

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: MA 164/2017**

**(arising in CS52/2017)**

**[2017] SCSC**

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**TODD BORISOV POPOV**

Petitioner versus

**LENA PERRIOL DESAUBIN**

Respondent

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Heard: 13 July 2017  
Counsel: Mrs Alexia Amesbury for petitioner  
Mrs Samantha Aglae for respondent  
Delivered: 13 July 2017

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**RULING**

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R. Govinden, J

- [1]** This is a Ruling in an Application for an Interlocutory Injunction dated the 5<sup>th</sup> of June 2017, filed by the Plaintiff in the Principal Case.
- [2]** The Applicant in this matter has filed a plaint before this Court in which as the Plaintiff, claims that he is the owner of Parcel T1914 situated at Takamaka Mahe. He avers in the plaint that the defendant is the owner of a Parcel Land adjacent to T1914. He avers further that by instrument of grant of easement dated the 22<sup>nd</sup> of January 2013, the company that sold him the Parcel T1914 granted an easement on his property in favour of

the defendant's property and that the easement consist of the maintaining of a septic tank and running of a water pipe across Parcel T1914.

- [3] He further avers in his plaint that having purchased the property he had sought and obtained planning approval to develop a residential accommodation thereon. The Applicant further avers, in his plaint, that the company that sold him the plot failed to inform him of the existence of the easement and that he never consented to the granting of the easement. The Applicant avers further that as a successor in title he can ask for the removal of the easement and he has asked for the removal, however, the Respondent has refused to remove same. He further claimed that at any rate the easement has become too onerous on Parcel T1914 and that as a result he cannot enjoy his land to his fullest. For this reason, he asked the Court to order for the removal of the easement and to relocate it on the Respondent's property.
- [4] Together with the Plaint, the Applicant has filed this Notice of Motion accompanied by an affidavit, of which he is the deponent. Therein, the Applicant motioned the Court to issue an interlocutory injunction ordering that the septic tank, that he avers is defective and encumbers his property, be removed from his property and be placed on the Respondent's property.
- [5] The thrust of the Applicant's motion is founded on the same ground as that of his plaint. The Applicant avers that the easement was registered against his property after he purchased it. He further avers that he had received a letter from the Ministry of Health to the effect that the septic tank is defective and is causing a nuisance. He avers that as a result of the septic tank being present on his property he is prevented from developing his property to the fullest and that this has to be relocated on the Respondent's land. The Applicant attached certain documentations to his affidavit, being a copy of the instrument of grant of easement; a letter from the Ministry of Health and then a bundle of photographs showing the extent of the pollution caused by the defective septic tank.
- [6] The Respondent, on the other hand, filed an objection to the Application for an Interlocutory Injunction. In her objection the Respondent avers that the easement binds

the owner of Parcel T1914, and her heirs, assignee and successor in title and that the easement was registered prior to the sale of the Parcel of T1914 to the Applicant.

- [7] The Respondent further avers that the letter to the Ministry of Health refers by the Applicant does not request for the removal of the soak away pit.
- [8] The Respondent also avers that the application is misconceived and that it is an attempt on the part of the Applicant to have the object of the easement removed altogether and therefore defeat the cause in the main suit before this Court. The Respondents avers that the soak away pit was in good condition until it was damaged by the agents of the Applicant. The Respondent avers further that the soak away pit does not hinder the development of the Applicant's land and the Planning Authority had asked the Applicant to hoard off the pit whilst any development was taking place on his land. The Respondent avers further that the Applicant purchased the property fully aware of the encumbrance and that the Applicant as such should bear any cost regarding the reparation of same.
- [9] During the course of the hearing learned Counsel for the Applicant took certain preliminary objections and submitted that the affidavit of the Respondent is defective in that there is no proper reference to the different items attached to the Respondent's affidavits and argues that as such these documentation are not exhibited and reference and should be ignored by this Court.
- [10] The Applicant's Counsel refers to the Applicant's affidavit as a proper reference point on how affidavit should be drafted, couched and referenced. Counsel for the Applicant also attempted to develop an argument against the legality of the encumbrance but abandoned this argument given its relevancy to the main action.
- [11] On the merits of the application, Applicant's Counsel repeated the argument raised in the plaint and she argues further that her client was not informed of the existence of the easement at the time the property was transferred. And that, moreover, the septic tank is now broken, defective and causing an environmental hazard. She refers to this Court to numerous photographs attached to the affidavit of the Applicant in that regards.

- [12] Learned Counsel argues that that the Applicant has the means to relocate the effective septic tank onto the Respondent's property. She argues that the balance of convenience in this case is on the side of the Applicant and that the Respondent will suffer no injustice.
- [13] Learned Counsel for the Respondent, on the other hand, argued that the easement is proper and legal and the Court should find that this is a matter that should remain to be decided in the main case. Mrs Aglae argued that if the Court is to grant the prayer as prayed for in this application for an injunction it will consist of disposing the merits of the main matter in the plaint before this Court. She also argues that there is no requirement in law for there to be stated in the transfer document that the land is to be transferred subject to an easement. She argues that at any rate it is clear on the evidence that the transferee and the transferor was aware of the existence of easement at the time of transfer.
- [14] Counsel for the Respondent further submit that the Town and Country Planning Authority upon giving development permission to the developer, indicated to the developer that there was the existence of the easement and that he was informed that this has to be hoarded off. And as a result the balance of convenience is in favour of the Respondent.
- [15] The law on matters of interlocutory injunction is well settled in this jurisdiction. Interlocutory injunction is a matter of discretion of this Court in terms of Section 6 of the Court's Act Section 304 of the Civil Procedure Code.
- [16] The Court will grant this remedy in order to prevent irreparable harms that may be caused to a party and where those harms may be not remedied by damages. This order is given pending the determination of the main case.
- [17] There must also be a substantive and arguable case on the merits. The Court in considering whether to grant or refuse an injunction should consider the balance of convenience and hardship between the parties. It is for the Applicant to show that the inconvenience he will suffer as a result is greater than that which the Respondent will

suffer. This jurisdiction is subject to equity, fairness, good faith and the practical convenience depending on the facts and circumstances of a case.

**[18]** I have given careful consideration to the submissions of both parties; affidavits evidence and pleadings filed before this Court. I see that there is a difference of language used by each parties as to the description of the encumbrance. One party alleges that it's a septic tank, the other that is a soak away pit. The Court finds that irrespective of the description of the encumbrance it is clear that all parties agree that the encumbrance consist of something receiving heavy waste affluent from the Respondent's property. This as it may, I find that the Applicant attached a letter from the Ministry of Health dated the 20<sup>th</sup> of February 2017, in which the Ministry refers to a soak away pit. For reference sake the Court will use this term in this Ruling.

**[19]** The argument regarding the documentation and lack of reference to documentation on the Respondent's affidavit, I believe has merits. The Court finds that the Respondent has attached affidavits to her objection. These are those of Winsley Morel, Harold Ally, Daniel Dubel and Andy Ernest. They all refer to the fact that they are aware of a property which is adjacent to that of the Respondent and that on this property and that they are informed that there exist a soak away pit in favour of the Respondent's property. And they had seen agents of the Applicant using heavy equipments unto the soak away pit. And that the Respondent has taken photographs of the damage done by as a result of the activities of these agents.

**[20]** However, there is no reference by these deponents to any documents which are attached to their affidavits, by way of reference. There is no direct or indirect reference to the photographs. Accordingly, I find that the affidavits have not produced any exhibits which are attached thereto. Therefore, for the purpose of this application the Court will disregard any documentation attached to those affidavits of those deponents as those documents has not been produced in evidence by the deponents.

**[21]** As to the balance of convenience, irrespective of the issue of the inadmissibility of the photographs of the above deponents of the Respondents, this Court finds as follows: -

- [22] The plaintiff in his plaint before this Court is asking for relocation of the easement, purportedly created by the former owner of Parcel T1914, unto the plot owned by the Respondent.
- [23] The Plaintiff in this application is also asking the Court to order the Defendant to remove the easement from the Plaintiffs and relocate same on the Defendant's property.
- [24] The prayer in the plaint therefore runs on all four with the prayer in the Application for injunction. To grant the injunction at this juncture, therefore, we will practically be awarding the main case in favour of the plaintiff. This will be done without this Court having the benefit of hearing the evidence and exhaustively hear any arguments for and against the legality of the creation of this easement. This will render the main case nugatory. There are substantial points of laws and facts to be argued on the merits. This is an exercise of equitable Jurisdiction and equity will not allow a remedy that is contrary to the law. Moreover, if the Court is to order the removal of the soak away pit and for the same to be put, even in the interim, on the Respondent's property, it will make no sense for the Court to order for same to be pulled down and be put back on to the Applicant's property in the event that the Court found otherwise in the main case.
- [25] Practical consideration cause for the Court to look at the facts of the case and decide in favour of the Respondent in this case. The balance of convenience favours the respondents. I will call upon the Respondent's Counsel, to file her statement of defence for the Court to be given the occasion of properly determining the issues after considering all the evidence. I see that Mrs Aglae is not in Court so notice will have to be sent to Mrs Aglae for her to file the statement of defence by the 19<sup>th</sup> of July 2017 at 10.30 a.m.

Signed, dated and delivered at Ile du Port on 13 July 2017

R. Govinden, J  
Judge of the Supreme Court