

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 61/2016

[2018] SCSC 519

**RUTH LYRA ALBERT
(REPRESENTED BY JEFFREY ALBERT)**

Plaintiff versus

ANABELLE PILLAY

First Defendant

REMOND PILLAY

Second Defendant

AUDREY PILLAY

Third Defendant

RANDOLPH PILLAY

Fourth Defendant

Heard: 2 November 2017, Locus in quo 6 February 2018, Continuation of Hearing 28
February 2018, Report 4 April 2017

Counsel: Ms. Vanessa Gill for plaintiff
Ms. Alexandra Madeleine for defendants

Delivered: 1 June 2018

JUDGMENT

M. Twomey CJ

- [1] The Plaintiff, the owner of land, namely Parcel C3550, averred in a plaint that the Defendants, the owners of land Parcel C505, which adjoined his property, had been using his property as a right of way and parking area inserted of using a right of way allocated to them. He prayed for an order that Parcel C3550 be no longer used as such, together with costs.
- [2] The Defendants in their defence averred that the Plaintiff had purchased his land from Roch Pillay, their father and predecessor in title and that they had always used the right of way uninterrupted for over 30 years and had been granted the same by him.
- [3] They also averred that the right of way is the only access to their land from the public road and prayed that the Plaintiff's claim be dismissed and that they be granted the right of way across the Plaintiff's land.

The Plaintiff's evidence

- [4] Mr. Jeffrey Albert, the brother of the Plaintiff and her duly appointed agent testified that his sister had bought Parcel C3350 at Anse Royale 9 December 2003 from Mr. Roch Pillay (Exhibit P2). The Defendants occupied the adjoining parcel of land, C505.
- [5] His sister had received approved plans to construct a wall and house on the land but had been prevented from doing so. She had dug a trench to begin constructing the wall which had been filled in and the construction materials removed.
- [6] The Defendants continue to gain access to their house through Parcel C3350 and to park their cars on the land. In consequence, the Plaintiff is therefore unable to enjoy her land.
- [7] In cross examination he denied that the Defendant's land was enclaved and that there was an alternative access to their land. He also stated that their use of the present road dissected Parcel C505 rendering it unusable for the construction of the planned house.

The Defendant's evidence

- [8] The First Defendant testified. She is a co-owner of Parcel C505 together with her siblings, the other three defendants. Together with her siblings they inherited their land from their mother, Annette Domingue who had passed away in 2013.
- [9] Her mother had been married to Roch Pillay and they had lived as a family on Parcel C505. Her parents had divorced in 1996 and her father who had owned the land had divided the land and transferred Parcel C505 to her mother. Before the land was subdivided they had always used the present access to their land. She admitted that there was no express reserved access on the land in question.
- [10] She and her siblings had continued to use the same access they had always used before the subdivision as their land was now essentially enclaved. She denied that their use of the access road over the Plaintiff's land interfered with the enjoyment of her property.
- [11] She accepted that there is a footpath across Parcel C504 to her land and to lands beyond which was also used by other persons.

Locus in quo

- [12] A visit to the scene was effected. It was observed that the road presently used by the Defendants bisects the Plaintiff's land. There was pointed to the court a road reserve towards the back of the existing house on Parcel C505 over a foot bridge. There is a wall between Parcel 505 and Parcel 504 which serves as a protection from water overflow from the river. It was also observed and agreed that Parcel C3550 was a narrow piece of land.
- [13] During the court's visit it transpired that the District Administrator had been in meetings with the Department of Planning for the construction of a road along the road reserve indicated on the location plan (Exhibits P3, P5 and P6).

Planning Office

[14] Mr. Laurent Desaubin from the Seychelles Land Transport Agency testified that plans were advanced for the building of motorable road to permit the homeowners beyond Parcel C3550 access to their lands. He stated that built access to Parcel C505 would be provided along the existing dirt access road from the public road. He produced a plan for the proposed works (Court Exhibit 1) and stated that the works would begin at the end of June or beginning of July.

The law

[15] Article 691 provides that:

*“Non-apparent continuous easements and discontinuous easements, apparent or non-apparent, may not be created except by a document of title.
Possession, even from time immemorial, is not sufficient for their creation.”*

[16] 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.”

[17] The situation is slightly different in law when the land’s enclavement occurs as a result of a subdivision or other land transaction.

[18] Article 684 of the Civil Code 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.”

Submissions and Discussion

- [19] Ms. Madeleine, learned counsel for the Defendants, relying on Article 685 of the Civil Code and the authorities of *Rose v Monnaie* (1997) SLR 177 and *Mirabeau and ors v Camile and anor* (1974) SLR158 has submitted that the land is enclaved and that the *assiette de passage* is clearly established by the continuous use of the existing right of way for over twenty years.
- [20] Ms. Gill, learned counsel for the Plaintiff , submitted relying on Article 691 (supra) and the cases of *Clarisse v Gomme* SSC, 19, September 2002 and *Lesperance v Richmond* CS 316/2008 [2016] SCSC 33, that to claim a right of way the Plaintiff has to produce a document of title showing the creation of a right of way. In the alternative a right of way can be declared by the court if the conditions in law are made out.
- [21] Ultimately where the land is not enclaved as in the case of *Tall v Lefevre* (1980) SLR 75, and the Defendants' boundaries were contiguous with the estate road, the party was not therefore entitled to a right of way of necessity.
- [22] It is clear to the Court from the documents of title e that there is no document of title creating a right of way across parcel C3550 in favour of Parcel C505.
- [23] It is also clear to the Court that Parcel C505 is in its present state after its subdivision by the Defendants' predecessor in title.
- [24] Further, it also clear that Parcel C505 is not enclaved as it is accessible from a road reserve on Parcel C504.
- [25] There is further evidence that the government will commence works on the improvement of the road reserve to provide access to the owners of Parcel C505 and those beyond it towards the mountainside.
- [26] I note that from the provisions of Article 684 (supra) and *Seychellois jurisprudence constante*, namely the authorities of *Azemia v Ciseau* (1963-1966) SLR 199 Vol III

(Azemia 1) *Vadivelou v Otar* (1974) SLR 216, *Azemia v Ciseau* (1978) SLR 158 (Azemia 2) and *Georges v Basset* (1983) SLR177 that where 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.

[27] In Azemia 1, Sauzier J stated:

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 “ayants cause à titre particulier” such as a person to whom the original transferee sells his land. Likewise, such right can only be exercised as 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...

[28] Hence, based on the principles above stated were I to find that Parcel 505 is enclaved, a right of way in its favour could not have been sought from Parcel C3550.

[29] Having visited the locus in quo and studied all the documents produced I find that Parcel C505 is not enclaved as it can be accessed through the road reserve. Little work has to be done by its owners across a small stream to access their land. In any case the government will be building a road for all the residents of the area along the road reserve at the end of June or the beginning of July as indicated by Mr. Desaubin.

[30] I also find that Parcel C3550 is awkwardly shaped and its enjoyment severely compromised by the use of the Defendants of a right of way across it and their parking of cars onto the Plaintiff's land. She would find it difficult to position a house on her land given the present state of affairs. It is impractical that the access used by the Defendants be given legal force.

[31] In the circumstances I find in favour of the Plaintiff but allow the Defendant's time to find alternative access to their land. I also point out that there is no counterclaim by the Defendants, only a defence, and I could not have entertained the Defendant's prayers in any case (see section 80 of the Seychelles Code of Civil Procedure).

[32] I therefore Order the Defendants not to use Parcel C3550 as an access road or for parking. This Order shall not come into force until the 1 December 2018 or until the new access road is built by the government, whichever is the soonest. The Plaintiff is awarded her costs.

Signed, dated and delivered at Ile du Port on 1 June 2018

M. Twomey, CJ
Chief Justice