

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC ...
CS 127/2018

In the matter between /
**Eveline Ah-Mane represented herein by her
power of attorney Stephen Stravens**
(rep. by Edith Wong)

Plaintiff

and

Errol Lesperance
(rep. by Basil Hoareau)

Defendant

Neutral Citation: *Ah-Mane v Lesperance* CS 127/2018) [2019] SCSC 12 March 2019).
Before: Twomey CJ
Summary: Plea in limine litis – licensee – claim of right of way –locus standi
Heard: 16 January 2019
Delivered: 11 March 2019

ORDER

The plea in *limine litis* succeeds. The Defendant’s counter claim is dismissed. Costs in the event. The case is fixed for hearing of the merits of the plaint and the defence.

RULING

TWOMEY CJ

Background facts

[1] The Plaintiff filed a Plaint in September 2018 in which she claimed that the Defendant had been trespassing on her properties namely Parcels H2706 and H6310 and continues to do so despite being put on notice to desist from the same. She further claims that attempts to prevent the Defendant from trespassing on her land has been resisted by the Defendant who has caused physical and moral damage to her property and to herself

amounting to SR404,500. She prayed for injunctive relief preventing the Defendant from accessing her property and for the payment of the damages claimed.

- [2] In response, the Defendant filed a Statement of Defence and a Counterclaim. The Defence is a general denial of the Plaint with further averments that the Defendant has been accessing the Plaintiff's properties for over seven years to access his residence. In his Counterclaim he avers that his residence is on land which is owned by a third party. He claims that the access over the Plaintiff's properties is the shortest and most convenient route to access his home and that the court should declare the he "has the right to use the road on Parcel[s] H6310 and... H12706."

Plea in *Limine Litis*

- [3] The Plaintiff has upon sight of the Defendant's pleadings filed a plea in *limine litis* submitting that the Defendant has no standing to claim a right of way over the Plaintiff's land and that the counter claim is bad in law and should be dismissed.
- [4] Time was given to the parties to file written submission on this issue and the Plaintiff has duly complied within the time allocated. The Defendant has not complied with the time period allocated and has only filed his submissions on the 11th March 2019 which submissions have been placed on the court file today, on the day of the delivery of the ruling. This is not acceptable and therefore the submissions cannot be considered at this late stage by the court.
- [5] In her written submissions, Learned Counsel for the Plaintiff, Ms. Wong has submitted that two issues ought to be decided by the Court at this preliminary stage: first, what is the nature of a right of way and secondly which persons are permitted to claim a right of way.
- [6] With respect to the first issue, relying on Article 637 of the Civil Code, she submits that a right of way is "a charge imposed over a tenement for the use and benefit of a tenement belonging to another." As to who can claim a right of way she submits that only a *propriétaire du fonds* (owner of the property) who can do so as is indicated by Article

682 of the Civil Code. She has relied on Encyclopédie Dalloz, Verbo Servitudes, paragraph 33, page 792 which states in this respect:

“La servitude est un droit reel immobilier. Elle est un droit, le droit appartenant au propriétaire du fonds dit dominant, d’exiger un service – positif ou négatif – du propriétaire du fonds servant. C’est donc, comme tous les droits, un rapport juridique entre deux personnes. Mais ce droit n’appartient à une personne, qu’en tant que celle-ci est propriétaire du fonds pour l’utilité duquel la servitude a été constituée, et la charge qu’elle constitue n’est supportée par une autre personne, que parce que celle ci est propriétaire du fonds grévé par la servitude” (emphasis added by Plaintiff) .

[7] It is the Plaintiff’s submission therefore that the Defendant, a mere licensee cannot claim, demand or enforce a right of way.

Discussion

[8] The Court notes that the Defendant has couched his claim for a right of way in nebulous terms: “the right to use the road”, the use of the road to access his home etc. He has expressly not used the legal terms of “easement”, “servitude” or “right of way”. This does not however take away from the fact that the Defendant has been accessing his home through the Plaintiff’s property without deed of title or registered permission, and this on his own admission. He is in effect claiming a right of way “by any other name”.

[9] Article 637 of the Civil Code (supra) indicates that a servitude is a right *in rem* attaching to an immovable property. For that right to exist, the Civil Code provides that there must be a document of title (see Article 691). Were that right to have been granted and registered it is without doubt that it would bind and benefit owners and their lessees or licensees of the dominant and servient tenements respectively.

[10] In the present case no such right exists. A right of way therefore has to be claimed and if merited granted by the court. In respect of such claimant, Title IV of Book II of the Civil Code expressly uses the word owner. It is not clear from the Defendant’s pleadings what his relationship with the owner of the dominant tenement is. He merely states that he is residing on the land with the consent of the third party owner. He is clearly not the owner of the land.

[11] The extract from Dalloz as submitted on this point is instructive. Equally Terré and Simler relying on Article 686 of the Civil Code state that the right to establish servitudes is reserved to owners of property or at the very limit emphyteotes (See Francois Terré et Philippe Simler, Droit civil – Les biens, 8e edn, Dalloz p.776). The present Defendant is not such a person.

[12] Further, a plea in equity as seems to be intimated by the Defendant in his pleadings, to use the Plaintiff's property as access to his home, cannot circumvent the law. As the maxim states: "Equity follows the law".

[13] Therefore, the Court finds that the plea in *limine litis* has merit and succeeds. The counterclaim is therefore dismissed. The merits of the Plaintiff and the Defence will now be heard. Costs will be in the event.

Signed, dated and delivered at Ile du Port on 12th March 2019.

Twomey CJ