

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side No: 95 of 2013**

**[2018] SCSC**

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**HEIRS SIMONE LEON HEREIN REPRESENTED BY THE  
EXECUTRIX DOROTHY LEON**  
Plaintiffs

Versus

**MRS SYBILLE CARDON DE LICHTBUER**  
Defendant

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Heard: 7<sup>th</sup> and 17<sup>th</sup> June 2016, 24<sup>th</sup> November 2017; 9<sup>th</sup> and 17<sup>th</sup>, 26<sup>th</sup> and 31<sup>st</sup> January  
and 2<sup>nd</sup> and 6<sup>th</sup> July 2018.

Counsel: Mr. F. Bonte for the Plaintiffs  
Mr. D. Belle for the Defendant

Delivered: 9<sup>th</sup> July 2018.

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**JUDGMENT**

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**ANDRE J**

[1] This Judgment arises out of a Plaint filed before the Supreme Court on the 6<sup>th</sup> December 2013 by Heirs Simone Leon represented by Executrix Dorothy Leon (*“Cumulatively referred to as Plaintiffs”*) against Sybille Cardon de Lichtbuer (*“Defendant”*), which Plaint claims *“existence of a right of way for over a period of 60 years to the Plaintiffs’ property namely Parcel PR 1450”* (*“Plaintiffs’ property”*) (subsequently subdivided as per (Exhibit P1), on the Defendant’s adjacent properties namely, parcel numbers PR 995 and PR 996 (*“Defendant’s property”*) and hence praying for Orders for the Defendant to: *“unblock the said right of way within 30 days at her own costs by pulling down all and any construction or obstruction there from and should she refuse to do so that the Plaintiffs can remove the same and bill the Defendant for the costs and (2) for the Defendant to pay damages in the sum of S.R. 600,000/- with interest and costs plus any other order as the court deems fit in the circumstances.”*

- [2] The Defendant filed her statement of defence on the 8<sup>th</sup> July 2014 and she vehemently denies all the averments of the Plaint and puts the Plaintiffs to the strict proof thereof and further avers that Plaintiffs property has been subdivided into six plots of land with construction erected thereon on some of them. It is further averred that the plots belonging to the Plaintiffs are not enclaved and that the Plaintiffs are accessing the new public road for over 20 years from their property and that the Defendant being a duly licensed development establishment, small hotel and restaurant has to guard same against robbers and loiterers. That the blockage to the right of way have visibly been done by the Plaintiffs themselves hence moving for dismissal of the Plaint with costs.
- [3] The hearing took place on the above-mentioned dates and upon completion of the hearing, both parties filed written submissions of the 26<sup>th</sup> and 31<sup>st</sup> January 2018 respectively of which contents have been duly considered for the purpose of this Judgment.
- [4] The following are the salient factual background as per Pleadings filed and evidence adduced during the hearing (as per the Record).
- [5] The Plaintiffs aver that late Simone Leon (“*Deceased*”) was the owner of Plaintiffs’ property situated at Cote D’or Praslin and that the Defendant owner of the Defendant’s property adjacent to the Plaintiffs’ property. Plaintiffs further aver that there exists a right of way for over sixty (60) years as detailed on survey plan of the Defendant’s Property which allows them to get access to their property.
- [6] It is further averred by the Plaintiffs that the Defendant erected a fence on the said right of way as demarcated leading to their property hence obstructing and destroying the existing of way.
- [7] The Plaintiffs further aver that despite several requests for the Defendant to unblock the said right of way, she has refused to do so and it is imperative that the said right of way be unblocked.
- [8] I view of the “alleged matters as against the Defendant, Plaintiffs are claiming loss and damages from the Defendant in the sum of Seychelles Rupees Six Hundred Thousand (S.R. 600,000/-) as moral damage and inconvenience (Seychelles Rupees Three Hundred Thousand (S.R. 300,000/- on each count) and prayers as afore-mentioned [*paragraph 1*] refers.
- [9] The Defendant on her side denies the Plaint and further avers that the Plaintiffs’ property have been subdivided into six subdivided parcels of land with constructions thereon on most of them. “*That the Plaintiffs’ Property is and or are not enclaved and that the Plaintiff are accessing the new public road for over 20 years from their Property and that she has ensured security of Property in view of it being a license tourism development. Small hotel and restaurant against robbers and loiterers and that the blockage has*

visibly been done by the Plaintiffs themselves” and moves for dismissal of the Plaintiff with costs.

- [10] At the hearing, the Plaintiff called two witnesses namely, Dorothy Leon and Denis Barbe then Director of Surveys in the Ministry of Land Use and Housing and the Defendant deponed on her own behalf and called Mr. Patrick Tall.
- [11] Dorothy Leon, the Executrix to the Estate of the Deceased (*Exhibit P2*) and being one of the Plaintiffs as an heir in her own name, testified that she lived on the Plaintiffs’ property since she was born and there had been a right of way there all the time. She testified that the main road was the only road accessing Baie-Sainte Anne from the Village du Pecheur and that other houses always used that road as well.
- [12] In cross-examination, Dorothy Leon further testified that this road was the only access she had to the public road and it had been blocked for six years or more.
- [13] She further testified that she had a family on Mahe so she travels to Praslin every six months and that herself and her sibling Mrs. Rogan built her house on parcel number PR6000, trucks carrying construction materials were able to access the property using the right of way. She further added that for all the construction in the area, that same access road was used throughout.
- [14] She further testified in the description of state of the access road, that, “*the passage was clean*”, *free of big trees*, and “*it was dirt road but we had transport access until up to the house.*” She later conceded however, in cross-examination, that there were some “bodamier” trees around.
- [15] *Dorothy Leon further testified that her sister was maintaining the right of way since her flat was nearest to it ‘and that they had verbal permission to do so from Mr. Patrick Tall’ as they were renting their house at the time. After Mr. Tall sold the land to the Defendant, the Defendant obstructed the right of way completely.*
- [16] Denis Barbe, the then Director of Survey in the Ministry of Land Use and Housing on his part testified with regards to the *alleged right of way* that there is a right of way as per survey plan from the old PR 966 which was subdivided into PR 1040, 1126 and 1037 in 1985 which extended all the way back to the property. He further indicated through evidence that there is a partial obstruction over the right of way in terms of a sewage treatment plant along the South Western boundary (*Exhibit P1 site layout*).
- [17] Denis Barbe further testified that the obstruction is partly on parcel PR 1126 and partly on the right of way. Moreover, there is a concreted pathway from the old Cote D’or road leading to the sewage treatment plant on PR 1126 which is being used as a right of way.
- [18] Denis Barbe further testified that in 1985 the same right of way was in existence. *That in September 2013, PR 1450 was subdivided but provision for the right of way was not made by the surveyor. PR 1450 constitutes the subdivision of PR 5595, 5596, 5598, 5597,*

5599 and 6000. He further confirmed that there was no demarcated right of way from the South connecting to those sub-divisions of PR 1450.

- [19] The Defendant Sybille Cardon testified that nobody told her that she had obstructed a right of way and that the neighboring houses accessed the main road through their family's properties. She denied that the neighbors had been using the 3 meter right of way for many years and insisted that they used a different passage way as a shortcut to PR 1037 instead which passed in the middle of her properties.
- [20] The Defendant further testified that the sewage system which she installed does not block anything it is between PR 996 and PR 1126 which comprises of just wood and land.
- [21] In cross-examination, Defendant confirmed that people had been walking through the property to get to theirs at the back. She further conceded that the usage of that passage way had been in use before she bought the property from the Plaintiffs' family.
- [22] Mr. Patrick Tall being owner of parcel PR 1037 testified that **'he never gave the Plaintiffs or any of the Heirs permission to use his property as a right of way'**.
- [23] To better understand the positions of both the Plaintiffs and Defendant, a locus in quo took place 9<sup>th</sup> January 2018 and all parties were present and it was observed by the Court that *the alleged right of way and the blockage in terms of the sewage plant and the fence erected by the Defendant along the boundary of her property and the Defendant further confirmed that everyone not just the Plaintiffs used the access road as a foot path previously.*
- [24] Further, at the locus in quo, one of the Plaintiffs Fabienne Leon confirmed that she was using the right of way prior to the Defendant building her tourism establishment and that she could no longer use the access road once the Defendant blocked and fenced it off.
- [25] *The Court further visited the alleged access of the Plaintiffs from the new public road as averred by the Defendant and it was confirmed on locus by a family member of one of the Plaintiffs namely one Sony Leon whose land was being used as a "temporary access" by the Plaintiffs from and to the new public road that there was no demarcated registered right of way on his Property and that he was simply allowing the Plaintiffs temporary use on compassionate grounds in view of them being his distant relatives pending unblocking of their proper right of way a claimed.*
- [26] Having highlighted the salient evidence relevant to the pleadings as filed on behalf of both parties, I shall now turn to address the legal standards and its analysis based on the evidence led in this matter (*supra*).
- [27] The Plaintiffs in this matter claim a right of way over the Defendant's property and an "assiette de passage" which has been fixed by prescription for over a period of 60 years.

[28] A right of way is a servitude or easement and is a real right as held in the case of ***(Mondon & Ors v/s Weller & Anor [2016] SCSC 451)*** and enshrined in Article 637 of the Civil Code ("Code") providing that:

*"An easement is a charge imposed over a tenement for the use and benefit of a tenement belonging to another owner".*

[29] Article 639 of the Code further provides that:

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

[30] Articles 688, 690 and 691 of the Code being also relevant to this matter, on their part provide that:

Article 688:

*"Easements are either continuous or discontinuous. Discontinuous are those which need human intervention for their use; such as right of way,... and others of similar kind.."*

Article 690:

*"Continuous and apparent easements are acquired by a document of title or by possession for twenty years"*.

Article 691:

***"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."***

(Emphasis is mine).

[31] Furthermore, with direct reference to Article 690 of the Code, the provisions of Articles 706 and 707 of the Code further provide that:

Article 706:

*"An easement is extinguished by non-user over a period of twenty years."*

Article 707:

*"The period of twenty years begins to run, according to the kind of easement, either from the day when the enjoyment is ceased in the case of discontinuous easements, or from the day when an act contrary to it was done in the case of continuous easements"*.

[32] It is also relevant in this case to consider Article 685 of the Code which provides upon a claim of right of way that:

*“1. The position any form of the right of way on the ground of non-access are determined by twenty years’ continuous use. ....”*

[33] Article 686 of the Code further provides for: ***“the use and the extent of the easement thus established are governed by the conditions contained by the document of title which created them, and in the absence of such document by the rules stated in the Code itself”***.

(Emphasis is mine).

[34] For the sake of clarity before applying the above legal provisions pertinent to this case to the salient facts as illustrated for the purpose of this Judgment, it is crucial to point out that there is a distinction to be made between the creation and continuance of the existence of a right of way being the stated cause of action in the Plaint. This right of way as alleged and claimed in the Plaint has to be created by way of Title or ***“by agreement”***. At the same time *“assiette de passage et mode de servitude de passage”* which arises upon establishing a right of way as per cited provisions of the Code (*supra*), is subject to prescription as per provisions of Article 685 of the Code (*supra*) and also subject of this Judgement.

(Emphasis is mine).

[35] Now, coming back the facts of the present case, it is evident that it has not been proven on a balance of probabilities, a right of way/easement as per the prerequisites of the Code (*Article 691 as cited*) (*supra*) and this in the ***absence of a document of Title and or agreement*** hence the *“claimed assiette de passage”* of the alleged right of way irrelevant for the purpose of this cause of action with reference to a *“discontuous easement”* as described in Article 688 of the Code (*supra*).

[36] It is further to be noted in the same light, that it is the position of the right of way which is determined by its continuous use for a period of twenty years (***Vide: Otar v/s Otar [1983] SLR 55***). Further, Article 685 of the Code provides that only the position and the form of the right of way are to be determined by twenty years continuous use and that, *“If at any time before that period the dominant tenement obtains access in some other way, the owner of the servient tenement shall be entitled to reclaim the right of way.”*

[37] Is there an alternative right of way in favour of the Plaintiffs is a question which begs to be answered in the circumstances of this case subject to my analysis and observations which follow.

[38] The Defendant contends that the Plaintiffs have an alternative road access at their disposal, so they should therefore not have to use the *“alleged right of way”* which she obstructed as above illustrated in evidence. However, this claim is not necessarily supported by the visual observations made by the Court upon intervention of all

interested parties at the locus in quo. The Court concluded at the locus in quo that the Plaintiffs may be enclaved and severely prejudiced by the “*enclavement*” to even develop their property in view of lack of suitable and appropriate access from the main road.

- [39] Dorothy Leon who was at the locus in quo stated that her brother Sony Leon built a small road to access the main road from his house but maintained that she cannot access that road and Sony Leon was seen to be the owner of parcel No. PR 3160.
- [40] Dorothy Leon further stated that there is a road access on the South but it involves going “*all the way round to get to where she lives and other heirs in fact reside*” She further state that the access road is dispute which leads to cote D’or is closer to her property.
- [41] The Defendant stated that PR 6000 is obstructing the right of way which the Plaintiffs has access and she further stated that the contested “*alleged right of way*” is only relevant to herself now and that the Plaintiffs are not enclaved. She further stated that the Plaintiffs can access the main road through Mr. Sony Leon’s property and that the other Heirs have been using that road and that “*... they have a main road, I have a main road on my side- why do we need to cross each other’s property?*”
- [42] ***Mr. Patrick Tall being owner of Parcel PR 1037 testified that he never gave the Plaintiffs or any of the Heirs permission to use his property.***
- [43] At the locus in quo however, Plaintiff Fabienne Leon confirmed that the heirs are now using the footpath on Sony Leon’s property since the alleged right of way over the Defendant’s property has been blocked.
- [44] Mr. Sony Leon on his part stated at the locus in quo that only he currently uses the footpath on his property to access his house and only his family is permitted to pass through his yard. He further indicated that there is no right of way over his property and the road begins from the seaside and end on his property. He stated that for years the family used “*Gemma’s road*” until it was blocked then they used the contested right of way.
- [45] Noting the above evidence of both Plaintiffs and Defendant and witnesses on the locus in quo and observations made by the court on the locus in quo, it is clear that in the absence of a right of way [*paragraph 33*] refers, the “*alleged usage of the claimed access*” in the locality of the road in question owing to the continuous use by the Plaintiffs for over twenty years is untenable in all the circumstances of this case of action.
- [46] The Court at the locus in quo in this case concluded that the Plaintiffs are apparently enclaved and in same and similar situations (*if enclavement is the cause of action which is not the case noting the averments and prayers of the Plaint as filed*), the Defendant should prove that there is an alternative route available to the Plaintiffs on a balance of probabilities. Land-locked properties are entitled to a right of way under Article 682 of the Code which provides as such”

*“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 neighbors 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.”.....*

[47] Now, even if the Court observed on the locus in quo that the Plaintiffs, *“may have a cause on the ground of enclavement”* warranting adjudication of the shortest access to the main road from their property, the Court in this case does not have a discretion but to adjudicate upon the pleadings as filed which is the “claim of a right of way on the Defendant’s land acquired by “alleged agreement” and use of *“assiette de passage”* over a period of twenty years. I have no discretion to make any Order otherwise than those as prayed for. In the latter regards, I refer to the Ruling in the case of ***(ICS No. 54 of 2015) delivered on the 21<sup>st</sup> June 2018 (Bernadette Fikion v/s The Estate of late Agnes Fikion and Ors)***, wherein it was held with reference to the case of ***(Antoine Leon v/s Volare (Prop) Ltd [2005] SCCA 3)*** that, *“the court refuses to entertain that a change of cause of action be done at the stage of submissions, on the basis that it is settled law that the parties are bound by their pleadings.”*

[48] Further, in the case of ***(Monthy v/s Esparon [2012] SLR 104)***, it was also held that, *‘a Judge granting a relief not sought in pleadings acts “ultra petita”*. Now, in line with settled law and judicial practice on the matter, the Court shall not consider the latter observed possible cause of action available to the Plaintiffs for it is not subject matter of this case as per the pleadings filed and argued.

[49] It follows thus, that the Plaintiff's Plaint is hereby dismissed based on the afore-said analysis of the evidence and the law which clearly indicate absence of right of way as alleged with costs.

**Dated this 9<sup>th</sup> day of July 2018.**

**ANDRE- J**  
Judge of the Supreme Court