

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS52/2017

[2018] SCSC 473

TODOR BORISOV POPOV

Plaintiff

versus

LENA DESAUBIN

Defendant

Heard: 26 July 2017
Counsel: Mrs Alexia Amesbury for Plaintiff
Mrs Samantha Aglae for Defendant
Delivered: 21 May 2018

JUDGMENT

R. Govinden, J

[1] Plaintiff is the proprietor of land parcel T1914 situated at Anse Corail, Takamaka (Mahe), which he purchased from Sea Shore (Pty) Ltd, a company represented by Mr France Bonte, the majority shareholder and director. Plaintiff effectuated the purchased by an Instrument of Transfer dated 28 December 2015 and registered on the 14th of January 2016.

- [2] Defendant is the proprietor of land parcel T3110 (6171 sq.m.) also situated at Anse Corail, Takamaka (Mahe), and which is adjacent to and contiguous to parcel T1914.
- [3] Sea Shore Ltd. unilaterally granted to the Defendant an easement in parcel T1914, namely to keep and maintain a septic tank and to run a water pipe across land parcel T1914 (*Instrument of Grant of Easement - Dated 22 January 2013 - Registered on 10 February 2014*).
- [4] In accordance with the easement, Defendant says that she keeps and maintain a septic tank on and runs a water pipes across parcel T1914. After purchasing parcel T1914, Plaintiff obtained approval to develop it as a residential accommodation with a swimming pool.

I. CONTENTIONS OF THE PARTIES AND EVIDENCE PRESENTED

A. *Plaintiff's Case*

- [5] Given that the easement was granted unilaterally in favour of the Defendant, Plaintiff avers that, as the Defendant's successor in title of land parcel T1914, he has all the rights and powers to revoke the grant of the easement. Plaintiff avers that by notice issued to the Defendant, he revoked and terminated the easement and requested that Defendant remove the easement from parcel T1914. Plaintiff maintains that the Defendant has failed, ignored or refused to remove the easement.
- [6] Plaintiff avers that at any rate the easement has become too onerous to parcel T1914 and renders Plaintiff's use and enjoyment extremely restrictive and that it restrict Plaintiff's intended development of the said parcel. Plaintiff claims that Defendant can properly be called upon to relocate the septic tank and run the water pipes on her own land.
- [7] Plaintiff maintains that the easement already existed as an encumbrance upon purchasing the parcel. When he visited the parcel, prior to the purchase, he indicated that he did not see the easement and that at any rate there was no mention by the seller of the said easement.

[8] Plaintiff testified that he started clearing parcel T1914 in September 2016 in order to carry out an approved development. During this process, machines were used by his workers. According to the Plaintiff, however, this did not cause any damage to the septic tank. He testified that he had completed building two houses with two bedrooms each, for which he had received planning permission. Moreover, he indicated that when the architectural plan was being done, the septic tank was taken into consideration. He testified that the septic tank as well as the soak away pit are surrounded by corrugated iron sheets.

[9] Plaintiff testified further that at the time that land title T1914 was transferred to him from Sea Shore Ltd, he was not informed that the said company had granted an easement to the Defendant, her heirs, assigns and successors in title to maintain and run a water pipe across his property.

[10] Indeed, this is reflected in the following trial proceedings :

Q: Mr Popov can you tell the court on this document who grants the easement and to whom is the easement granted as opposed to what?

A: The easement is granted by France Gonzalvez Bonte to the proprietor of title T3110 her heirs and assigns. To keep and maintain the septic tank and to run a water pipe across the said property T1914.

Q: Now on this document is the easement granted to a person or is the easement granted to the benefit of another property?

A: It is granted to a person.

[11] Kosta Shekefev, Plaintiff's chief carpenter, testified that he was having delays in completing the house especially with the foundation as he cannot continue the work because of the soak away pit. He testified that if the soak away pit was repaired he would be able to work.

[12] Mrs Mary Jane Maillet, a Public Health Officer, testified that there had never been any complaints before in respect of the septic tank and the soak away pit belonging to the Defendant. She testified that it was Plaintiff's complaint that alerted her mind to come and investigate. It is her testimony that it can be repaired and emptied.

[13] Mr Clement Athanasius testified for the Plaintiff. He is a compliance officer at the Registration Division. He deponed about the registration of the easement in respect of parcel T1914. The easement is in favour of parcel T3110. According to Mr Athanasius, the easement is not granted to the land itself but to a person.

B. Defendant's Case

[14] In her Statement of Defence, the Defendant raised three pleas in *limine*. All of them have to do with the legality of the easement on parcel T1914. Defendant avers that:(1) the easement is legal and was granted prior to the sale of T1914 to the Plaintiff; (2) the easement is not against public policy and has been used and enjoyed and is still being enjoyed by the Plaintiff; and (3) finally that the Defendant is not the proper party in this case, and that there is no cause of action against the Defendant.

[15] Defendant denies that Plaintiff had sought and obtained approval to develop T1914 as a residential accommodation and swimming pool with a retaining and a boundary wall. Defendant avers that the easement was granted to the Defendant by the former owner of parcel T1914, Sea Shore (Pty) Ltd. on 22 January 2013 and registered on 10 February 2014, prior to the Plaintiff purchasing the parcel.

[16] Mr France Bonte who was the Attorney for the Plaintiff during the time of the sale of parcel T1914 testified before the court for the Defendant. He testified that parcel T1914 was previously owned by him and that at that time it had the easement on it. He testified that he sold the parcel to the company Sea Shore (Pty) Ltd and that the company later sold parcel T1914 to the Plaintiff and in so doing parcel T1914 granted the easement in favour of parcel T3110. He confirmed that he was the director of the said company and he had the legal authority to grant the easement. It is the evidence of Mr Bonte that the Plaintiff was aware of the easement before he bought the parcel.

- [17] Defendant testified that she had a septic tank and pipes on parcel T1914 ever since the land had belonged to France Bonte and that she never had an issue with the public health department regarding nuisances caused by the easement. Defendant testified that when the development started on parcel T1914, the heavy machinery used on the land caused damage to the soak away pit. She indicated that she is prepared to repair the soak away pit but that she is not responsible for the damage. She is asking the Plaintiff to effect the repair.
- [18] She conceded that she is prepared to retain one pipe on the easement.
- [19] Mr Winsley Morel, a worker of the Defendant, testified about seeing heavy vehicles carrying out works on the Plaintiff property and that this damaged the pipes of the Defendant, which exist as part of the easement.
- [20] Mr James Chang Tave, gave evidence for the Defendant, as the representative of the Seychelles Planning Authority. He testified that the Planning Authority gave permission to build a two bedroom house on parcel T1914 and that the plans of the Plaintiff took into consideration the septic tank which is on parcel T1914. He said that one of the condition of the development was that it does not interfere with the easement. He stated that that the easement is a legal instrument and cannot be interfered with by the Planning Authority.
- [21] It is Mr Chang Tave's testimony that he visited parcel T1914 and saw earth work being carried out on the site and a precautionary stop notice was issued. He noticed that equipment were used on the soak away pit. He testified that the notice was lifted thereafter.
- [22] It is the Defendant's case that the easement is legal and valid and for the benefit of parcel T3110 irrespective of the fact of the proprietor being mentioned as the beneficiary of the easement as it is the parcel itself which is burdened by the encumbrance. Defendant is of the view that the Plaintiff has always maintained the septic tank and pipe on parcel T1914 for the benefit of parcel T3110 belonging to her.

C. Locus in Quo

- [23] The court went on locus on the 6th of December 2017 at 3 p.m. in the presence of all parties. The court proceeded in the absence of counsel for the Defendant, with the approval of the Defendant.
- [24] The court was shown the boundary line between the Plaintiff's property and the Defendant's property, which consist of a stone wall.
- [25] The court found three polythene pipes belonging to the Defendant running unto the Plaintiff's property.
- [26] On the Plaintiff's property, parcel T1914, eight meters from the boundary wall of the Defendant, the court observed an enclosure consisting of corrugated iron sheets on all sides. Upon removal of the enclosure, the court noticed a concrete slab of two meters by a half a meter. This was the septic tank. It was neither damaged nor was it leaking.
- [27] Three meters from the septic tank and eleven meters from the boundary wall of the Defendant, the court noticed accumulated stagnant water on the ground surface. This area was indicated as the site of the soak away pit. It was in the middle of a development being erected by the Plaintiff, consisting of a Guard House and a Guest House.

II. ISSUES TO BE DETERMINED

- A. What is the easement granted by the instrument of grant of easement?
- B. To whom is the easement granted by the instrument of grant of easement?
- C. Whether the Defendant ignored or neglected to disclose the existence of the easement to the Plaintiff and or consented to the grant of the easement in favour of the Defendant or the person which sold the Plaintiff the servient tenement?
- D. Has the easement become too onerous and as a result can the Defendant be compelled to relocate the easement or the Plaintiff relocate the easement at the expense of the Defendant?

III. DISCUSSIONS

A. What is the easement granted by the Instrument of Grant of Easement?

[28] Plaintiff avers that the instrument of grant of easement grants lesser rights than what the Defendant purport it granted. It is the Plaintiff's case that the grant of easement instrument allows the Defendant to keep and maintain a septic tank and to run a pipe across property T1914. On the other hand, the Defendant's case is that it allows her to keep and maintain the septic tank, including the soak away pit and to run pipes across property title T1914. However, during the Defendant's testimony she conceded that she is ready to run only one pipe across the Plaintiff's property.

[29] Upon scrutinizing the Instrument of Grant of Easement, it is patently clear that parcel T1914 is encumbered to run only a water pipe across T1914 and not more than that. I accordingly find that to the extent that this parcel is encumbered with an easement to run a water pipe in favour of parcel T3110, this relates to only one water pipe. Any more pipes would be over and above the encumbrance.

[30] As to the keeping and maintaining of a septic tank, it is also clear that on the face of the Instrument of Grant of Easement that it does not refer to the soak away pit, but only the septic tank. However, evidence led before the court has shown that the septic tank and the soak away pit had been encumbered on parcel T1914 since it was it was owned by Mr France Bonte and that both the septic tank and the soak away pit formed one integral drainage disposal system. It is also the evidence of Mr Chang Tave that a septic tank has to necessarily exist together with a soak away pit, as the latter is used to drain excess overflow from a septic tank.

[31] Accordingly, I find that the encumbrance and easement though it refers to keeping and maintaining the septic tank, necessarily includes the soak away pit as one cannot exist without the other.

B. To whom is the easement granted by the Instrument of Grant of Easement?

[32] The Defendant's position is that the easement encumbers parcel T1914 and that the easement was granted to a person and therefore it cannot bind parcel T3110 itself.

[33] On this issue the court has scrutinised the grant of easement document as made on the 2 July 2013 and registered on the 10th February 2014. The instrument reads as follows:

“Seashore (PTY) ltd herein represented by France Gonzalves Bonte of La misere, Mahe, Seychelles in consideration of Rupees one (Rs1), the receipt of which sum has been paid, hereby grant to the proprietor of title no T 3110, her heirs, assigns and successors in title the following easement on property herein occupied in the abovementioned title (T1914) to keep and maintain the septic tank to run a water pipe across the said property T1914”

[34] From the foregoing it is quite clear that the easement is granted to the *“proprietor of title T3110, her heirs, assigns and successors in title”*. Accordingly, the proprietor of parcel T3110 being the Defendant would benefit from the easement parcel T1914. This would also apply to the heirs, the assigns and successors in title of the Defendant.

[35] I therefore find that the easement on title T1914 is created not only in favour of parcel T3110 but also her proprietor, her heirs, assigns and successors in title. Accordingly, I find in favour of the Plaintiff on this issue of fact.

[36] Indeed, article 686 of the Civil Code of Seychelles provides that:

“An owner may create upon his property or in favour of his property such easements as he deems proper, provided however that the easement 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 easement are not contrary to public policy.”

[37] I find that article 686 does not run contrary to the provision of the Instrument of Grant of Easement. Since the easement grants an encumbrance to the *“proprietor of title T 3110 or her heirs, assigns and successor in title of T3110 or her heirs, assigns and successor in title”*, it is granting an easement to title T3110, the heirs of the proprietor of title T3110, assign and successor in title. This is so as the proprietor of title T3110 is synonymous to title T3110 in the language that the instrument it was drafted in.

[38] It would have made no difference in the context to have said that the easement is granted to title T3110 as this would have been enjoyed by its proprietor upon her death, by her heirs, upon transfer by the proprietor to her successor in title, and upon assignment to her assignees.

C. Whether the Defendant ignored or neglected to disclose the existence of the easement to the Plaintiff and/or the Plaintiff did not agree or consent to the grant of the easement in favour of the Defendant or Sea Shore (Pty) Ltd.?

[39] The Defendant has no duty to disclose to the Plaintiff the existence of the easement. Once the easement was created by the Instrument of Grant of Easement, the easement existed as a matter of fact and law. The instrument was registered under the provisions of the Land Registration Act. This registration has effect both against the servient tenement and third parties. Moreover, I find that the Plaintiff was aware of the existence of the easement, at least when he did the site visit.

[40] When the Plaintiff purchased parcel from Sea Shore (Pty) Ltd., the easement was legally and factually present. The easement which created a real right would encumber T1914. The issue of the Plaintiff consenting to the grant of easement in favour of the Sea Shore (Pty) Ltd. or the Defendant is therefore irrelevant.

[41] I therefore find that the previous owner of Title 1914, Sea Shore (Pty) Ltd did consent to the grant of easement and once granted, it bind parcel T1914, the person having ownership of the property and eventually the heirs of the owner and the assigns of the property.

D. Has the easement become too onerous and can the Defendant be compelled to relocate the easement or the Plaintiff compelled to relocate the easement at the expense of the Defendant?

[42] Article 701 of the Civil Code provides that:

“The owner of the servient tenement shall do nothing which may tend to impact 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 a different place from that in which it was originally located.

However, if the original location has become too onerous to the owner of the servient tenement or if it prevent him from carrying out improvements upon it, he may offer to the owner of the dominant tenement a place of equal convenience for the use of his right; such an offer may not be refused.”

- [43] It is the Plaintiff’s case that the easement has become too onerous a burden on land parcel T1914, particularly with respect to his use and enjoyment and given his plans for development. The Plaintiff submit that the pipes and the septic tank and soak away pit are clearly an onerous burden on the Plaintiff’s property as they prevent him from carrying out improvements and developments as per the planning permission upon his plot. Therefore, Plaintiff maintains that it ought to be cancelled, terminated or extinguished and that Defendant should be ordered to remove the easement and/or relocate it.
- [44] The soak away pit and the pipes are at the entrance to the plot of the Plaintiff, which is twenty four metres wide. Although the Plaintiff has complied with all the conditions imposed for the development of his property, the pit and the pipes block the normal entrance to the plot and the completion of his project. Plaintiff submits that he has offered the Defendant, the owner of the dominant tenement, the possibility of resettling the easement on the Defendant’s land at his own cost. Plaintiff submits that the court should find in his favour in that regards as such an offer cannot be refused.
- [45] [In responding to this submission, the Defendant submits that it is obvious that the septic tank and soak away has to be removed as it hinders the development of the Plaintiff’s property.] It is the submission of the Defendant that an easement can only be removed if it is against public policy and has become too onerous to the Plaintiff. However, he contends that no evidence has been adduced to this effect before the court.

- [46] The court went on a *locus in quo* in this case. The septic tank on T1914 is eight metres away from the boundary wall of the Defendant. The septic tank is found three metres from a current development on the Plaintiff's property. The soak away pit is found exactly in the middle of a Guest House and a Guard House being built by the Plaintiff. It is two and a half meters from each structure and emitting stagnant water. This is the condition that the court found the locus.
- [47] The septic tank and the soak away pit on the servient tenement T1914 has been on the parcel since it was owned by Mr France Bonte. The easement was then transferred to and thereafter to the Plaintiff. Before being transferred to the Plaintiff, parcel T1914 was vacant and undeveloped. The Plaintiff requested a planning permission for a residential development on the said parcel. The Defendant's permission was given on the condition that the septic tank be cordoned off. However, the soak away pit remained uncovered and leaking and appear as a health hazard standing in the middle of current development of the Plaintiff's property. At any rate, the enclosed septic tank is also impeding the Plaintiff's development and is an eye sore.
- [48] Hence I find that the easement has become too onerous a burden on the Plaintiff's property as they prevent and hinder the Plaintiff from carrying out or improving approved development on T1914.
- [49] I find that on evidence, that the Plaintiff has been willing to offer the Defendant an alternative place to use her right of easement that would be a place of equal convenience. That would mean moving both the septic tank and the soak away pit to another alternative location.
- [50] I find that there exist area adjacent to the Defendant's property which is five square meters inside the Plaintiff's property that is currently below some concrete steps leading from the secondary road. This is an ideal place for the septic tank and the soak away pit. This place is away from the approved development on the Plaintiff's property.
- [51] For avoidance of doubt, this location is marked and identified in red by this court on the **Approved Plan** annexed herewith.

I order the removal of the septic tank and soak away pit from their actual locations to this location. All the works for the removal and replacement of the septic tank and the soak away pit would be done by the Plaintiff and at the expense of the Defendant in accordance with article 697 and article 698 of the Civil Code. This change in the location of the easement cannot be refused by the Defendant.

IV. PLEA IN LIMINE LITIS

V. The Defendant raised three plea in *limine litis* against the Plaintiff. They are as follows:

1. The easement is legal and was granted prior to the sale of T1914 to the Plaintiff.
2. The easement is not against public policy and has been used and enjoyed and still being enjoyed by the Plaintiff.
3. The Defendant is not the proper party in this case, there is no cause of action against the Defendant.

[52] During the course of the hearing it was agreed that the court deal with the pleas in *limine* together with the merits of the case.

[53] The first and second plea in *limine* can both be taken together. There is no dispute regarding the legality of the easement. It is not being contested that the easement is in compliance with public policy and has been used and continues to be used and enjoy by the Plaintiff. This easement was granted by a valid grant of easement instrument. The scope of the easement has been already pronounced upon by the court.

[54] However, the court has found that though it is legal and was granted prior to the sale of T1914 to the Plaintiff, it is caught by the obligation of article 693 of the Civil Code, which provides that:

“Easement set up by the previous owner shall only be accepted if two contiguous plots, at present divided, were in the ownership of the same owner and if the incidents which gave rise to the easement were created by him.”

[55] As such the servient tenement, as it is in this case, can offer the dominant tenement a place of equal convenience for the use of this right.

[56] As to the plea that the Defendant is not the proper party in this case and that there is no cause of action against the Defendant, I see no merits in this plea. The Defendant is the owner of the dominant tenement, parcel T3110. The owner of T3110 is the person that has to answer to any claim regarding the legality of the easement. No other person can have *locus standi* to meet and defend the claim. Accordingly the Defendant was rightly sued as a defendant.

[57] For the aforementioned reasons, I make the following orders:

1. The Defendant shall remove all excess water pipes on the Plaintiff's property and keep only one pipe within two weeks from the date of this judgment, otherwise this shall be effected by the Plaintiff at the expense of the Defendant;
2. The Defendant shall within one month from the date of this judgment remove both the septic tank and the soak away pit from their actual location and place them in the location ordered by this court at paragraph 49 and 50 of this judgment; this after the water pipes of the Defendants are removed from that location in accordance with this judgment; and
3. Failing the carrying out of the above works of relocation of the septic tank and the soak away pit by the Defendant within the time set by the court, the Plaintiff shall carry out their removal at the expense of the Defendant.
4. I make no order as to cost.

Signed, dated and delivered at Ile du Port on this 21st day of May 2018.

R. Govinden, J
Judge of the Supreme Court