

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 64/2016

[2018] SCSC 515

ANDY LOZE

Plaintiff

Versus

HERBERT POTHIN

Defendant

Heard: 16 May 2018

Counsel: Mr. Nichol Gabriel for plaintiff

Defendant absent and unrepresented.

Delivered: 25 May 2018

JUDGMENT

M. TWOMEY, CJ

Background facts

[1] The Plaintiff, the registered owner of Title C 3105, claimed that his land was enclaved. He would have to pass on the Defendant's land, Title C3106, contiguous to his land to reach the public road. Both the Plaintiff's and the Defendant's land are subdivisions of Title C1896.

- [2] The Plaintiff claimed that on the survey plan for the subdivisions, a three metre right of way to his land was indicated from the main road and running along the west side of Title C3106 belonging to the Defendant.
- [3] The Plaintiff claimed that he had no other way to access his land and asked the court to grant the three metre right of way as indicated on the survey plan.
- [4] The Defendant in his statement of defence denied that the Plaintiff's land was enclaved and asked for a dismissal of the suit.
- [5] The trial was adjourned on a number of occasions on the basis that the parties were making attempts to reach an amicable settlement. This did not materialise and the case was set down for hearing. On the date for hearing, the Defendant did not put up an appearance despite being served and the case proceeded in his absence. There was therefore no contest to the evidence as adduced by the Plaintiff.

Legal Submissions

- [6] Mr. Gabriel, for the Plaintiff, submitted that the Plaintiff was entitled to a right of way relying on the authorities of *Vadivello v Mart* [1994] SLR 159, *Leveille v Pascal* (unreported) SCA5 /2004 and *Umbricht v Lesperance* (2007) SLR 221.
- [7] These authorities are however of little assistance as the Plaintiff's land became enclaved as a result of the subdivision of the parent parcel, namely C1896. In these particular circumstances it is Article 684 of the Civil Code that applies. It provides:

“If the non-access arises from a sale or an exchange or a division of land or from any other contract, the passage may only be demanded from such land as has been the subject of such transactions. However, if a sufficient passage cannot be provided from such land, paragraph 1 of article 682 shall apply.

Discussion

- [8] It is clear from the provisions above and Seychellois *jurisprudence constante*, namely the authorities of *Azemias v Ciseau* (1963-1966) SLR 199 Vol III (Azemia 1) *Vadivelou v Otar* (1974) SLR 216, *Azemias v Ciseau* (1978) SLR 158 (Azemia 2) and *Georges v*

Basset (1983) SLR177 that where as in this case the enclaved land is a subdivision of a bigger plot of land and the enclavement arises from that fact, a right of way ought to be claimed from the land from which it is subdivided.

[9] In *Vadivelou*, the vendor of the enclaved land still owned the mother parcel from which the vendee's subdivision had been created. In those circumstances it was clear that the right of way ought to have been sought from the original vendor, the owner of the mother parcel, and not from the adjacent owner of another subdivision of the same mother parcel.

[10] In the present case, it is the Plaintiff's testimony, supported by documentary evidence, that his land, Title C3105, was extracted from Title C1896. It follows from Article 684 that the right of way should have been demanded from the owner of Title C1896. This poses a difficulty in the present case as the owner of the mother parcel no longer owns any land having divested herself of all the land through subdivisions. The question therefore arises as from whom the Plaintiff should seek a right of way.

[11] The same problem arose in *Azemia* (supra). Sauzier J in coming to a decision first explained the distinction between *conventional* and *legal* easements in French law from which our Article 684 is derived. He continued:

“Under such principles the rule that the passage may only be demanded from the land which has been the subject of the transfer only applies where the non-access arises as the immediate result of the transfer. As a consequence of such limitation of the rule the right conferred by Article 684 can only be exercised by the original transferee and his “ayants cause à titre universel” such as his heirs but not by his original transferee and his “ayants cause à titre particulier” such as a person to whom the original transferee sells his land. Likewise, such right can only be exercised against the original transferor and his “ayants cause à titre universel” such as his heirs, but not as against his “ayants cause à titre particulier” such as a person to whom the original transferor sells his land...”

[12] It would seem therefore that when, as in the present case, the land becomes enclaved through a subdivision, the right of way is deemed conventional as its creation would arise by agreement between the owners of the dominant and servient tenements. However,

since the claim of the right of way from the original vendee, Helda Pierre, became extinguished on the transfer to the Defendant who is an *ayant cause à titre particulier*, the right of way cannot be sought under Article 684.

[13] Following the above authorities and also the courts pronouncement in *Potter v Cable and Wireless Ltd* (1971) SLR 334, the Plaintiff can only claim a right of way as against the owner of any properties by which his property is enclosed if he satisfies Articles 682 and 683 of the Civil Code.

[14] These provisions in summary state where one's property is enclosed on all sides with no access to the public highway forming an enclave, a right of way of necessity will be granted to that property. The right of way granted is generally the nearest to the public highway causing the least damage to other properties.

[15] I am satisfied from the testimony of the Plaintiff and the documentary evidence that his land, Title C3105, is enclaved and that a right of way needs to be created to allow access to the public road. In the absence of any evidence to the contrary, I also conclude that the three metre right of way as designated on the cadastral plan (Exhibit P2 (b)) is the least obtrusive and most direct and convenient route to the public road and will cause the least damage to other properties.

Orders of the court

[16] In the circumstances I order that a right of way is registered in favour of Title C3105 against Title C3106 as per the cadastral plan attached to this order (Exhibit P2(b)).

[17] I also grant a perpetual injunction restraining the Defendant from interfering with the Plaintiffs' use of the said right of way, from obstructing the said right of way or causing any damage to it.

[18] The whole with costs.

Signed, dated and delivered at Ile du Port on 25 May 2018

M. TWOMEY
Chief Justice