They stated that unless a retaining wall was erected there was high a risk of further erosion on their property. A second escarpment had been formed on their land as a result of water being diverted from the unlawful construction of a drain on the Defendant's property. They stated that although they had taken steps to deter the encroachment they had been unsuccessful and that the Defendant's actions amounted to a *faute* in law for which he was liable.
- [3] The Defendant filed a statement of defence which amounted to a demurrer. He also specifically denied carrying out any farming activities, constructing a store, wall or drain on the Plaintiff's land.
- [4] The Plaintiffs called Joelane Sinon, a land surveyor, to give evidence. He testified that he had been employed four times to carry out work at the Plaintiff's property, the last time in 2013. He stated that he relocated beacons and verified boundaries and drew a sketch map. He said that the Plaintiffs' property had been encroached on in that a store and a concrete drain had had been built thereon. The store was in use. Beacons had been removed. There was also a pawpaw plantation on the Plaintiffs land. Earth cutting had also been done and created an embankment of between 2.5 and 3 metres.
- [5] The 1<sup>st</sup> Plaintiff also gave evidence. He testified the he and the 2<sup>nd</sup> Plaintiff purchased Parcel B720 in 1995 and thereafter the adjoining parcel B1624. They built their home and resided therein. He stated that when he bought the property the Defendant was already encroaching on the land. He had a cowshed on their land and they approached him to remove the cow shed and not to continue with any further encroachment on their property but had not been successful. Over the years they had tried to settle the matter but had

failed and in 2011 they went as far as to offer the Defendant a lease on the part of the land that he was encroaching on but he did not respond.

- [6]** The Ministry of Land Use and Habitat were also contacted for their intervention. They also tried to impress upon the Defendant that his actions were wrong and to desist from encroaching on the Plaintiffs land but all these calls fell on deaf ears. The land was surveyed and resurveyed, beacons were placed and replaced. Letters from the Ministry produced support this fact. A Planning Enforcement Officer from the said Ministry also came on site and made his findings in a report dated 20<sup>th</sup> February 2014. He stated therein that the following was observed:

“Unauthorised garden tool store has been constructed with block and C.I. sheets by Mr. Ah-Kong.

Unauthorised concrete drain from Parcel B403 to Parcel B1624.

Erosion caused by unauthorised concrete drain has caused damage to Parcel B1624.

Unauthorised cultivation of agricultural crop on Parcel B1624 by Mr. Ah-Kong.”

He advised the Plaintiffs to bring the matter to the civil courts for recourse.

- [7]** Photographs and a site map showing the Defendant’s encroachment were produced together with correspondence from all who had intervened to resolve this issue.
- [8]** The 1<sup>st</sup> Plaintiff produced receipts of expenses he had incurred in terms of survey works. This amounted to SR17, 000. He sought quotes from contractors for fencing the land and received a quote for SR600, 000. He also claimed SR400, 000 for the unlawful excavation and damage to his property. He was given a quote of SR250, 000 to remedy the situation regarding the escarpment caused as a result of damage to his land from the water from the drain, He claimed another SR250, 000 for the loss of use and enjoyment of his land and another SR150,000 for inconvenience, anxiety and distress. He testified as to the stress his wife and himself had been under and stated that unless restrained the Defendant would carry on in the same manner.

- [9]** In cross examination he admitted that when he purchased B1624 he became aware that some encroachment was on the eland. The wall had been built but not the drain. He denied that there was a lease between the government of Seychelles and the Defendant subsisting for part of the land comprised in Parcel B 1624. He confirmed receiving a letter (Exhibit P24) from the Ministry of Housing and Land Use which stated that the government had settled all claims in full and final settlement with the Defendant regarding the lease on the Plaintiff's land. He could not confirm whether the Defendant was still actively cultivating on his land but that he did see the workers of the Defendant on his land. The 2<sup>nd</sup> Defendant adopted the evidence of the 1<sup>st</sup> Plaintiff and was submitted to the Defendant's Counsel for cross examination but this was not availed of.
- [10]** The Defendant also deponed. He stated that he was a farmer and purchased three properties for that purpose thirty-four years ago. He produced a letter dated 9<sup>th</sup> April 1996 in which he was informed that approval had been granted for him to lease an area of land of 11700 square meters. He stated that he cultivated crops on the land. He added that he did not build a store but a toilet on the land before the Plaintiffs purchased it. He accepted that he had built the stone wall and the drain but could not remember the year he had built them.
- [11]** He further accepted that he put pawpaw trees on the land. He also accepted that an award of SR980, 917.50 in compensation for the lease being terminated was made to him by the government in June 2004 when the land was sold but qualified this statement by producing a letter dated 13<sup>th</sup> July 2009 from Mr. Chang Tave from the Ministry of Housing and Land Use which indicates that the compensation paid was for two parcels of land, the one at La Misere and one at Grand Anse. He denied cultivating the land and removing beacons since the Plaintiffs had purchased it.
- [12]** The parties made written submissions. Plaintiffs' Counsel in his submission stated that the cost for rehabilitating the land would be SR 2, 392.749 : for a long retaining wall to be built and another SR327,600 for a new drain to be constructed. It is trite that evidence cannot be accepted by the Court after the case has been closed. The provisions of section 134 of the Seychelles Code of Civil Procedure infer that evidence must be called at the

trial and not after the trial. The costs of such constructions cannot be taken into account for this decision.

[13] The Plaintiffs in their submission also raised section 75 of the Seychelles Code of Civil Procedure. They have relied on the case of *Barclays Bank (Seychelles) Ltd v Gopal and anor* (2011) SCSC 66. They submitted that the Defendant was precluded from bringing any evidence to the contrary of what is alleged in the Plaintiff when his statement of defence only amounted to a demurrer. I agree with this submission. Section 75 clearly states:

“The statement of defence must contain a clear and distinct statement of material facts on which the defendant relies to meet the claim. A mere denial of the plaintiff’s claim is not sufficient. Material facts alleged in the plaintiff must be distinctly denied or they will be taken to be admitted.’ (emphasis mine)

The Court of Appeal in *Gopal v Barclays Bank* (2013) Vol II SLR553 upheld the decision of the Supreme Court. I therefore disregard any evidence proffered by the Defendant outside what he has averred in his statement of defence.

[14] I find that the Plaintiffs have proved their case in terms of the encroachment. Their evidence is corroborated by both the land surveyor, Mr. Joelane Sinon and the ample documentary evidence including the correspondence and report of the officers of the Ministry of Housing and Land Use. It appears to me that the Defendant wanted to have his cake and eat it. He was compensated for not being able to cultivate the land but wanted to continue availing of the land for his farming activities. He refused point blank to desist from acts of encroachment. He acted and continues to act as if the property of the Plaintiffs is his. He has caused damage to their land. His actions amount to a *faute* in terms of Article 1382 of the Civil Code of Seychelles for which he is liable.

[15] As for the quantum of damages payable in this case while I believe the Plaintiffs that untold damage has been done to their land and that they have suffered distress and not been able to enjoy their land for over a decade, not all their claims are made out sufficiently to justify the quantum set out in their Plaintiff. This Court has stated on many occasions that where parties fail to substantiate their claim the trial judge can only make

an arbitrary assessment and award of damages. I err in this exercise on the side of caution and fairness.

- [16]** Although the Plaintiffs have deponed as having spent SR 17,000 for land survey, relocating and placing beacons on their property they have only claimed SR14, 105.00 in their plaint for the work. I can only grant what the parties have pleaded in their plaint. I therefore award the sum pleaded. The parties have claimed SR 600,000 for the encroachment. At the trial they did not substantiate the claim with any documentary evidence nor did they produce a quantity surveyor to substantiate this claim. As they corroborate each other I am prepared to accept that substantial damage was caused to their property by the encroachment and the building of the wall, store and drain. I award SR400, 000 under this head. As for the damage caused by the unlawful excavation and earth cutting I make an award of SR250, 000. The escarpment is partly covered by the head of damages relating to the encorachment already awarded but I accept that it will cause further damage to the property. For this I award SR150, 000. In terms of the loss of use and enjoyment of their land I award SR 100, 00. I award the Plaintiffs another SR80, 000 moral damages for inconvenience, and anxiety and distress.
- [17]** Rehabilitation work will have to be undertaken namely in terms of the construction of a retaining wall by the Defendant. As I have already said I cannot accept a quote for this work as that quote was submitted after the hearing. I can only make an arbitrary award, While the Defendant is ultimately liable for its construction I anticipate that there will be problems in its construction or the standard of the construction of the wall if it were to be built by the Defendant. I therefore make a further order of SR700, 000 for its construction by the Plaintiffs.
- [18]** I therefore grant a total of SR 1,694,105 to the Plaintiffs, together with costs of this suit.
- [19]** Further, I grant a prohibitory injunction to prevent Regis Ah-Kong, the Defendant from trespassing and encroaching in any way whatsoever onto the land of the Plaintiffs, namely Parcel B1624 at La Misère, Mahé.

Signed, dated and delivered at Ile du Port on 18<sup>th</sup> January 2016.

**M. TWOMEY**  
Chief Justice