

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 251

CS 54/2016

GINA LAPORTE

(rep. by Mr. Rene Durup)

Plaintiff

and

MERCIA CHETTY

(rep. by Mr. Danny Lucas)

1st Defendant

EMILIE CHETTY

2nd Defendant

Neutral Citation: *Gina Laporte vs Mercia Chetty* (CS 54/2016) [2019] SCSC 251

(27th March 2019)

Before: Nunkoo Judge

Summary:

Heard:

Delivered: 27th March 2019

ORDER

Prescription: article 2262-occupation with consent- acquisitive prescription..

JUDGMENT

NUNKOO J

- [1] The dispute in this case is about the boundary line between two neighbours. The Plaintiff is claiming that the Defendant has encroached upon her land by constructing a boundary wall as well as a swimming pool on part his land. The Defendant is denying this.

[2] The Plaintiff has averred that ever since the Defendant began encroaching, he was notified orally as well as in writing to take to allow the encroachment. It is also averred that the Defendant had agreed not to encroach on the Plaintiff's land.

[3] The Plaintiff has averred that she is now about to construct on her land and the encroachment will obstruct her construction. The Plaintiff has averred a fault on the part of the Defendant and is therefore asking the Court to order the Defendant:

i. With immediate effect and at least within 3 months of judgment to remove the encroachment by removing the wall and swimming pool and such other construction built on her property, and in the case of non-removal of the encroachment within the prescribed time that the Defendants pay the Plaintiff the sum of SR.5000 for each day or part thereof that the encroachment remains;

ii. Once the order under i. above is complied with; within 30 days thereafter to restore the Plaintiff's land in good state and remove all debris therefrom and that in the event of default the Defendants shall continue to pay to the Plaintiff the sum of SR. 5000 for each day of default or part thereof;

iii. Build such wall along the boundary wall that will prevent land from Title H802 from sliding and any excess water from flowing onto the Plaintiff's land;

iv. In the event that the Defendant fails to comply with i, ii and iii above, the Plaintiff may at her discretion undertake the works specified by contracting a contractor of her choosing to carry out the works and the cost of such works shall be chargeable to the Defendants who shall pay the same 30 days of completion of the works, written notice having been given by the Plaintiff and that the Plaintiff shall not obstruct or prevent entry onto her premises for the carrying out of such works.

- v. The Defendants pay the Plaintiff SR. 400,000.00 for having made use of and enjoying the Plaintiff's land.
- vi. Such other relief as the Court may deem fit.

[4] The Defendant has denied constructing the boundary wall and has pleaded that it existed at the time she purchased the land. The plot and the boundary were identified by an agent, in this case Mr Pardiwala. She has pleaded prescription for having occupied the land for more than 20 years.

[5] She has also denied having ever been advised by anybody about any encroachment though she has admitted having received a letter from the Plaintiff on 19 July 2012.

Evidence of the Michel Leong, Surveyor

[6] The Plaintiff called Mr Michel Leong, a professional surveyor to give evidence on her behalf. He produced a copy of his survey report. He testified that there was an encroachment on plot H801 belonging to the Plaintiff. The survey report clearly shows the boundary line and the area of the alleged encroachment. The encroachment is 3.3 m wide on one side and 6.7 m on the other side and the area is 140 sq metres.

Testimony of the Plaintiff, Mrs. Gina Laporte

[7] The next witness was the Plaintiff herself. She testified that the property was transferred in her name by her father. She stated that she had been living abroad and she has now come back and wishes to develop her land. That is why she is asking the Defendants to remove the encroachment on her plot. She also testified that her father had on several occasions asked the Defendants to remove the wall and the swimming pool and every time they had asked for time. She also stated that when she would phone her father the latter would always report about the discussions he had with the Defendants. She referred to a letter written by her attorney as far back as July 2012 asking the Defendants to remove the encroachments. And the letter indeed refers to requests made

previously to the Defendants regarding the encroachments by them. She also testified as to the discussions her parents had with the Defendants regarding the encroachment. She maintained that her father had never given any consent to them to occupy that part of the land.

- [8] According to her the encroachments took place when Defendants built their new house. Mr. Padayachy built a wall, a stone wall in fact. She testified that when he was constructing it, it was at the perimeter of the Plaintiff's property and Defendant's property. She testified that the Defendants had built another wall and which is further inside her property. When Learned Counsel for Defendant put it to Plaintiff that her father had no problem whatsoever with the construction of the wall or for it being kept there the Plaintiff replied that he had never allowed that to be so.

Testimony of Mrs. Geraldine Laporte – the mother of Plaintiff

- [9] She testified that she did not know when Mr. Padayachy – the Defendant's ex-husband put up the boundary wall. However she testified that one Mrs. Jonas who lived on their plot, H801, informed them that Mr. Padayachy was entering into their land. In cross examination when asked by Learned Counsel for Defendant as to when the boundary wall was set up, she stated she was not in Seychelles at that time and indicated it could have been between 1991 and 1994. This was when she was living in Australia. But her caretaker who was living on their land, one Mrs. Jonas, contacted her and informed her that "Chetty was entering their property" (Madame Quatre Chetty pe entre dan zot la propriete) and thereupon she called her husband and informed him. Mr Pragassen, a land Surveyor was then requested to carry out a survey of the land. Following the survey Mr. Chetty acknowledged having encroached and he was prepared to buy the land that he had encroached upon. The witness also stated that this boundary wall was put in some time between 1991 and 1993. The Learned Counsel put it to her that her "memory was not precise" the witness answered as follows:

"If you are telling I do not have a good memory? I do have a good memory because I am not senile but I remember our caretaker coming to me and telling me that the Chetty's are encroaching on the property."

[10] She further testified that Mr Chetty had gone to their home and admitted having encroached on the Plaintiff's land, and offered to buy that part. But the Plaintiff's father did not accept as he had promised the land to her daughter. Mr Chetty told Mr Laporte that as he was going to redo his house he would build it a little backward and will also push the swimming pool back and return the land to the Plaintiff's father. She testified that they believed Mr Chetty's word of honour. Later when they decided to give the property to the Plaintiff, more of the land had been encroached upon.

Evidence of Mr Peter Padayachy

[11] The Defence called Mr Peter Padayachy, the one time owner of the land who sold it to the Queso Property Ltd. He stated that he owned a land Plot H 802 which he had bought from late Mr Patrick Laporte, the Plaintiff's father sometime in 1989.

[12] When asked by Counsel whether there was any wall on the land he answered he did not recall there was.

Q And when you bought this parcel of land were there any walls around the perimeter of that parcel of land?

A Not really, no. I do not recall there was.

[13] He admitted having built a wall along the boundary of his parcel. It was a dry stone wall; it was not cemented. It was built as a retaining wall. He also stated it was about 4 feet high and planning permission was not needed for that. He also stated that wall could be removed easily. Mr Padayachy stated he could not confirm if he had encroached as the beacons were not there.

Q: There is encroachment which is clear. It has got evidence in court there is encroachment. Can you confirm that to court if you lawfully built your wall right on the division between the two parcels or did you encroach to that extent and built that wall.?

A: Anyway I cannot confirm this as the beacon at that time was not there.

Q: You cannot say.

A: No

Q: You cannot confirm any thing.

A: No.

[14] He also explained that when he was fixing the wall he took as reference the only beacon found.

Q: And he confirmed he gave you permission to build that retaining wall or the wall along the boundary where it is right now?

A: Yes there was one beacon at the back. We took the measurement on the back and then we bring it forward and the mistake went there.

[15] In cross examination the witness admitted having built a stone wall that could be easily removed.

Evidence of Mrs Mercia Chetty

[16] The first Defendant testified next. Mrs Mercia Chetty. She stated representing the second Defendant, Emily Chetty in virtue of a power of attorney. She stated having bought the land in 1994 from Quezo Island Pty Ltd in 1994.. She confirmed that that parcel ie H802 was sold to herself and her ex-husband Chrystold Chetty. She was referred to the valuation report and where reference was made to the existing wall. She stated in unambiguous terms that there was a block wall and not a stone wall as testified by the witness Mr Padayachy, who was also a previous owner of the property.

[17] She said they added on top of the existing wall for reason of security. The witness was evasive when questions about the height of the wall was put to her, and her answers were contradictory. She once said that she built the wall for security reasons but later stated that she never built any wall but only a swimming pool. There too it's eloquent what she says: it was realised by the Chettys that they had trespassed on the land of the Plaintiff and they therefore informed the Plaintiff's father about that; they had a meeting to appraise the late Mr Laporte, father of the Plaintiff of the situation.

Evidence of Mr Christold Chetty

[18] Witness Christold Chetty, the first Defendants ex-husband deponed and testified that there was a wall around the perimeter of his land and that is also shown in the valuation report made in 1994 by Mr Alton, quantity surveyor. The witness also referred to another report by one Mr Praful who also refers to a boundary wall but this gentleman refers to a wall made of ‘stone wall rendered and painted with rod iron works’. It is worthy to note that Mr Alton refers to a full block wall and stone wall and bricks with balustrade facing the sea.

[19] The witness testified that it was Mr Peter Padayachy who built the wall at the request of some Russian owners. When asked by Counsel whether the walls were there when they bought the land he stated that at least the stone wall was there and from this the small balustrade had been removed and also a small decorative wall.

[20] Mr Chetty denied that Mr Laporte had asked him to demolish the walls; however he admitted that the architect, Mr Ferdinand Louis, told him that there could be an anomaly on the side of the sea and advised him to have the land surveyed and beacons placed. According to Mr Chetty he then called Mr Laporte at his place and spoke about that. The witness stated clearly that Mr Laporte told him that they had to work it out. It is appropriate here to consider the following articles of the Civil Code of Seychelles defining property rights.

[21] Article 545

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.

[22] Article 546

The right of ownership of property, whether movable or immovable, shall give the right to everything that the property produces and to anything that accedes to it either naturally or artificially. This right is called right of accession.’

- [23] Furthermore, article 552 states that ‘ownership of the soil carries with it the ownership of what is above and what is below it.’ The owner may build any structures which he deems proper, but there are exceptions such as where a real right encumbers the property, where there is an easement over it.
- [24] Importantly, article 553 in relevant parts states that ‘[a]ll buildings and works on land . . . shall be presumed to have been made by the owner at his own cost and to belong to him *unless there is evidence to the contrary*; this rule shall not affect the rights of ownership that a third party may have acquired or may acquire by prescription’ (own emphasis.) But, in terms of article 555, when structures are erected, and works carried out by a third party who has not been evicted, with materials belonging to such party, the owner of land shall be empowered either to retain their ownership or to compel the third party to remove them. The removal will happen at the third party’s expense and without any right to compensation. (See Art 555(2)) The owner may also retain the structure and must then reimburse the third party. (See Art 555(3)).
- [25] This court has held that reference to third party in Art 555 could mean any party other than the owner of the land. (See *William & Anor v Dogley* (CS 61/2005) [2007] SCSC 87 (30 May 2007). This would include an owner of an adjacent property.
- [26] The establishment of encroachment depends on the evidence presented. Usually, a land surveyor provides evidence of the parameters of the properties. But in some instances, like the present case, the encroachment can be common cause and the land surveyor’s evidence merely serve to reaffirm the extent of the encroachment. The evidence of Mr Peter Padayachy, the erstwhile owner, was to the effect that he received permission from the then owner of the adjacent property (the Plaintiff’s father). So, encroachment was established in this case. This means that an evaluation of the plea of prescription must follow.

Prescription

- [27] The Defendants have pleaded prescription. They rely on Art 2262 of the Civil Code which provides that:

‘All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.’

[28] The claim against the Defendants was instituted more than 20 years after the encroachment happened. While the exact date is unknown, the wall was built a short while after its purchase in 1989 or in any event before April 1994, as a demarcation of boundaries between the two properties. But, she only instituted the action in 2016. Thus, the Defendants submit that the claim has prescribed. Their view is that they developed the portion over time, and in good faith. And although not stated quite explicitly, it appears that their suggestion is that they have acquired ownership of this portion.

[29] In defence, the Plaintiff claims that the claim has not prescribed. In any event, prescription does not feature since permissive possession was admitted in evidence. Reliance was placed on *Seychelles Development Corporation v Morel* (SCA 8/2002) [2002] SCCA 17 (18 December 2002) where the Court of Appeal held that the permissive possession (that is, possession with the consent of the owner) is incompatible with possession as an owner. In that case, the court considered the elements of acquisitive prescription set out in Art 2229. This section reads: ‘[i]n order to acquire by prescription, possession must be continuous and uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of an owner.’ The court read this provision with Art 2231, which states that ‘[w]hen a person begins to possess on behalf of another, he shall always be presumed to possess on the same basis unless there is proof to the contrary.’

[30] The court said that because the initial entry onto the property was with permission, there was no evidence led that there was afterwards a change in the character of his possession. It also considered Art 2236, which provides that those who possess on behalf of another shall not acquire by prescription however long they may be in possession. This, in its view, bolstered the finding that there could be no acquisition. It stated that it was necessary for the Defendant to show when his permissive occupation ended, and when possession as an owner started. Prescription would only start to run

from the latter period. Since there was no evidence led by the Defendant to this effect, the court dismissed the plea of prescription.

[31] The reasoning in *Morel* appears sound. The mischief that the requirement for ownership seems to seek to avoid, is a situation where an owner would find themselves without property after she, more than 20 years ago, gave a person consent to occupy their property.

[32] A recent judgment of the Court of Appeal, *Prosper & Another. v Fred* (SCA 35/2016) [2018] SCCA 41 (14 December 2018), also dealt with encroachment and a plea of prescription of part of a property. The court looked at the requirements for acquisitive prescription. However, what distinguishes *Prosper* and *Morel*, is the fact that in *Morel*, there was knowledge of encroachment, and it was through permission. Like the instant case.

[33] It seems therefore, that the appropriate view is that espoused in *Morel*. Namely, that the question of prescription does not feature in the instance where there was permission from the owner. As mentioned, one good reason for this, is to avoid the unfairness that could arise where an owner of immovable property, in good faith, allows another person to raise a structure on his property, and later be told that the property now belongs to that person.

[34] The version of the Plaintiff throughout has been that her father and everyone in her family, were fully aware of the encroachment and that her father had called the attention of the Defendant to that, who had always agreed to remedy the situation. In the light of the evidence submitted the Plaintiff has proved her case on a balance of probabilities.

[35] In the circumstances, the claim has not prescribed. Since the Plaintiff has sought damages, damages ought to be awarded.

I therefore make the following orders:

- a) The Defendant to remove all the encroachment that is the boundary wall and the swimming pool within three months as from the date of this judgment.
- b) To restore Plaintiff's land in good state by removing all debris after removing the encroachments.

- c) To build a retaining wall along the boundary between her plot and Plaintiff's plot.
- d) In case the Defendant fails to take the above steps within three months the Plaintiff is hereby authorised to carry out all the above works, that is the removal of the encroachments and all incidental works mentioned above and the Plaintiff shall claim the costs duly certified by a quantity surveyor and the Defendant shall within one month settle the claim.
- e) I order Defendant to pay SR 50,000.00 as damages.
- f) With costs.

Signed, dated and delivered at Ile du Port on 27th March 2019.

S.NUNKOO