**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS113/2015**

**[2016] SCSC** 963

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**ALLEN HOAREAU**
**EXCEUTOR OF THE ESTATE**
**OF HEIRS RENEE HOAREAU**
Plaintiff

versus

**JERINA BERYL AH TIVE**

**ENGLISH RIVER**

Defendant

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Heard: 3rd day of November 2016

Counsel: Mr. J. Renaud for Plaintiff

Mr. B. Georges assisted by Ms. Gill for the Defendant

Delivered: 29th day of November 2016

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**JUDGMENT**

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**Govinden-J**

[1] The Plaintiff in this action prays this Court for a Judgment against the Defendant in essence, seeking the following remedies:

(a) *For a Judgement ordering the Defendant to remove the concrete wall which obstructs the right of way and amounts to an encroachment;*

(b) *For a Judgement awarding damages in the sum of Seychelles Rupees Five Thousand (S.R. 50,000/-); and*

(c) *For any other Order that may seem fit and just in all the circumstances of the case.*

[2] The facts of the case as transpired from evidence are in essence in a gist as follows.

[3] At all material times the Plaintiff was the Executor of the Estate of the Heirs Renee Hoareau, the Estate comprising of a portion of land registered as Parcel No. V 5663.

[4] The Defendant was the owner of an adjacent Parcel of land surveyed as Parcel No. V 5667.

[5] In the year 1978, Heirs Renee Hoareau obtained on the land Parcel V 5663, a right of way to and from the public road over parcel V 5667, by way of a deed of Transcription dated the 12th day of November 1969, registered at the Land Registration's Office, in Volume B 28 No. 2806 Repertory Volume No. 417.

[6] In the year 1978, a dispute arose regarding the above mentioned parcels of land which originally belonged to Renee Hoareau and Alone Ah-Tive the latter being the predecessor of the Defendant. As a result, the Supreme Court, in Civil Side No. 142 of 1978 entered Judgement on the 26thday of June 1979 (hereinafter referred to as the "Court Order") stating inter alia as follows:

*"A right of way can only be acquired by agreement or by law. It cannot be created by prescription. However, the "assiette de passage" can be fixed*

*by prescription and clearly has been so fixed in this case.* ***An agreement has been clearly recited in the notarial deeds of the plaintiff.... it would appear from the defendant's title deed that the original owner of both pieces of land belonging to the parties was Mrs. Sepherin Vidot and I can only presume from the facts proved to me that there must have been an agreement when the land was divided whereby the plaintiff's predecessor in title was granted a right of way over the defendant's land in order to reach the main road. This presumption is fully supported by the parties title deeds and the path and steps themselves being undisputably there in all their glory for the past 40 years or more. They were built by Mrs. Murray before she sold the land to Mr Grandcourt in 1950. The presumption that I have found exists that there was a right of way created by agreement between the former owners of the properties has in no way been rebutted by the defendant and I accordingly find that plaintiff has proved her case.....I declare that plaintiff has a right of way over the defendant's property 21/2 feet wide inside his boundary with plot V 958 to the main road and grant a perpetual injunction restraining the defendant from interfering with plaintiff's use of the said right of way or causing any damage to it***".

(Emphasis is mine)

[7] The original owner of Parcel V 5667, Alone Ah Tive has since passed away and the Defendant has inherited the said parcel of land as one of his children.

[8] It is the evidence of the Plaintiff that although the Court has ordered a perpetual injunction restraining the Defendant from interfering with the Plaintiff's use of the said right of way, or causing any damage to it, the Defendant has deliberately demolished the existing concrete steps, as

well as removing supporting earth and rocks leading to the Plaintiff's property, and obstructing it by constructing a concrete wall right across the right of way, preventing the Plaintiff access to his property.

[9] It is further the evidence of the Plaintiff that despite written requests for the Defendant to demolish the concrete wall and clear the right of way access, the Defendant has failed to do so. That in doing so, the Defendant has acted wrongly and has no right or lawful reason to obstruct the right of way given by the Supreme Court on the 26th day of June, 1979 (supra), and that the Defendant's unlawful actions amount to an "encroachment and "faute" in law for which the Defendant is liable to the Plaintiff to make good. It has further been alleged that the Defendant has deprived the Plaintiff and his family the use and enjoyment of their property and hence they have suffered loss and damage which is estimated at Seychelles Rupees Fifty Thousand (S.R. 50,000/- and justifying the above-mentioned reliefs [Paragraph 1]refers.

[10] In support of the Plaintiff's evidence several exhibits were adduced inter alia, the Court Order [paragraph 6] refers; along with certified copy of Transcription Volume B 28 No. 2806 [Paragraph 5] refers, photographs of the actual road access prior to the "wall erection" as well as letter of the 4th day of November 2015 requesting the Defendant to remove the "encroachment" to the right of way.

[11] The Defendant on her part, denied all the allegations of the Plaintiff excepted as to the Court Order to the effect of [paragraph 6] (supra) and as to her predecessor in Title as per [paragraph 7] (supra).

[12] The Defendant testified in rebuttal and substantiating the averments of the Statement of Amended Defence of the 21st day of June 2016 to the effect that, ***"the path has not been used by the owners of parcel V 5663 for a period in excess of twenty five years, that the path has***

***fallen into disrepair and disappeared, and that consequently the easement has been extinguished".***

(Emphasis is mine)

[13] It was further testified by the Defendant that, ***"she has been compelled to build a wall adjacent to the location of the former footpath in order to secure her land from an embankment with the neighbour, and not with a view to obstructing the path."***

(Emphasis is mine)

[14] In the end result, the Defendant prays for the dismissal of the Plaintiff's action and for the Court to declare that any right of way over Parcel V 5667 has been extinguished by effluxion of time, with costs.

[15] Both Learned Counsels filed written submissions in support of their respective clients' evidence of the 13th and the 19thday of July 2016 respectively and of which due consideration has been given thereto for the purpose of this Judgement.

[16] The Plaintiff in this matter claims a right of way over the Defendant's land by virtue of a Court Order in Civil Side No. 142 of 1978 and same stands undisputed by the Defendant. It is also to be noted in that regards, that the "assiette de passage" which can be fixed by prescription has also been clearly dealt with in the same Court Order upon the Court Ruling that the "assiette de passage" having been clearly fixed hence it being futile for this Court to rehearse and or rule over the same issue over again.

[17] Without intending to re-open the arguments and or debate in respect to the creation of a 'discontinuous right of way and or easements' as treated in the Court Order in Civil Side No. 142 of 1978 at length, it simply needs to be restated, that the relevant and guiding Articles pertinent to

this matter are the provisions of Articles 685, 686, 691, 697, 698, 701 706 and 707 of the Civil Code of Seychelles Act (Cap 33) (hereinafter referred to as the "Code").

[18] The relevant Articles provide as follows:

***"Article 685: 1. The position and the form of the right of way on the ground of non-access are determined by twenty years' continuous use. If at any time before that period the dominant tenement obtains access in some other way. The owner of the servient tenement shall be entitled to reclaim the right of way on condition that he is prepared to return such a proportion of any compensation received under paragraph 1 of article 682 as is reasonable in the circumstances."***

***"Article 686: An owner may create upon his property or in favour of his property such easements as he deems proper, provided however that the easements created neither bind persons nor are they in favour of persons but apply only to property and are for the benefit of property, and provided also that the incidents are not contrary to public policy.***

***The use and the extent of easement thus established are governed by the conditions contained by the document of title which created them, and in the absence of such document by the ruled stated hereunder".***

***"Article 688: Easements are either continuous or discontinuous. Discontinuous are those which need human intervention for their use; such as right of way, ..... and others of a similar kind."***

***"Article 691: ..... discontinuous easements, apparent or non-apparent, may not be created except by a document of title.***

***Possession, even from the time immemorial, is not sufficient for their creation".***

***"Article 697: The owner of the dominant tenement shall be entitled to do all that is necessary for the use and preservation of the easement".***

***"Article 698: The cost of such work shall burden the owner of the dominant tenement and not the owner of the servient tenement unless the document creating the easement provides the contrary".***

***"Article 701: The owner of the servient tenement shall do nothing which may tend to impair the use of the easement or to render it more inconvenient".***

***Thus, he may not change the condition of the premises nor remove the easement to as different place from that in which it was originally located".***

***"Article 706: An easement is extinguished by non-user over a period of twenty years".***

***"Article 707: The period of twenty years begins to run, according to the kind of easement, either from the day when its enjoyment ceased in the case of discontinuous easements, or from the day when the act contrary to it was done in the case of continuous easement".***

[19] For the sake of clarity, it is trite, upon a careful scrutiny of the provisions of the Code above-referred governing the creation and continuance of the existence of a right of way being the subject matter of the Plaint, it is evident that the right of way of 21/2 feet wide granted as per Court Order in Civil Side No. 142 of 1978 of the 26th day of June 1979, is a discontinuous easement, in terms of Article 688 of the Code. This right

was created by way of a document of title or "by way of agreement" as per the Court Order (supra).

[20] At the same time, "l'assiette de passage et mode de servitude de passage" is subject to prescription as per the provisions of Article 685 of the Code (supra) and in the instant case ruled upon as having been prescribed for over a period of 40 years by the Court Order (supra).

[21] Coming back to the facts of this case, it remains uncontested, the existence of the right of way on Parcel V 5667 (servient tenement) in favour of Parcel V 5663 (the dominant tenement).

[22] However, what remains contested and which is the determinant factor at this juncture for this Court to adjudicate upon, is whether the easement has been extinguished by non-user over a period of twenty years in line with the provisions of Article 706 of the Code in line with the arguments of the Defendant and same also in line with the Court Order creating as argued by Learned Counsel for the Plaintiff a "perpetual injunction restraining the Defendant from interfering with the Plaintiff's use of the said right of way or causing any damage it".

[23] The evidence of the Plaintiff and that of the Defendant concur as far as to the end date of the occupation of the Parcel V 5663 belonging to the Plaintiff that is around the year 1986 and further as to the starting date of the "construction" and or "renovation" of the house of the Defendant being in the years 1994 or 1995. As of the year 1995, the Plaintiff testified that he had no access to his property in view of the construction having blocked the right of way and this is was obvious upon a visit to the locus in quo, whereby it was observed and found that the right of way has been deliberately blocked by a retaining wall from the main road latter being the subject matter of the first relief sought from this Court.

[24] It was further observed on locus, that the "right of way was partially physically visible" only in view of the remainder of part of the steps located within the boundary of Parcel V 5667 belonging to the Defendant and that the rest was systematically demolished and disposed of altogether by the Defendant upon the construction of a retaining wall alongside the newly renovated house of the Defendant. An additional obstruction was spotted being huge mango tree which had completely blocked the access to the right of way located just after the concrete wall blocking the same from the main road.

[25] Now, noting that the time lapse in between the vacating of the Plaintiff's land by the last occupants and also the start of the construction and or renovation of the Defendant's house, in the year 1994 or 1995 , it is clear that only a lapse of around ten years had occurred (if any) and that this does not by any stretch of imagination fall within the period of prescription extinguishing a right of way as provided for in Article 706 of the Code hence untenable in the circumstances of this case.

[26] In the latter regard I note the arguments of Learned Counsel for the Plaintiff as to the existence of the "perpetual injunction" as per the Court Order pertaining to the use of the right of way but with respect, I need to make the following observation in that regard. That as rightly submitted by Learned for the Defendant, the Court Order is of course contingent on the existence of a right of way and if same had been extinguished by virtue of applicability the provisions of Article 706 of the Code (which latter provisions are of public policy) then the said Order though making reference to a "perpetual injunction" would have no effect in the circumstances.

[27] Now, having set out the position of the law in relation to the relevant facts in evidence vis-à-vis the existence of the right of way as per agreement and the "assiette de passage" which had been prescribed as

endorsed in the Court Order (supra, for explanations), I now deem it crucial to refer to the provisions of Articles 697, 698 and 701 of the Code treating more specifically the "Rights of the Owner of the Dominant Tenement".

[28] As illustrated above, the Court had the opportunity to go on locus and observed that albeit the "assiette de passage" being practically visible in terms of certain remaining visible steps located within the boundary of Parcel V 5653, the rest of the "vestiges of the old assiette de passage" were barely visible and this in view of the construction of a retaining wall by the Defendant in order to secure as per evidence loose soil which was falling from the adjacent property of another neighbour. What however, remained evident is that the right of way was to be located on top of the retaining wall as newly constructed by the Defendant

[29] Having found that the 'extinctive' prescription in terms of Article 706 of the Code as far as the right of way does not apply in this case and of the undisputed facts as to the creation of the right of way and "assiette de passage" as per Court Order, in terms of Article 697, the dominant tenement shall be entitled to do all that is necessary for the use and preservation of the easement. Further, the cost of such work shall burden the owner of the dominant tenement and not the owner of the servient tenement "unless the document creating the easement provides to the contrary" and "also subject to the owner of the servient tenement doing nothing which may tend to impair the use of the easement or to render it more inconvenient. In the latter regard, the owner of the servient tenement may not change the condition of the premises nor remove the easement to a different place from that in which it was originally located".

[30] Applied to the specific facts of this matter, the right of way benefitting the Plaintiff's property is along the boundary between Parcel V 5667 and

V 9458, adjacent. Upon locus, it was found that there is provision made along that boundary for the right of way to be exercised. The full exercise of the use of the right of way will entail the falling of huge mango tree and the construction of steps up from the main road as well as the partial demolition of a boundary wall along the wall constructed by the Defendant "alleged encroachment" in the Plaint. It follows that the exercise of the right of way as lawfully demarcated cannot be exercised in view of the boundary wall, the overgrown mango tree blocking the right of way and the demolition of the old steps by the Defendant.

[31] In line with the provisions of Article 701 of the Code (supra), it thus the responsibility of the Defendant to provide and rebuild the "demolished steps", removal of the overgrown mango tree and partial demolition of the boundary wall giving unlimited access of the Plaintiff to the right of way from the public road and the costs of such works shall be borne by the Defendant in line with the perpetual Injunction as per Court Order ***"which restrained the defendant from interfering with the plaintiff's use of the said right of way or causing any damage to it."***

[32] Bearing the above analysis of the relevant legal principles applicable to a discontinuous right of way on the strength of the evidence and pleadings on record, the Court concludes that the Plaintiff is still entitled to a right of way as established by the Court Order (supra) as well as to the "demarcated assiette de passage" again as per the Court Oder (supra), and that by virtue of the provisions of Article 701 of the Code, (supra) it is thus the responsibility of the Defendant to provide and rebuild the "demolished steps", removal of the overgrown mango tree and partial demolition of the boundary wall giving unlimited access of the Plaintiff to the right of way from the public road and the costs of such works shall be borne by the Defendant in line with the Perpetual Injunction as per

Court Order ***"which restrained the defendant from interfering with the plaintiff's use of the said right of way or causing any damage to it."***

[33] The Plaintiff in his Plaint is also seeking damages against the Defendant in the sum of S.R. 50,000/- based more particularly on the denial of access to the right of way over a period of eighteen years and that is as of the date of "blockage" of the right of way excepted for a few years from 2011 to 2014 when he was on treatment in Italy and which evidence was admitted by the Defendant.

[34] In regards to the latter relief of damages as sought, this Court notes the facts as to how the non-access arose, the balance of convenience and hardship over the past eighteen years or so arising as a result of the denial of access to the right of way, the availability, practicability and cost of construction and or reinstatement of the right of way to the original state prior to demolition by the Defendant as well as the denial of the Plaintiff's right of peaceful enjoyment of one's right of way with least interference from others by virtue of the Court Order (supra) and the need to reduce as far as possible any damage to the right of way, on the basis of the analysis at paragraph 32 thereof, the Plaintiff have to my mind obviously suffered a certain degree of hardship and inconvenience. However, the amount of S.R. 50,000 as claimed in my opinion is exaggerated noting the nature of the case and noting that the Plaintiff was also not in the country for a period of around five years to access the right of way hence the Defendant's unlawful act not being the sole cause of the alleged damage.

Considering all the relevant circumstances, I award a global sum of S.R. 30,000/- in favour of the Plaintiff for moral damages, which sum in my view is reasonable, appropriate and meet the ends of justice in this matter.

[35] In view of all the above, namely the analysis of the evidence as clearly illustrated at paragraphs 33 and 34 of this Judgement (supra), I enter Judgement in favour of the Plaintiff as follows:

(i) Firstly, I hereby order that the Plaintiff is still entitled to a right of way as established by the Court Order (supra) as well as to the "demarcated assiette de passage" again as per the Court Order (supra), and that by virtue of the provisions of Article 701 of the Code (supra), it is thus the responsibility of the Defendant to provide and rebuild the "demolished steps", removal of the overgrown mango tree and partial demolition of the boundary wall giving unlimited access of the Plaintiff to the right of way from the public road and the costs of such works shall be borne by the Defendant in line with the Perpetual Injunction as per Court Order ***"which restrained the defendant from interfering with the plaintiff's use of the said right of way or causing any damage to it."***

(ii) Secondly, I further award a sum of S.R. 30,000/- for the Plaintiff against the Defendant towards damages the Plaintiff suffered because of the obstructions the Defendant had put blocking his right of way; and

(iii) I further award the Plaintiff the costs of this action.

Signed, dated and delivered at Ile du Port on 29th day of November, 2016.

Govinden-J
**Judge of the Supreme Court**