

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS/52/2016

[2018] SCSC 349

Anthony Larue

Plaintiff

versus

1. Thrya Boniface

2. The Estate of Mea Simeon

(represented by Raymond Simeon and Jane Simeon)

Defendants

Heard: 18 January 2018, 19 January 2018, Locus in quo 19 January 2018, Submissions
14 February 2018.

Counsel: Ms. Kelly Louise for Plaintiff
Ms. Edith Wong and Mr. Olivier Chang Leng for the First Defendant
Mr. Serge Rouillon for Second Defendant

Delivered: 10 April 2018

JUDGMENT

M. TWOMEY, CJ

[1] In an amended plaint dated 27 November 2017, the Plaintiff states that he is the owner of land at Bel Eau, namely Parcel V2610 which is enclaved. He claims that the First Defendant is the owner of Parcel V2611 which is situated between his land and a secondary public road. He also claims that the Second Defendant is the owner of Parcel

V2609 which is situated adjacent to the First Defendant's land and between his land and the secondary public road.

- [2] He prays that he be granted a right of way across the Defendants land to access the secondary public road in order to have full enjoyment of his land.
- [3] The First Defendant denies the plaint and avers that the road referred to by the Plaintiff is not a secondary public road. She avers that there is a more convenient route by which the Plaintiff can access his land which does not entail access through her land.
- [4] She counterclaims in the total sum of SR 100,000 for physical damage resulting from the Plaintiff's acts in entering her land illegally, damaging it and for moral damage suffered.
- [5] The Second Defendant also denies the plaint generally and specifically denies that the road used by the Plaintiff is a secondary public road. It admits that it does not object to part of the right of way passing through Parcel V2609.
- [6] It counterclaims SR 200, 000 in damages for the Plaintiff's continued acts of nuisance, trespass and damage to Parcel V2609 and for moral damages caused by the Plaintiff's acts. It avers that the Plaintiff approached two of the heirs in the past requesting a right of way and this was allowed pending the executors' appointment in relation to the estate. It avers that before these issues were resolved and without the estate's consent or authority, the Plaintiff unilaterally and illegally created a right of way and erected a wall of corrugated iron sheets along the encroachment interfering with the enjoyment of the property.
- [7] It avers that other unauthorised activities including continued and excessive encroachment, blasting and building works, the taking of soil and debris from Parcel V2609 to backfill Parcel V 2611 and interference by the Plaintiff with beacons.
- [8] The counterclaims are denied by the Plaintiff. He testified that he bought Parcel V2610 on 29 April 2010. He built apartments on the land financed by a loan from the Development Bank of Seychelles. He accesses the apartments by going through the two Defendants' land. He obtained permission from the Simeon family before the construction work began by speaking specifically to Benjamin Simeon who was the

executor of the Estate. Mr. Simeon had not objected but had subsequently passed away. He has no alternative access to his property. He had tried to obtain the permission of the present owners of the parcels of land in person and by phone but they had refused the same. Previously there had been a footpath to his property.

[9] He was not of the view that he had damaged the Defendants' land. He had asked them to sell him some of the land but they had refused. He was willing to compensate the owners for a three metre right of way through their land or for any damage he had caused to them.

[10] In cross examination, he admitted that when he purchased the land he was aware that it was enclaved. He also admitted that he had received a letter for the Planning Department in August 2017 asking him to desist from continuing with his development until he had received authorisation from the owners of Parcel V2609 and V 2611 to access his land. He also admitted that he not obtained the permission of the First Defendant at all to go through her land.

[11] He had built three apartments. He admitted that he damaged grass and a *jamalak* tree by his contractor driving the excavators to his land but that the grass had all grown back. He admitted that he was still going through the First Defendant's land to gain access to his property.

[12] He also admitted that he not obtained written permission from the Second Defendant, only a verbal agreement from two members of the family who were the executors in 2015 before he had started construction. He admitted carving out an area of about six meters of land including the removal of foliage and a big boulder from the Second Defendant's land to get to his property. He admitted that the road he was using had not been registered but stated that anybody could use it and that no one had objected to him using it.

[13] He admitted putting material for the construction of his property on the Second Defendant's land but said the same was used the very same day, or two or three days later.

[14] The First Defendant also testified. She had title to Parcel V2611 for about twenty years. When she was informed that the Plaintiff had trespassed onto her land, she reported the

matter to the police. The Plaintiff had never approached her for permission to enter her land. It was subsequent to this event that he had approached her to ask for permission.

[15] She produced photographs to show the damage to her land occasioned by the acts of the Plaintiff in June 2015. She stated that the photographs show several trees and bushes had been knocked down. She saw the Plaintiff's excavator on her land. She pointed out that the road to her property was not public but had been built about 25 years ago by the four families who owned adjacent land and they were the only users of the road.

[16] The previous owner of the Plaintiff's land had difficulties building on it as she had no access to it. Since the Plaintiff had acquired the land there had been chaos in the small Simeon community. He had made a way to his land through the land of others without obtaining their permission.

[17] She had claimed moral damages in the total sum of SR50, 000 because she had had the inconvenience of leaving her place of work to seek police assistance and then to return to make statements. She had had to do this twice. The Plaintiff had never apologised for this. He was aggressive and angry and she did not feel she could approach him to rectify the matter.

[18] He had subsequently used an alternative access through the Simeon land and did so by cutting down trees. She admitted that Mr. Simeon had married into one of the families that used the road he used to access his property but that he did what he did arrogantly. She felt that it would be unreasonable to grant another 1.5 m right of way across her land to the Plaintiff's as her land was already quite small and she had previously parted with some of it for the existing access road.

[19] The Second Defendant called Mr. Joseph Simeon as a witness. He testified that he was an heir to Mea Rachel Simeon's estate. He had received a letter dated 9 October 2016 from the Plaintiff's lawyer, Mr. Georges in which he was asked for a part of his property for a right of way. The letter should not have been sent to him as he was not the owner of land adjoining the Plaintiffs required to give him a right of way. A bundle of documents had been pushed through his door including the following To Whom It May Concern letter which he had not signed:

We, Joe Simeon and Raymond Simeon, acting as Executors of Parcel V2609, and residing at Bel Air, consent to allow Mr. Anthony Pascal Larue, also residing at Bel Air, to use part of the above-mentioned property(mutually agreed), for the purpose of barricading his own property during the construction of his building.

Mr. Anthony Larue is at the liberty to use part of this property to temporary install a gate/ fencing/ other means of barricade to safeguard his materials located on his own property during the period of construction of his building. The barricade must be removed when the building is completed.

Yours faithfully.

Joe Simeon

Raymond Simeon. (sic)

[20] He had taken photos of the conditions on the property in 2016. The area had been covered with trees which had been cut down without authorisation by the Plaintiff. He had broken down rocks as well. He had constructed on his land and built a concrete road on heirs Mea Rachel Simeon's land to reach his land without being permitted by the heirs. They had called the police because the Plaintiff had removed beacons on the land.

[21] Mr. Raymond Simeon, a co-executor of the estate of Mea Rachel Simeon also testified. Mrs. Mea Simeon had been his mother and he had seven surviving siblings altogether, all heirs to the estate. The heirs always discussed matters relating to the estate. He was not of the view that his late brother, Mr. Benjamin Simeon had given permission to the plaintiff for a 1.5 metre access road across their property.

[22] He had been called to the Plaintiff's lawyer's office to discuss the matter but on reaching there learnt that the Plaintiff was away overseas. He had been to the heir's land, and had seen the Plaintiff's two storey building, rocks and a boulder broken on their property, soil excavated and trees cut down. A beacon was also removed. An electricity pole had been erected without permission being granted for it by the Public Utilities Company.

[23] The Plaintiff had encroached about six metres onto their land. The witness became very emotional talking about the actions of the Plaintiff and the fact that the original executor,

his brother Benjamin Simeon had died and he had had to take up the issue of the Plaintiff's encroachment. The Plaintiff took advantage of the situation. He had put up a commercial building and was running a car hire company from the same premises.

[24] The heirs were counterclaiming for damages for the moral damage and inconvenience caused by the Plaintiff which bore heavily on them especially as it followed their brother's death and also damages for the destruction to their property.

[25] At the locus in quo it was pointed that the interference with the Second Defendant's land, for example the removal of the boulder had been at the current concreted entrance to the Plaintiff's property. It was admitted that the vegetation apart for the trees had grown back. It was observed that the electricity pole had been erected on the First Defendant's land.

[26] The encroachment by the Plaintiff to build access to his property from Parcels V2611 and V 2609 onto the two Defendants' land was measured 9.63 m by 6.10 metres, an area of 58.73 square metres. As a beacons check was necessary, this encroachment could not be confirmed. In a subsequent submission, a detailed survey plan by Antoine Ah-Kong was attached showing the encroachment by the Plaintiff onto the Defendants' land.

[27] Learned Counsel for the First Defendant has submitted that the testimony of the Plaintiff indicates that he was aware when he purchased the land that it was enclaved but that he was of the view that he would be granted a right of way in any case. He submitted that the Plaintiff had not acted in good faith in his application for the right of way, having first asked for 1.5 metre right of way and subsequently a 3 metre right of way over her land with the knowledge that the First Defendant's land was already burdened with another access road and was quite small in area. He queried how a commercial building had been erected without a right of way and despite the Planning Authority asking the Plaintiff to desist from construction until the same had been obtained. He further submitted that the Plaintiff had not brought evidence to show that the secondary road he was using to access his land was in fact a public secondary road. Finally, he submitted that substantial damage was intentionally caused by the Plaintiff to the First Defendant's land.

- [28] Insofar as the law is concerned, he conceded that when land is enclaved a passage has to be granted to the owner of the property but that adequate compensation ought to be paid for any damage caused and account taken of the need to reduce damage to the neighbouring property.
- [29] Similarly, the Second Defendant has submitted that the acts of the Plaintiff were done without permission and that he had forced the issue of the right of way by assuming that one would be granted in any case and was uncaring about the damage he occasioned to the Second Defendant's land in the process. Further, since it has now transpired that access to the Plaintiff's land would necessitate a right of way from the public road across other land belonging to persons not joined in the suit, the right of way claimed should not be granted.
- [30] Despite the Plaintiff's Counsel stating in court that she would be filing submissions in this case none have been forthcoming from her and I proceed nevertheless.
- [31] In *Ramgasamy v Chief Executive Officer of Planning Authority*[2016] SCSC 865, I gave a summary of the law relating to rights of way in Seychelles. I can do no better than to reiterate what was stated in that case:

“35. The law relating to rights of way is clearly stated in the Civil Code and in jurisprudence. First, Article 639 states:

An easement arises either from the natural position of land or from obligations imposed by law or from agreements amongst owners.

36. In addition, Article 682 provides in relevant part:

1. The owner whose property is enclosed on all sides, and has no access or inadequate access on to the public highway, either for the private or for the business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause (emphasis mine).

37. Article 691 also provides in relevant part that:

Non-apparent continuous easements and discontinuous easements, apparent or non-apparent, may not be created except by a document of title.

38. In addition, section 52 of the Land Registration Act (LRA) provides in relevant part:

(1) The proprietor of land or a lease may, by an instrument in the prescribed form grant an easement to the proprietor or lessee of other land for the benefit of that other land.

(2) The instrument creating the easement shall specify clearly:

(a) the nature of the easement, the period for which it is granted and any conditions, limitations or restrictions intended to affect its enjoyment; and

(b) the land burdened by the easement and, if required by the Registrar, the particular part thereof so burdened; and

(c) the land which enjoys the benefit of the easement, and shall, if so required by the Registrar, include a plan sufficient in the Registrar's estimation to define the easement.

...

(3) The grant of the easement shall be completed by its registration as an encumbrance in the register of the land burdened and in the property section of the register of the land which benefits, and filing the instrument

39. The principles that we can distil from all the above provisions read together are that an agreement among owners can create a right of way but that the agreement shall only have effect if created by a document of title, which is registered. In addition, based on Articles 639 and 682 (supra), where land is

enclaved the owner of the dominant tenement may apply to the court to have a right of way across a servient tenement. Court orders in this respect are also registered.

40. There is also *jurisprudence constante* that a right of way requires a document of title or an order of the court (see *Hoareau v Ah-Tive* (1979) SLR 38, *Payet v Labrosse and another* (1978) SLR 222 and *Delorie v Alcindor and another*(1978-1982) SCAR 28, *Sinon v Dine* (2001) SLR 88, *Laurette v Sullivan* (2004) SLR 65, *Umbricht v Lesperance* (2007) SLR 221).

41. The law is also clear on the fact that it is incumbent on the person who seeks the right of way to prove it by registered title deed or to claim it in court. The owner of the servient tenement need not prove anything and the dominant tenement is only burdened by registered easements arising from title or court orders (see article 682 above).”

[32] Applying these principles, I have ascertained from a study of the documents produced and an appraisal of the evidence adduced that there is no registered right of way in respect of any of the parcels concerned in this suit.

[33] I have also ascertained both by the evidence adduced and a visit to the site that the Plaintiff’s land is indeed enclaved and that there is neither a registered right of way from the public road to his property nor a registered agreement with adjoining land owners to provide him with the same. He has therefore a right to a remedy under Article 682 of the Civil Code.

[34] What he doesn’t have, however under any provision is a right to self-help. One cannot barge one’s way through people’s property and prospectively claim the right of way availed of through force.

[35] I also find that on a balance of probabilities the Plaintiff has not proved that there is a public road adjacent to land titles V 2609 and V2611 from which he claims a right of way in this Court. He has merely produced a location plan of the parcels concerned on which is marked a road serving the existing homes. There is indeed an access road from the public road passing through Parcels V7240, V7239, V18166, V18167, V1877,

V2615, V2612, V2054, V2611 and V2609 but the Defendants categorically deny that this access road used by the Simeon family is in fact a secondary public road. They have testified, and I have no reason to disbelieve them, that this was an informal arrangement among family members to pass over each other's land and that the road had been constructed by themselves for the exclusive use of their families.

[36] It is not only seriously concerning but it also beggars belief why the Planning Authority granted planning permission for construction of a commercial building on an enclaved land without a right of way and why when the same Authority wrote to the Plaintiff to ask him to desist from continuing with the development that he flagrantly proceeded nevertheless and the Authority's notice to him not enforced.

[37] Might is not right and this court cannot condone the action of a Plaintiff who approaches it for a remedy with bad faith. In any case, even if the court granted him the right of way he seeks under Article 682 (1), given that his land is enclaved, this would be futile as he has no right of way across the many parcels of land he has to cross from the main Bel Air-Sans Souci road to access the right of way he seeks. His pleadings are not sufficient to grant him the remedy he seeks and it is hereby dismissed. He is at liberty to approach the court with proper pleadings against property owners from the public road to his land to obtain a right of way to his enclaved property.

[38] Insofar as the Defendants' counterclaims are concerned, I have no doubt that the experience they were subjected to was traumatic and upsetting. They came across as gentle folk living peacefully in a tight knit community until the Plaintiff burst onto the scene and wreaked havoc onto their properties and their lives. I am therefore minded to grant them moral damages. I also have evidence through their testimonies and photographs of the wanton acts of the Plaintiff bulldozing his way through their respective land to access his property and build his apartments.

[39] Outside specific evidence of the value of the trees, shrubbery and land interfered with and damaged by the Plaintiff my award will have to be arbitrary. I believe SR25, 000 for each Defendant in respect of physical damage to their land is sufficient to meet the cost of the destruction. I also grant each of them SR25, 000 for moral damages.

[40] The Second Defendant has also prayed for an order prohibiting the Plaintiff from trespassing over its land, this is in the circumstances is also granted and will remain in operation until a right of way is obtained through legal means by the Plaintiff.

[41] I therefore make the following orders:

1. The Plaintiff's claim is dismissed with costs.
2. The Plaintiff will pay the First Defendant SR25, 000 for physical damages to her land and SR25, 000 for moral damages.
3. The Plaintiff will pay the Second Defendant SR25, 000 for physical damages to its land and SR25, 000 moral damages for the heirs.
4. The Plaintiff is hereby prohibited from further trespassing onto the Second Defendant's land.

Signed, dated and delivered at Ile du Port on 10 April 2018.

M. TWOMEY
Chief Justice