

IN SUPREMECOURT OF SEYCHELLES

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Reportable  
[2019] SCSC .1.26  
CS 19/2017

**HEIRS GUY DEVOUD**

**Plaintiff**

**REPRESENTED BY EXECUTOR OF HIS**

**ESTATE JACQUES DEVOUD**

*(rep. by Charles Lucas)*

and

**EUROPEAN HOTEL AND RESORTS LIMITED**

**REPRESENTED BY LAURENT MOSER**

*(rep. by Basil Hoareau)*

**1<sup>st</sup> Defendant**

**LAZARE PROPERTIES LIMITED**

*(rep. by Basil Hoareau)*

**2<sup>nd</sup> Defendant**

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**Neutral Citation:** *The Heirs of Guy Devoud (represented by Executor of his Estate Jacques Devoud v European Hotel Resorts Limited and Lazare Properties Limited CS 19/2017) [2019] SCSC 874 (14 February 2019).*

**Before:** Vidot J

**Summary:** Droit de Passage Civil Code of Seychelles, Party to a suit Ss 71 and 107 of Code of Civil Procedure, locus standi, Ss 73 and 111 of the Code of Civil Procedure.

**Heard:** 26 November 2018

**Delivered:** 22 February 2019

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**ORDER**

**Plaint dismissed.**

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**JUDGMENT**

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[5] In view of such breach the Plaintiff claims from the Defendants and prays Court for the following;

- (a) To order the Defendants to forthwith demolish and remove all structures built obstructing the Plaintiff's established easement of right of way;
- (b) To order the Defendants to reinstate the Plaintiff's right of way prior to the erection of the encroachment of the track consisting the Plaintiff's easement;
- (c) To order the Defendant to pay to the Plaintiff the sum of SR 2,000,000 or such other sum as the Court may determine in damages plus interest at the rate of 10% from September 2013;
- (d) An injunction restraining the Defendants, their employees, servants or agents from preventing the Plaintiff in the exercise of their right of easement; and
- (e) Any such further order as the Court may deem fit in the circumstances.

#### **Plaintiff's Evidence**

[6] In his testimony, Jacques Devoud representing the Plaintiff as Executor, rehearsed practically the fact as laid down in the plaint. He added that since around the year 2012, they have been prevented from using the droit de passage. They are stopped by the security guards of the Defendants hotel. This is the access that is situated at the ex-Plantation Club Hotel, now occupied by the Kempiski Hotel. The Defendants have put up a barrier. Mr. Devoud engaged the services of land surveyor Mr. Leong to draw a plan of the access where the track used to be. That sketch was marked as exhibit P1.

[7] Mr. Leong deponed that he was instructed to carry out some survey works by Mr. Jacques Devoud. He did not go on site to perform the work as he had already done some work in the same area and he already had an idea where "*the track*" was. To that end he prepared exhibit P1. It showed the location of the vehicular track in relation to the parcel. The track which at the time he visited the location was unsurfaced begins at the gate of the hotel and is about 150 meters long. Some chalets have been built in the way of the track.

[8] Mr. Devoud testified that the entire main road frontage to Kempiski Hotel is walled up. At the entrance is the barrier. He has tried to engage with one Mr. Suleman, someone believed to be an officer of the Defendants but nothing was resolved. As the problem persisted Mr. C. Lucas, Attorney-at-Law was asked to write a letter of demand asking the Defendants to unblock the droit de passage which the Plaintiffs had been using for more than 20 years and prevented from using around 2012. No reply was received. He claims that such blockade of the access is causing him inconvenience and prejudice.

### **The Defence**

- [9] In the statement of defence of the Defendants deny that the encumbrance of the right of way was in favour of the descendants of the vendors and also that parcel T3605 and T3606 was subject to a right of way in favour of the Plaintiff. The Defendants further aver that if a droit de passage existed, it has been terminated by non-usage of 20 years. In furtherance of its defence the Defendants argue that the Plaint has been commenced by the wrong party or a non-existent party and that the right of passage exists on land title T3605 only.
- [10] The Defendants did not call any witnesses but Counsel cross examined the Plaintiff's witnesses and were able to establish that Jacques Devoud was appointed the Executor of his father's and not that of his mother's. The land was in both the mother's and father's name.
- [11] T166 has been transferred to Messrs. Jacques Devoud and Gerard Devoud and that the former has discharged all the obligations of Executor by transferring all the estate and assets of Guy Devoud to himself and the latter, his brother. It was also suggested that the right of way was not a vehicular one but only provided as a means of reaching the beach by foot.

### **Discussions**

- [12] Counsels filed written submissions which addressed mainly legal issues. Mr. Lucas Counsel for the Plaintiff's submission focussed mainly on the fact that the action is a class action brought on behalf of Heirs Guy Devoud. Mr. Hoareau Counsel for the Defendants based his submission on 3 issues, namely that Plaint cannot be supported as it brought by

non-existent parties and that the Plaintiff does not disclose all material facts. It also argued that the submission that the case is being brought as a class action is devoid of merit.

### **Plaint Commenced by Wrong and Non Existent Party**

- [13] Mr. Lucas argued that the case being prosecuted as a class action, namely the descendants living or born as at 1976. The descendants living as at that date are his 2 sons, namely Jacques Devoud and Gerard Devoud. The sale of the of T147 was subject to “*a droit of passage*” as described in paragraph 2 above. As correctly pointed out, that would technically apply to Jacques and Gerard Devoud provided the same are pleaded
- [14] For his part Counsel for the Defendant argued that the capacity in which the action is prosecuted does not meet the requirement of section 71(b) of the Civil Procedure Code (CPC) as it does not identify the name, description and place of residence of the Plaintiff. It is indeed correct that the Plaintiff falls foul of such provision of the law as these requirements are not included in the caption of the Plaintiff.
- [15] So who are the persons that may be cited in a suit? Can Heirs Guy Devoud be considered to be “legal person” or “physical persons” capable of instituting a suit? Section 107 of the CPC provides that “*all persons (underline mine) may be joined in one suit as plaintiff in whom the right to any relief is alleged.*” However, the CPC does not provide a definition of what is considered a person, but section 22(1) of the Interpretation and General Provisions Act provides that a “Person” is said to include any public body, company or association or any other body of persons corporate or incorporate. That definition in effect incorporates all legal person to a suit. It follows therefore that only a person may be joined as a person or party in a suit and that that person has to be cited by name in the suit. Therefore, following from such definition, that concludes that “The Heirs of Guy Devoud” cannot be cited as legal or physical persons capable of instituting a case under section 71 and it also falls foul of section 107 of the CPC. As such the case cannot be maintained in law.
- [16] Counsel for the Defendants further argued that in the Plaintiff, Jacques Devoud is mentioned as representing the Plaintiff and that he is not actually the Plaintiff. It is submitted that if

indeed the Plaintiff has capacity to sue, then the case was commenced by the wrong party. In the case it is abundantly clear that Jacques Devoud is exercising his right as executor of the estate of his late father Guy Devoud. As executor he is bound by Article 1029 of the Civil Code (“the Code”) which provides that “*executors shall represent the estate in all legal proceedings, and shall act in any legal action the purpose of which is to declare the will null. At the end of their function they shall render the account of their administration as provided for fiduciaries in the Chapter referred to in Article 1028*” Therefore, that Article provides the executor with the right to institute a suit only in respect of a right that belongs to the estate which he or she represents. By implication the executor cannot institute a suit in respect of a right which does not belong to the estate. In this case the executor is not instituting or defending a right in respect of the estate of Heirs Guy Devoud. Furthermore, the executor stated that he has completed his work as executor. The land parcels have already been transferred to him and his brother and other assets shared out. He has completed his administration of the estate. Therefore, he no longer holds the role of Executor, so cannot sue as such.

[17] Sections 73 and 111 of the CPC provide as follows;

S73 “*If the Plaintiff sues, or the defendant or any of the defendants are sued in a representative character, the plaint must state in what capacity the plaintiff or the defendant sues or is sued.*”

S111 “*Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by Court to defend in such cause of or matter, on behalf of or for the benefit of all persons so interested subject to such notice to the persons interested as the court may direct.*”

[18] Upon a close appreciation of sections 71 and 111 of the CPC; the submission of Counsel for the Plaintiff that the case is being sued as a class action cannot be maintained. It is abundantly clear from the above provisions of the law that a plaintiff who sues by way of a class action must set out in the citation and in the plaint that he is instituting a suit as such and he must clearly indicate the class of person he so represent. It follows thereafter that

by virtue of section 111 the Court has power issue such notice that the Court considers necessary on such persons who are being represented in a class action.

[19] I note that in the Plaintiff there is no mention that the suit is a class action. The suit is being prosecuted by the Plaintiff by way of an action of the executor. That is clear from the caption of the Plaintiff. This is further referred to in paragraph 1 of the Plaintiff. Counsel for the Defendants cited the case of **Civil Construction Limited v Federick Leon and Others SCA 36/2016** explaining how a class action should be instituted. It states;

*“In In Re Tottenham v Tottenham [1986] 1 Ch. 628 A, in a case where a creditor sued a testatrix stating in the last paragraph of his pleadings that he was suing on behalf of all the other creditors of the deceased, the court found that this fact ought to appear in the title of the statement of the claim, and not merely in the body thereof, otherwise it would be of no use to show the representative capacity in which he sued. The rule followed by the court in that case (Order 6 and rule 3 of the UK Supreme Court Rules) is akin to section 73 of the Seychelles Code of Civil Procedure’.*

#### **Plaint Does not Contain Material Facts**

[20] The Defendant relied on section 71(d) of the CPC to establish what has to be included in a plaintiff which reads that *“a plain and concise statement of the circumstances constituting the cause of action and where it arose and of the material facts which are necessary to sustain the action”*. It is argued that the Plaintiff fell short of that requirement. Counsel cited the case of **Gallante v Hoareau [1988] SLR 122** which held that *“the function of pleadings is to give fair notice of the case which has to be met and define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties”*

[21] The Court can only grant relief as prayed for in the plaintiff. Pleadings not objected to and the relief not pleaded for, cannot and does not have the effect of translating the said issues into pleadings of evidence, vide **Marie-Ange Pirame v Armano Peri SCA 16 of 2017**. It was also held in **Tirant & Anor v Banane [1977] 249** that *“in civil litigation each party must state his whole case and must plead all fact on which he intends to rely, otherwise*

*strictly speaking he cannot give evidence of them at trial. The whole purpose of pleadings is so that both parties and the court are made fully aware of all issues between the parties."*

[22] That translates to the position that the only reliefs that the Plaintiff is entitled to will be those alleged in the plaint and proven at the trial, vide **Re Wrightson [1980] 1 Ch. A.** It is submitted that the Plaint does not contain all the material particulars necessary to sustain the action for right of passage to the beach. Referring to that part of the sale which reserves a right of passage as quoted in the transcription at paragraph 2 (Exhibit P5) above, Counsel argued that beside Helene Dawson and Guy Devoud only 2 categories of people are entitled to the right of passage. They are;

- (i) any person who at the time of execution of Exhibit P5 was residing either with Helene Dawson or Guy Devoud, or
- (ii) the descendants of Guy Devoud and his wife who was alive at the time of execution of Exhibit P5.

This Court agrees with the interpretation accorded to that excerpt as contained in Exhibit P5. The Plaint does not satisfy any of the conditions above mentioned. It was necessary that the Plaint discloses that the Plaintiff was residing with Helene Dawson or Guy Devoud at the time of execution of the deed of transcription or that the Plaintiff was descendant of Guy Devoud and his wife who were alive at the time execution of the deed of transcription. Such particulars were not pleaded and therefore fell short of the requirement of Section 71(d) of the CPC.

[23] Therefore having found that the Plaintiff was a non party or non-existent party contrary to sections 71 and 107 of the CPC, the fact that the case was not, as argued by the Plaintiff a class action falling foul of Article 1029 of the Code and sections 73 and 111 of the CPC and that the Plaint does not disclose material facts necessary, the plaint is hereby dismissed.

[24] I make no Order as to cost.



Signed, dated and delivered at Ile du Port on 22<sup>nd</sup> February 2014



Vidot J