

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 41/2018

[2018] SCSC

RAJA ROBERT
Plaintiff

versus

JOSEPH EVANS AGLAE
Defendant

Heard:

Counsel: Mr. France Bonte for Plaintiff
Mr. Bernard Georges for Defendant

Delivered: 21st November 2018

JUDGMENT

Nunkoo J

BACKGROUND

[1] The Plaintiff is owner of a plot of land Parcel number T .822, adjoining the property of Defendant at Bougainville, Mahe. The Plaintiff resides there. The access road is on the neighbouring plot. The Defendant is objecting to the use of the said access road by the Plaintiff and wishes to fence his land and close it to the public.

- [2] In 2001 the Plaintiff was granted the road access by the then owner of Plot .1932. one Mr Philippe Le GALLE. A document was drawn up and signed by him on 1st May 2001; it was registered on 25 October 2017. It stipulates that the then owner was giving a droit de passage to the Plaintiff and that that road which was built by the Plaintiff at his cost was going to be used by him as well as a second access.
- [3] In November 20016, the Defendant served notice to the Plaintiff to stop using that road. The Plaintiff thereupon entered this entered this action claiming that the road access was built by him; it is the only way that he can access his property T 822. The Plaintiff is therefore praying this court to order that said road access granted by the owner of plot T.1932 constitutes a legal servitude burdening the said plot and:-
- (a) Declare that that the Plaintiff has a motorable right of way or road access on property T .1932.
 - (b) Order the Defendant and or his agents and invitees to not interfere with the said road access;
 - (c) For the Land Registrar to be ordered to make the necessary entries in the Land Registry to reflect the order made herein;
 - (d) That the Defendant pays the sum of Rs 700, 000.00 as moral damages for disturbing the use of the registered easement.
 - (e) Order costs against the Defendant.
- [4] The main issue before the Court in this case is whether the Plaintiff has a right of way on Parcel T1932 and whether the agreement dated May 2001 and registered in 2017, gives to the Plaintiff a legally valid right of way that the Defendant cannot challenge.
- [5] Learned Counsel has submitted that the land of the Plaintiff is not enclaved and if enclaved then it is self enclaved as on side facing the highway the Plaintiff has constructed a huge retaining wall. It has also been submitted that the Plaintiff can use a right of way on plot T821, on the south of plot T822.

[6] As regards the retaining wall facing the road the Court had the benefit of visiting the locus and it is my view that this is not a feasible solution specially in view of the proximity of the house with the main road and the potential risks of the soil subsiding as a result of the removal of the retaining wall and thus lightly damaging the house of the Plaintiff. The retaining wall is serving its purpose, that of retaining the land.

[7] It is also submitted by the Learned Counsel that the easement not having been registered under the Land Registration cannot validly and legally constitute one.

[8] The law on easements must always be understood with reference to the guiding principle of absolute and inviolable property rights of the owner. This is expressed in Article 545 of the Civil Code of Seychelles which 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.’

[9] Nevertheless, the law recognises real rights to property, other than ownership. An easement is an example of such a right, and there is a distinction between those created by law and those by man. Thus, Article 637 of the Civil Code defines an easement as a charge imposed over a tenement for the use and benefit of a tenement belonging to another owner. Further, Article 639 states: *An easement arises either from the natural position of land or from obligations imposed by law or from agreements amongst owners.*

[10] Such rights are subjected to a formality under the Land Registration Act. Learned Senior Counsel has rightly referred the Court to this requirement under the above Act. Generally, easements are registrable in terms of s 52 of the Land Registration Act (LRA) which provides in relevant part:

(1) The proprietor of land or a lease may, by an instrument in the prescribed form grant an easement to the proprietor or lessee of other land for the benefit of that other land.

(2) *The instrument creating the easement shall specify clearly-*

(a) *the nature of the easement, the period for which it is granted and any conditions, limitations or restrictions intended to affect its enjoyment; and*

(b) *the land burdened by the easement and, if required by the Registrar, the particular part thereof so burdened; and*

(c) *the land which enjoys the benefit of the easement, and shall, if so required by the Registrar, include a plan sufficient in the Registrar's estimation to define the easement.*

(d) *The grant of the easement shall be completed by its registration as an encumbrance in the register of the land burdened and in the property section of the register of the land which benefits, and filing the instrument.*

[11] The law recognises the plight of owners like the Plaintiff. Section 682 of the Civil Code provides as follows:

The owner whose property is enclosed on all sides and has no access as 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.”

[12] It must also be noted that the issue of compensation is not relevant to the present case as it would have be fallen on the previous owner to claim it. The previous owner was content that the Plaintiff has spent his money and in return he would use the road.

- [13] The question that arises is this; does the fact that the right to access claimed by the Plaintiff was not registered under the LRA makes it something that cannot be indicated.
- [14] In in the case of *Mondon and Ors v Weller and anor* (CS 72/2015) [2016] SCSC 451 (30 June 2016) para 43, it was stated that even if a document purporting to allow an easement was not in the prescribed form, it would still be accepted even if it was not done on the form prescribed by the LRA. In that case, the registrations had been done but not entered in the registry. The court still held that they were bound by the easement agreement.
- [15] In fact the question in the present case is whether the Plaintiff has a title to the easement which he has not registered under the Land Registration Act.
- [16] In the present instance, the document was drawn up and registered. I am of the view that the fact that it was not done in the prescribed form does not detract from its validity (see *Mondon*) and that the Plaintiff has a title. I therefore orders as follows:
- That the Plaintiff has a motorable right of way/ access on property T.1932
 - That the Defendant and or his agents should not interfere with the said road access.
 - The Land Registrar makes the necessary entries in the Land Registry records to reflect this order.
- [17] I decline to grant damages as no damage has been proved or suffered by the Plaintiff.
- [18] I do not make any order as to costs.

Signed, dated and delivered at Ile du Port on 21st November 2018.

S Nunkoo
Judge of the Supreme Court