

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS. 23 of 2016

[2018] SCSC 733

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ROBERT ETIENNE

Plaintiff

Versus

WILNA MARIE-ANGE FLORENTINE

Defendant

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Heard: 28<sup>th</sup> May 2018.

Counsel: Ms. Parmantier for the Plaintiff  
Mr. B Georges for the Defendant

Delivered: 1<sup>st</sup> August 2018.

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JUDGMENT

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ANDRE J

[1] This Judgement arises out of a Plaint filed before the Court by Robert Etienne (“*Plaintiff*”), on 2<sup>nd</sup> March 2016 and filed on the 28<sup>th</sup> March 2016 against Wilna Marie-Ange Florentine (“*Defendant*”), wherein it is prayed *inter alia*, that ‘ as a result of the Defendant’s employees, servant or agents encroached on the Plaintiff’s property by causing a road to be built on parcel S7445 without the permission or consent of the Plaintiff hence as a result the plaintiff has been deprived of the use of his land in that he has been unable to proceed with any development on the said land as the encroachment lies in the middle of his property making for him to build on the land and as a result the value of his property has been negatively affected hence claiming damages and loss allegedly suffered in the sum of Rupees Four Hundred and Fifty Three Thousand, Five hundred (SR 453,500/-) as well as orders for the Defendant to remove the encroachment

*with immediate effect and or in the alternative to pay the Plaintiff damages in the total sum of Rupees Four Hundred and Fifty Three Thousand (SR 453,500) with interests and costs.’ With regards to a counterclaim as raised by the Defendant, the Plaintiff moves, ‘for its dismissal in its entirety with costs and alternatively should the Court finds in favour of the Defendant’s counterclaim, to order the Defendant to compensate the Plaintiff in the sum as claimed in the Plaint in damages with interests and costs.’*

- [2] On 3<sup>rd</sup> of November 2015, the Defendant filed a Statement of defence which was thereafter amended on the 25<sup>th</sup> January 2017 and also incorporating a counterclaim to which the Plaintiff responded as above referred. In her amended statement of defence the Defendant admitted the Plaint in so far as being a co-owner with Pierre Marcel of Anse-Boileau. She further admits that an access road was built by the Defendant on the Plaintiff’s property and that it was effected with the express permission of the Plaintiff as she was enclaved, and further the Plaintiff who was present at the time of construction of the same never made any statements revoking such permission. It is also admitted that requests to remove the road were made and that the road was not removed by the Defendant and that she informed the Plaintiff to remove as much of the road as he wanted, so long as she had a remaining access so her property and would not be enclaved but that the Plaintiff never did so. Hence, moving for a declaration from Court that the Defendant has a right of way on the Plaintiff’s property as a result of *enclavement* and should the Court order of removal of encroachment then Defendant claims to be refunded for disbursements made to construct the access road.
- [3] Thereafter, the matter was heard on the above-mentioned date and heard ex-parte hence only the evidence of the Plaintiff heard.
- [4] The salient factual background as per the records of proceedings for the purpose of this Judgment reveal as follows.
- [5] The Plaintiff is the owner of an undivided  $\frac{1}{4}$  share of parcel S7445 (“*Plaintiff’s property*”) situated at Anse Boileau, Mahe, Seychelles and holds the fiduciary in respect of the property and the Defendant is the owner of the neighboring parcel S1198 (“*Defendant’s property*”).
- [6] The Plaintiff avers that the Defendant has through its employees, servant or agents encroached on the Plaintiff’s property by causing a road to be built on the Plaintiff’s property without the permission or consent of the Plaintiff.
- [7] The Plaintiff further avers that he wrote to the Planning Authority on several occasions informing them of the said encroachment and attaching a survey plan to which the Authority encouraged the parties to resolve the matter amicably and that despite several requests to the Defendant to remove the said encroachment, she has failed, refused and or ignored to remove the said road for the land and return Plaintiff’s property to the original state.
- [8] The Plaintiff further avers that as a result of the encroachment the plaintiff has been deprived of the use of his land in that he has been unable to proceed with any

development of the Plaintiff's property as the encroachment lies in the middle of his property making it impossible for him to build on the land and as a result the value of his property has been negatively affected and hence he has suffered loss and damages for which the defendant is liable.

- [9] The Plaintiff claims loss and damages as follows, namely, Two Hundred Thousand Rupees (S.R. 200,000/-) for unlawful trespass and encroachment; One Hundred and Fifty Thousand Rupees (S.R. 150,000/-) for loss of use and enjoyment of the land; One Hundred Thousand Rupees (S.R. 100,000/-) for moral damages; and Three Thousand Five Hundred Rupees (S.R. 3500/-) for cost of survey and for reliefs as at [paragraph 1] (*supra*)
- [10] The Plaintiff further denies the counterclaim of the Defendant and avers that he at no material time given any express permission to the Defendant, her employees, servants or agents the permission to construct any concrete road on Plaintiff's property and that alternatively the Plaintiff avers that if any permission was given to pass on Plaintiff's property during the period of construction of the Defendant's house located on Defendant's property and that he never gave permission of the road construction and or right of way over Plaintiff's property.
- [11] The Defendant as per Statement of defence filed, denies the averments of the Plaintiff and further avers that any construction carried out was effected on her property only. That she similarly tried to find an amicable solution to this boundary dispute. That there is no encroachment requiring her to remove any construction hence moving for dismissal of the case with costs.
- [12] The Defendant further avers in terms of her counterclaim she is entitled to a right of way by reason of *enclavement* on Plaintiff's property.
- [13] At the hearing, the Plaintiff was present and neither Defendant and or Counsel appeared, hence the matter proceeding ex-parte with the evidence of the Plaintiff only.
- [14] The Defendant failed to appear to defend her counterclaim let alone her defence as filed and illustrated (*supra*).
- [15] The Plaintiff testified that he was currently living in a house belonging to his girlfriend and had a Power of Attorney and fiduciary over the Plaintiff's property since he has a joint share with his aunt who currently resides in the UK.
- [16] He further testified that he has an uncle, who is the partner of the Defendant's mother, and he had asked the Plaintiff for permission to bring construction materials through his land and that this access was strictly temporary. He allowed this since he could not refuse his uncle.
- [17] Plaintiff further testified that he never gave permission for the road to be built, and that there is an alternative access to their property. He adds that even though this alternative

road access is not very well built, other members of the community still use it in order to access their land.

- [18] The Plaintiff testified that after the meeting had gone terribly wrong with the Planning Authority, due to the Defendant insulting everyone, the Planning Authority wrote to her, asking her to remove the road and gave her a deadline, however that was ignored (*Exhibit P1*).
- [19] The Plaintiff testified that he had made a house plan in order to start construction on his land, he hasn't been able to begin the construction because of the encroachment in question, and since 2015 he had to renew his plan twice since it had expired. (*Exhibit P4*).
- [20] He testified that the road built by the Defendant was without the permission of the Planning Authority (*Exhibit P1*) and that the actions of the Defendant has affected him morally because he had an initial plan to build his own house on his property, however, due to the circumstances he has been living in other people's homes. He further explained that as a man he would like to have his own home, and it has been a huge factor in affecting him virtuously because of the scarcity of land parcels in the Seychelles. He testified to having to beg the Planning Authority to approve his plan but then being unable to start the construction is something that he cannot cope with.
- [21] The Plaintiff claims that the Defendant will have to remove this road so that he can have access to his property and that Defendant is able to use the access road that had been built by the government, because he will also be using that same access road.
- [22] The Plaintiff testified to receiving a letter from the Ministry of Land Use and Habitat, after requesting for the renewal of his plans in August 2012. (*Exhibit P4*) and according to him the Defendant has illegally and intentionally encroached onto his parcel of land by constructing an access road which passes on the Plaintiffs land. Hence, the Plaintiff moves for dismissal of the Counterclaim of the Defendant in its entirety with costs and for an order that the Defendant removes the encroachment as prayed for in [*paragraph 1*] (*supra*) and alternatively, that the Defendant be ordered to compensate the Plaintiff in the sum of Four Hundred and Fifty Three Thousand Rupees (SR 453,000/-) in damages with interest and costs as prayed for.
- [23] I shall now move to consider the legal standard to be applied in this case and its analysis thereof.
- [24] Article 544 of the Civil Code of Seychelles (*Cap 33*) ("*the Code*") (*entitled "Ownership"*) provides that, "*Ownership is the widest right to enjoy and dispose freely of things to the exclusion of others, provided that no use is made of them which is contrary to any laws or regulations.*"
- [25] Further, Article 545 of the *Code* provides that, "*No one may be forced to part with his property except for a public purpose and in return for fair compensation. The purposes*

*of acquisition and the manner of compensation shall be determined by such laws as may from time to time be enacted.”*

[26] Article 555 of the *Code* additionally provides that:-

1. *“When plants are planted, structures erected, and works carried out by a third party with materials belonging to such party, the owner of land, subject to paragraph 4 of this Article, shall be empowered either to retain their ownership or to compel the third party to remove them.*
2. *If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of land.*
3. *If the owner elects to preserve the structures, plants and works, he must reimburse the third party in a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of such reimbursement, after taking into account the present conditions of such structures, plants and works.*
4. *If plants were planted, structures erected and works carried out by a third party who has been evicted but not condemned, owing to his good faith, to the return of the produce, the owner may not demand the removal of such works, structures and plants, but he shall have the option to reimburse the third party by payment of either of the sums provided by the previous paragraphs.*
5. *Where an owner, who is subject to a condition subsequent, has caused plants to be planted, structures erected and works carried out, he shall be presumed to have acted in good faith, unless he actually knew when such acts were performed that the events, which was the subject of the condition, had already occurred. This rule shall not apply to a usufructuary or a tenant unless specific permission to plant erect or construct had been given by the owner.”*

[27] If one builds on someone else’s property a structure which entirely stands within the boundaries of that property, it will be Article 555 (1) of the *Code* which shall apply in terms of the fate of the structures erected and works carried out by the third party.

[28] However, if one builds partly on one’s property and the structure goes over the neighbour’s boundary encroaching on his land, Article 555 of the *Code* finds no application. The legal basis for such a stance is as found in Article 545 of the *Code*,

which provides that, ‘no one may be forced to part with his property except for a public purpose and in return for fair compensation.’ If damages and compensation were allowed to be given instead of demolition, the principle of Article 545 of the *Code* would be breached as the neighbour would be forced to part with the strip of land encroached upon for a private and not for a public purpose.

[29] The fact that the encroachment was done in good faith or brought about by a mistake as to the correctness of the boundary would have no effect on the Court’s duty to order demolition. It is to be noted that in Mauritius the principle of strict application was followed in the case of *[Tulsidas MR 1976, Pg. 121]*. This state of affairs may cause grave injustice in certain cases. For a small area of land encroached upon, part of a huge building would have to be demolished causing damage out of proportion to the value of the land encroached upon.

[30] Most naturally, the Court has tried to find a way to temper the strictness of the principle with equity and in the interest of justice in cases where the encroacher has acted in good faith and within the rules of construction without breaking laws, and where demolition would cause great hardship, the insistence of the owner of the land to request demolition and refuse compensation is considered an ‘*abus de droit*’. In such a case the Court would not order demolition and would allow damages and compensation commensurate to the encroachment.

[31] “*Abus de droit*” has been defined in Articles 16 and 17 of their Civil Code as follows:-

Article 17 provides that :

“*Nul ne peut exercer un droit en vue de nuire à autrui ou de manière à causer un préjudice hors de proportion avec l’avantage qu’il peut en retirer.*”

[32] Although, in Seychelles there is no corresponding provision in our *Code*, it would appear that our law and Jurisprudence have adopted the same principles. Article 1382-1383 of the *Code*, provide that a person would commit a fault in the exercise of a right if the purpose of so acting was to cause harm to someone else.

[33] With respect to Delict and Quasi-delict, our *Code* provides that:

*Article 1382:-*

1. *Every act whatever of man that causes damages to another obliges him by whose fault it occurs to repair it.*
2. *Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.*

3. *Fault may also consist of an Act or an Omission, the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of legitimate interest.*
4. *A person shall only be responsible for fault to the extent that he is capable of discernment provided that he did not knowingly, deprive himself of his power of discernment.*
5. *Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement. However, a voluntary assumption of risk shall be implied from participation in a lawful game.”*

[33] Now, to turn back to this present matter in line with the uncontroverted evidence of the Plaintiff ex-parte, it is evident that as per site plan (*Exhibit P2*) it is made apparent that the Defendant has encroached on the Plaintiff’s land through building of a concrete access road directly to her property and same without the permission of the express permission of the plaintiff for a permanent structure hence claim of a right of way (*being a discontinuous easement*) cannot be sustained in the absence of any express agreement to that effect in line with the provisions of Article 639 of the *Code*.

[34] The Plaintiff has made it clear in evidence that he never allowed the Defendant to build on his property but simply a verbal permission for temporary use of an access for the building of her house upon request of his uncle. That verbal permission would not in any way amount to an agreement leading to a right of way being granted on Plaintiffs property and in that light the Court notes the evidence of the Plaintiff that even the concrete road was not allowed. Hence, it is evident as per (*Exhibits P1 and 2*) that the Defendant has encroached on the Plaintiff’s land without the required permission to do so and thus not falling within the parameters of the provisions of Article 554 of the *Code* either for “public interest” does not arise out of any acquisition either.

[35] It follows therefore, that the presence of the unconverted evidence of the plaintiff as corroborated by (*Exhibits P1 and P2*) thereof, I find that the defendant encroached on plaintiff’s property without consent.

[36] With regards to damages arising as alleged and claimed by the Plaintiff as a result of the unlawful trespass, encroachment, loss of use and enjoyment of the Plaintiff’s land, and moral damages, I keep in mind that assessment of damages are to be compensatory and not punitive and that moral damages are intangible and neither, material nor corporal and hence inconvenience is to be weighed by court with utmost care. (Reference is made to the matter of (*Jacques Versus Property Management Corporation (2011) SLR 7*))

[37] The Defendant further claims *enclavement* in her counterclaim and request for the access road to remain in view of that status quo. If such is the case, is there an alternative access road to dis-enclave the Defendant is a question which begs to be considered at this stage.

[38] As indicated earlier, the Defendant failed to appear to defend her claim and the Plaintiff on his part testified that there is an alternative right of way which the public use and which he will be using for accessing his property once his house is built.

[39] In the absence of evidence to the contrary, the Court therefore upholds the testimony of the Plaintiff in that regards as to alternative access to Defendant's property and dismisses the counterclaim of the Defendant accordingly.

[40] It follows, therefore that the Plaint is granted in the following terms:

- (i) The Defendant is hereby ordered to demolish and remove the encroachment in the form of a concrete road access partly encroaching on Plaintiff's land as per site plan (*Exhibit P2*);
- (ii) I further award for unlawful trespass and encroachment and loss of use and enjoyment of the Plaintiff's land the sum of Seychelles Rupees Twenty Five Thousand (*S.R. 25,000/-*), moral damages at Seychelles Rupees Five Thousand (*S.R. 5000/-*) and cost of survey at Seychelles Rupees Three Thousand and Five Hundred (*S.R. 3500/-*) (latter as claimed).

All awards with interests and costs.

[41] As above indicated at [*paragraph 39*], the counterclaim is dismissed accordingly.

Signed, dated and delivered at Ile du Port on the 1<sup>st</sup> day of August 2018.

**S. ANDRE**

**Judge of the Supreme Court**