

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS228/2011

[2017] SCSC 302

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1. Theodore Edmond
 2. Lucy Edmond
 3. Michel Chetty
 4. Therese Chetty (Executrix of the Estate of Dauphine Julienne)
 5. Rita Victorin
- Plaintiffs

versus

1. Andre Chetty
 2. Government of Seychelles
- Defendants

Heard: (After failed mediation proceedings) 25 November 2016- 22 February 2017

Counsel: Mr. Joel Camille for plaintiffs
Mrs. Karen Domingue for first defendant
Mr. George Tachet for second defendant

Delivered: 31 March 2017

JUDGMENT

M. TWOMEY, CJ

[1] The Plaintiffs and First Defendant are adjoining land owners at Anse Aux Pins, Mahé, with their respective properties being adjacent to Chetty Flats.

[2] They are also co-owners of Parcel S71 on which there is a private right of way giving access to all their respective properties.

- [3] The Second Defendant is joined as it has granted a separate right of way to the Plaintiffs and the Second Defendant's properties from the main road at Anse Aux Pins.
- [4] The Plaintiffs claim that the existing right of way being literally on their doorstep (the north wall of the Fourth Plaintiff's house is actually situated astride the right of way – see Exhibit P. 5) is unsafe and causes disturbance to them daily and nightly and is often accessed by public vehicles. The First Defendant's house at the end of the *cul de sac* is not so inconvenienced.
- [5] The Plaintiffs have approached the Second Defendant for the grant of an alternative motorable access and it has proposed and made available an access reserve to the north of the existing right of way (on Parcel S4986) for substitution with the right of way on Parcel S71.
- [6] The First Defendant despite repeated requests and the intervention of a mediator appointed by the Court has refused to entertain the alternative motorable right of way to the parties' properties.
- [7] He has after a question from the Court stated that he would be prepared to accept the proposed alternative right of way only if the Second Defendant was to designate the same as private.
- [8] The Second Defendant has stated that it cannot accede to the First Defendant's request as it is not government policy to designate access reserves as private access.
- [9] Learned Counsel for the Plaintiffs, Mr. Camille has submitted that the First Plaintiff's refusal is *male fides* and amounts to an *abus de droit*. He has relied on the authorities of *Mancienne and anor v Ah-Time and anor* (2013) SLR 165 and *Nanon v Thyroomoody* (2011) SLR 92 for this proposition.
- [10] Mrs. Karen Domingue, Learned Counsel for the First Defendant has submitted that the right to property is sacrosanct both because of the provisions of Article 26(1) of the Constitution and Article 545 of the Civil Code, save where the exceptions laid down

under Article 26(2) of the Constitution are made out. It is her view that these exceptions are not met in the present case and that the existing right of way should be maintained.

- [11] Learned Counsel for the Second Defendant, Mr. Tachet has submitted that although the Government is willing to grant the right of way as requested by the Plaintiffs, it is one of the conditions of the grant that the parties must all consent to it. Since the First Defendant withholds such consent he submits that the application by the Plaintiffs cannot therefore be sustained. It is also his submission that if the right of way as prayed for by the Plaintiffs was granted, it would only result in an enlargement of the present right of way of way as it is adjacent to the proposed alternative and therefore the First Defendant could not be prevented from continuing using the present right of way.
- [12] The Court has gained much insight in the issues raised by visiting the *locus in quo*. It is obvious that the existing right of way is impractical and dangerous given the fact that it is a motorable access and one of the Plaintiff's houses is positioned astride it, others abut it or are sited closely to it.
- [13] It is also obvious that the new right of way proposed, although running parallel to the existing one and adjacent to it would give some added security and safety to the inhabitants of the Plaintiffs houses.
- [14] It is also clear that despite the First Defendant's protests that he will be inconvenienced very slightly, if at all, in that only some small adjustment would have to be made to the entrance of his property. It is also plainly obvious that the First Defendant is uncooperative. At the *locus* he was unreasonable and became irascible when propositions were made to him, promising to emigrate if any change to the right of way was made.
- [15] Admittedly a right of way is a property right. As all rights, it is subject to limitations. The First Defendant's right to property must not be exercised to the detriment of the Plaintiffs' right to enjoy property. In the circumstances I am of the view that there is a clear abuse by the First Defendant of his property right and that the authorities of *Mancienne* and *Nanon* are applicable to this case.

[16] This case is unusual in the sense that all the parties concerned with the right of way over Parcel S71 are also the owners of the dominant tenement and servient tenement simultaneously since they all co-own Parcel S71.

[17] A change in a right of way is permitted by French jurisprudence. The authors Terré and Simler state:

L'assiette et les modalités du passage peuvent être modifiées, à la demande d'un changement de la destination de l'exploitation de ce fonds. Les besoins de l'exploitation qui motivent le droit de passage s'apprécient au moment où la prétention à la modification est émise. La servitude peut être lors non seulement modifiée, mais déplacée et transportée d'un fonds sur un autre.

Le changement peut aussi être décidé à la demande du propriétaire du fonds servant, à condition que le passage primitive soit devenu pour lui incommode... (Francois Terré et Philippe Simler, Droit civil – Les biens, 8^e edn, Dalloz p. 256).

[18] The authority above is to the effect that both the proprietors of a servient and a dominant tenement may demand a variation in the position of a right of way in circumstances when the existing position of right of way becomes too inconvenient for the servient tenement. The existing right of way can be displaced or transported to other property.

[19] This principle however is limited by the provisions of Article 685 (1) which prescribe the extinction of the position and the form of a right of way after twenty years. However, as no one has raised the issue of prescription and since the court cannot on its own take judicial notice of prescription the issue doesn't arise (*viz* article 2224 of the Civil Code of Seychelles).

[20] Further, what must be borne in mind is the *raison d'être* of the right of way in the first place. Rights of ways are created to permit access to enclaved land. Article 682 provides in relevant part that :

“The owner whose property is enclosed on all sides and has no access or inadequate access onto the public highway shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property...”

- [21] The Plaintiffs and Defendant’s properties are not enclaved and have not been for some time given the grant by the Second Defendant of the alternative access. Terré and Simler state that a right of way can be extinguished when land is no longer enclaved and such extinction can be declared by the court:

“La creation d’une nouvelle voie publique directement accessible ou l’acquisition par le titulaire de la servitude légale, ou encore, à l’inverse l’acquisition du fonds enclavé par le propriétaire du fonds servant, sont des événements qui suppriment l’état d’enclave...”

...si celui dont le fonds a cessé, par une autre voie, d’être enclavée, n’accepte pas à l’amiable l’extinction de la servitude de passage née de l’état d’enclave qui n’existe plus, celui qui subit la servitude pourra s’adresser au tribunal d’instance même si le passage acquis par suite d’enclave a fait l’objet de [vingt] ans d’usage. (Terré et Simler (supra) p. 257-258).

- [22] Hence the creation of an alternative right of way which results in the property not being enclaved results in the original right of way being extinguished even if the limitation period has expired. There is Seychellois authority to that effect as well. *Tall v Lefevre* (1980) SLR 199 decided that where land is not enclaved and there is no necessity to a right of way as claimed, the owner is not entitled to it. Further, as the French authorities point out, where the owner of the servient tenement does not acquiesce to the extinction of the right of way, a court can make such a declaration.

- [23] I am of the view that given the evidence in this case and the circumstances surrounding the grant of an alternative right of way by the second Defendant, the danger posed to the Plaintiffs and their properties, that the existing right of way on Parcel S71 should be extinguished and I so order.

[24] The Plaintiffs and the Second Defendant are ordered to make the public motorable access granted usable within three months of this order and to substitute the same for the existing right of way. A permanent bollard is then to be placed at the entrance of Parcel S71 making it impassable to motor vehicles. The Plaintiffs and the First Defendant remain in ownership of Parcel S71 and their property rights therein are not otherwise affected.

[25] For the avoidance of doubt the costs of making the alternative access motorable is to be borne by the Plaintiffs. The first Defendant is at his own costs to demolish that part of his wall which would hinder access by him and his tenants to his property.

Signed, dated and delivered at Ile du Port on 31March 2017.

M. TWOMEY
Chief Justice