SUPREME COURT OF SEYCHELLES

Reportable
[2019]SCSC 428
CS18/2016

In the matter between

YU PING LEE **Plaintiff**
(rep. by Serge Rouillon)

and

MRS MARY YVONNE MOREL **Defendant**
(rep. Miss Louise)

Neutral Citation:	Lee *v* Morel CS 18/2016 [2019] SCSC..... (judgment date 0/05/ 2019).
Before:	Govinden J
Summary:	**Right of way. Right of access to public road. Right to compensation. Judicial admission.**
Heard:	16th November 2018
Delivered:	30th May 2019

JUDGMENT

GOVINDEN J

[1] The Plaintiff, the owner of parcel V12546, sues the owner of parcel V12365, the adjoining proprietor of a plot of land found at Belle Eau, Mahe, for a declaration that she has a right of way across parcel V12365 in order for her to access her property from the public road. The Plaintiff also sues for an order compelling the Defendant not to interfere with the exercise of the said right by the Plaintiff, with cost from the date of the filing of the Plaint.

[2] In her Statement of Defence the Defendant has admitted averments in the Plaint to the effect that there is a "***motorable right of way***" that exist from the Plaintiff land to the public road.

[3] The Defendant further admitted to averments found in the Plaint to the effect that the said "***motorable right of way"*** has been used by "***various parties for many years"*** and that the Plaintiff's property is ***"practically enclaved save this right of way".***

[4] Having made those admission the Defendant went on to deny that the said right of way, that she then described as an ***"access road"***, constitute a legal servitude which burdens her property that allows the Plaintiff a right of way to the public roads and that it is the most accessible to and from the Plaintiff's property.

[5] At any rate the Defendant further avers that the Plaintiff has not asked her for permission to use the access road and that such a usage has caused nuisances that has hampered the development of her own property.

[6] <u>The Plaintiff's case</u>

In support of her case the Plaintiff chose to call the Defendant on her personal answer. She stated in her personal answers that her property and that of the Defendant are neighbouring properties situated at Bel Eau, Mahe and that her property title consist of title V12365, whilst that of the Defendant is parcel V12346. She went on to state that she had been living on her property for 38 years and that she was in court regarding a right of way issue in which the Plaintiff is asking for a right of way across her property. She was concerned that in her absence the Defendant started using her property without her permission. She stated that she is prepared to grant a right of way across her property provided that the access is for residential purposes and that she is compensated.

[7] The Defendant accepted that the property of the Plaintiff is enclaved but for the existence of the existing motorable road and that the road is used by tenants of the Bel Eau flat and their guests. She went on to say that the Defendant and her clients have been using the access without having approached her and asking her for permission. As far as she is concerned she had previously instructed her Attorney to write a letter to the Defendant on the matter but it has been to no avail.

[8] The Plaintiff's Counsel closed his case upon completing the examination of the Defendant on her personal answers.

[9] **The Defendant's case**

Ms Louise, the learned counsel for the Defendant, did not call the Defendant or any other witnesses to testify under oath in support of the Defendant's case, but instead adopted all the answers that the Defendant had given, including her re-examination, as evidence in support of the Defendant's case.

[10] **The locus in quo**

The court carried out a visit to the locus on the 17th of July 2018 at 2.30 pm, in the presence of all parties. The court noticed that the Plaintiff's and the Defendant's property are divided by a one way secondary access road starting from the Bel Eau road at the back of the National House Building and ending at some government flats, known as the Bel Eau flats. The road is two meters wide and it dis-enclave the flats. The Plaintiff's property is situated to the north of the Defendant's property. The Defendant's dwelling house is situated at approximately 10 meters from the Plaintiff's property and on the Defendant's property is situated a newly built multi storey building. There is a drain on the north side of the access road.

There is a "*slip way*" giving to a roller shutter door of the Plaintiff's building and it has encroached by one and a half feet unto the location where a beacon between the two properties was found .The Defendant claimed that the "*slipway*" is used to access a storage facility on the ground floor of the Plaintiff's building and that vehicles of the Plaintiff blocks the road when they are unloading their goods. The Court noted that the building of the Defendant is three storey high.

The Defendant's property is situated at a lower level compare to that of the Plaintiff's property. The secondary road seen on locus by the court is also described as ***"the existing right of way"*** in the plaint.

[11] The submissions

The Plaintiff's counsel submitted that the pleadings of the Defendant consist of an admission of the plaint, as the bare denial of the right of way together with the acceptance of the enclavement of the Plaintiff's property coupled with the admission that the most accessible access is on the Defendant's property, by the Defendant, consist of an admission of the Plaintiff's case. The Plaintiff further avers that admissions by the Plaintiff in her personal answers consist of an "*aveu ujudiciaire*" and that the court would be acting "*ultra petita*" if it was to award to the Defendant more than what she claimed in her defence.

The Defendant's counsel, on the other hand, submitted that despite these concessions made in her defence, the action in court is by and large the fault of the Plaintiff who refused to meet with, ask for permission to use and negotiate for a right of way over the Defendant's property but instead pursued this matter through the court.

[12] Evidential issues

Of particular significance in this case is that the evidence in the entire case consist of the personal answers of the Defendant, being evidence given not upon oath. The Defendant being present in court, was called on her personal answers by learned counsel for the Plaintiff on the date of the hearing. She was examined and thereafter re-examined by her counsel. The Plaintiff closed her case upon completion of the examination of the Defendant. Whilst the Defendant decided to rely on her answers as evidence in support of her case.

Given this state of evidence, the following issues arises for consideration when it comes to matters of evidence;

(1) Can the Plaintiff prove the entirety of her case solely on the personal answers of the Defendant?

(2) Can the Defendant, on the other hand, rely on her personal answers in support of her case without adducing further evidence?

(3) Has the Defendant admitted the Plaintiff's case in her Statement of Defence?

[13] The procedure to call a party on his or her personal answers is found in S162 (1) and ors of the Seychelles Code of Procedure (CAP 213), which provides that, *"Any party to a cause or matter may examine the adverse party on his personal answers as to anything relevant to the matter at issue between the parties".*

[14] Section 164 further provides that, *"if a party to the cause or matter is present in court at the hearing of the case, he may be examined on his personal answers with the permission of the judge without any previous application".*

[15] In the case of *Chez Deenu (PTY) Ltd vs Philibert Loizeau , SCA No 17 of 1987*; the Court of Appeal held, "*The right of a party to examine his opponent on personal answers should not be taken away from the party except on strong grounds. The purpose of calling a Defendant on his personal answer is to obtain an admission from him or evidence that would destroy his case or strengthen that of the party calling him".*

[16] In *Ex parte Kassamaly Esmael, (1941) MR 17,* it was further observed that "*the party examined is not required to testify on oath or affirmation, he is heard as an adverse witness for the purpose of obtaining from him admissions or statements derogatory to his own case or to substantiate his opponent case; he is a party in the cause who has already submitted to the jurisdiction of the court, otherwise he could not be required to submit himself for examination on personal answers."*

[17] It is the usual practice for the examination to be held at the commencement of the hearing of the case and of the proceedings. Thereafter, the party so examined testifies on oath or affirmation on his own behalf and swears to the truth of his personal answers. Whether he gives or abstain from giving evidence, any part of his personal answers may be relied upon (a) to disprove his case or (b) to prove his opponent case".

[18] From the above provisions of law and judicial pronouncements, I deduced and I find that; a party who has given his or her personal answers is not obliged to testify *de novo* in order to support his case. He or she has a right to later testify thereafter on oath or affirmation on his or her own behalf or call witnesses and seek to confirm his or her answer given in her examination on personal answer or he or she can adopt her personal answers as evidence in support of his or her case. However, that is a matter of adducing of evidence and would be the decision and responsibility of the Plaintiff or Defendant who has the carriage of his or her case.

[19] However, this said the decisions would be at the risk and peril of any of the parties. Both sides have a burden of proof, to prove on a balance of probabilities that their case is more probable than the other. Moreover, the one that aver has a duty to prove. The averments in their respective pleadings needs to be proved through evidence, which would become facts upon which this court will adjudicate upon before coming to a determination. Restricting their cases to the personal answers of a party may therefore stand the risk of not enabling a party to prove some aspects of his or her case.

[20] In this case the Defendant did not confirm her personal answers under oath, she adopted her personal answers as her evidence in the case in re-examination by her counsel during the course of her personal answers. Hence, the only evidence in support of the Defendant's case is unsworn personal answers given during the course of her examination and re-examination.

It is my view that the person who is calling the adverse party and examining that party may also exercise his or her right not to subsequently testify or call testimonies under oath or affirmation in order to prove his or her case. This is what the Plaintiff did in this case.

[21] I am therefore of the view that the parties in this case were within their rights to act and take the decision in the way they did, albeit with the potential deficiencies evidential deficiencies that may entail.

[22] The issues as to whether the Defendant has made an admission of the Plaintiffs case would be dealt with together with the merits later in this judgment.

[23] Issues for determination

Regarding the merits of this case, having scrutinized the pleadings in the light of the evidence adduced and the submissions of parties, I find that the following issues arises for determination.

(1) Whether the access over the Defendant's property by the Plaintiff consist of a servitude that encumbers the Defendant's property.
(2) Whether or not there are any contested issues regarding the "*assiette de passage*" of this right of way .

(1) Whether the access cover the Defendant's property by the Plaintiff consist of servitude that encumbers the Defendant's property.

[24] The Defendant in her Statement of Defence does not deny that there exist an access road on her property which is being used by the Plaintiff in order for the latter to access her property. However, she avers that the Defendant should have asked her for permission to use the access road before she used it and she claimed for compensation as a result of this failure. The Defendant further accepts that this access which is being used by the Plaintiff is currently being used by other members of the public, more particularly those residing at the Bel Eau flats, including the guests of those residents.

[25] The Defendant being called on her personal answers also made a number of admissions. This is reflected by the following exchanges during the Defendant personal answers;

Q. *"No but that is another matter this case is for the right of way of the Plaintiff. So basically you accept that the property is enclaved for the existing road?*

A. *"I do"*

Q. *"And you accept that this road has been used by the public for about 30 years?*

A. *Not public but for resident of the government Bel Eau Flat.*

Q. *"And these people a lot of them don't have transport, well you wouldn't know that so is it correct to say that all kinds of people are using this road?*

A. *"Yes resident for the Bel Eau flats."*

Q. *"And non residence?"*

A. *"Well guess their guests coming there."*

[26] According to article 682 of the Civil Code of Seychelles Act," *The one whose property is enclosed on all sides and has access or inadequate access on the public highway , either for the private or for the business used of his property, shall be entitled to claim from his neighbour a sufficient right of way to ensure the full use of such property , subject to his adequate compensation for any damage that he may have caused".*

[27] Article 683, goes on to provide that "*a passage shall generally be obtained from the side of the property which access to the public highway is nearest. However, account shall be taken of the need to reduce any damage to the neighbouring properties as far as possible."*

[28] On the other hand, the purpose of a personal answers is to obtain admission from an opponent or evidence which would destroy his case or strengthened that of the party calling him. Upon going over the personal answers in this case. I am of the opinion that the Plaintiff's counsel has been very effective in achieving the objective of his case through the examination of the Defendant. During the course of her personal answers the Defendant has damaged, if not destroyed, her case and at the same time strengthened the

case of the Plaintiff. She did that in a series of judicial admissions, which has sealed the faith of her case regarding the existence of a right of way over her property. She has admitted that the access road is being used by the Plaintiff and used by the members of the public. Furthermore, she also admitted that the Plaintiff"s property is enclaved on all sides, except for the motorable access road.

[29] Coupled with this, in her Statement of Defence, the Plaintiff has admitted to the following averments found in the Plaint:

(1) That the Plaintiff is the registered proprietor of parcel of land known as title V12546 and the Defendant is the owner of the adjacent title V12365 and that the parties are neighbours,(Paragraph 1 of the Plaint and paragraph 1 of the Statement of Defence).

(2) That the said title V12546 is practically enclosed saved for an existing motorable right of way from the Plaintiff's land to the public road across the Defendant land titled V12365 , which have been used by various parties and neighbours for over 30 years.(Paragraph 2 of the Plaint and paragraph 2 of the Statement of Defence).

(3) That the existing motorable right of way has been built and maintained by the government of Seychelles and been in constant used for over 30 years for the purpose accessing other neighbours property further up the road and most importantly two government blocks further up the road. (3rd paragraph 3 of the Plaint and paragraph 3 of the Statement of Defence).

[30] To my mind the above admissions in the Statement of Defence, couple with those found in the personal answers of the Defendants, consist of a total acceptance of the Plaintiff's case. The rest of the averments of denial found in the Statement of Defence only goes to the issue of compensation and damages and the failure of the Plaintiff to ask the Defendant for permission to use the access road as a right of way, which are dealt with below. The cause of action of the Plaintiff is otherwise admitted by the Defendant. Whether this had seen done advertently or inadvertently, in law the end result is the same.

The parties are bound by their pleadings. This court can only make awards based on the pleadings, doing otherwise would be *ultra petita*. I am here reminded of the Court Of Appeal pronouncement in the case of *Monthy v Esparon SLR 104 2012,* which held that, *" Section 71 of the Seychelles Code of Civil Procedure requires specific pleadings to be included in plaints, in particular a plain and concise statement of the circumstances constituting the cause of action and of the material facts which are necessary to sustain the action. It must also contain a demand for the relief which the plaintiff claims. Courts cannot grant relief not sought in pleadings, (Barbe v Hoarau SCA 5/* 2001 and Leon *v Volcere SCA 2/2004).* If they do they are acting ultra petita. The same court, had prior to, found in the case *of Charlie v Francoise SCA 12/1994* that, *"The system of civil justice does not permit the court to formulate a case for the parties after listening to the evidence and to grant a relief not sought by either of the parties".*

[31] As to the judicial admissions by the Defendant, this consist of a statement made in the court process whereby a person recognizes the truth of an averment of fact made against him or her which is taken to be binding upon him or her and is of such a nature as to produce legal consequences.

[32] Article 1356 of the Civil Code of Seychelles Act provides that, it is the declaration which a party or his specially authorized proxy makes in the course of legal proceedings.

[33] There are three legal consequences following such admissions; firstly it is accepted against the person who makes it; secondly it is irrevocable, except if it is made on a mistake of fact and thirdly it is indivisible. This was reaffirmed in the Court of Appeal case of *Opportunity International General Trading LLC VS Krishnamart and Company (Pty) Ltd. SCA 14/2013* .

[34] The personal answers of the Defendant in this case consist of such admissions declarations.

[35] Hence, I also find that the Defendant has irrevocably accepted the factual conditions for the applicability of article 1356. She has admitted that the property of the Plaintiff is

enclaved except the access over her property and that this access has been used by the members of the public for thirty years and is currently being used by the Plaintiff.

[36] Once the enclavement is proven, in law, the burden the shifts to the Defendant to prove that the shortest and least damageable way to the public road was not through her property.Vide, *Potter v Cable and Wireless (1971,) SLR 334*. In this case the Defendant has not adduced evidence to show that the shortest and least damageable way to the public road was not through her property. To the contrary it appears that the Defendant admitted that the only access possible from the Plaintiff's property to the public road is through her property.

[37] The only remaining points to consider, therefore, is the issue of permission and compensation.

[38] Article 682 of the French civil code is an exact replica of our article 682 of our Civil Code. We have inherited our property law, including this article, from the French Civil Code. I will therefore refer to some case law which have been rendered in France in order to assist me in determining the remaining aspect of the case. According to *'Dalloz, Code Civil, 90 eme edition, servitudes, article 682,* ***Applications; utilization normale du fonds, page 500****. Le droit, pour le proprietaire d'une parcelle enclavee, de reclamer un passage sure le fonds de ses voisins est en function de l'utilisation normale du fonds quelle qu'en soit la destination. Civ. 1ere, 2 Mai 1961, Bull, civ 1, no 220. Ainsi en est-il de l'expoitation dune salle de cinema exigeant une issue de secours.Civ.3eme, 5 mars 1974. De l'exploitation agricole exigeant la passage de machines .Civ, 3 eme, 9 mars 1976, Bull, civ III, no 107.*

[39] It is clear from these case law that the day to day activities to be carried out on the right of way would depend on the nature of the normal and ordinary functions of the property which benefits from the exercise of that right. Accordingly, I find that the issue of compensation for delictual responsibility of the Defendant does not arise in this case. The activities of the Plaintiff in its usage of the right of way in law depends on nature of the function of the Defendant's property. If its function is commercial, which is the case in this matter, the used of the right of way by the Plaintiff as part of the commercial

operation of the Plaintiff's property cannot give rise to damages. Moreover, the access road was being used as a motorable access by members of the public long before it was made used by the enclaved parcel of the Plaintiff, with all the inconvenience that this may cause to the peaceful enjoyment of the Defendant of her property.

[40] As *"juge du fond"* in this case, I have appreciated the possible nuisances that the used of the right of way by the Plaintiffs vehicles and or that of its agents may cause to the Defendant and I find that it falls within a level that is reasonable and justifiable, given the locus of the properties and the level of vehicular activities prior to the used of the Plaintiff. Accordingly, I find that no compensation is liable to be paid by the Plaintiff to the Defendant as no damages has been caused by its used.

[41] As to the issue of permission to use the access road in this case. The Plaintiff has decide to exercise her right to come to court under article 686 of the Civil Code of Seychelles. She is asserting her civil right that she is given to her in law. This she can claim as of right against the Defendant and in law there is no requirement for the demanding of permission from the Defendant. Once the court makes a finding of fact that the Plaintiffs has shown that her case is fully compliant to article 686, the right of way is exercisable against the Defendant without compensation payable. The right of way is not purchased under this article, it is claimed against a property. I note that the said article goes go on to prescribed that, *"account shall be taken of the need to reduce any damage to the neighbouring properties as far as possible"*. I bear this proviso in mind, however, I find that the Plaintiff only made used of an existing motorable access road and that there was no earth cutting; building of embankments ; asphalting and other similar activities which are a usually associated with road building, that could have inconvenience any other properties , including that of the defendant. Therefore, subject to what I will further find below, no damage is caused to the Defendant by exercise of her civil right .

[42] However, this court has also found, when it went on the locus in quo, that the Plaintiff has built a *"slipway"*,that gave way to a door on the ground floor of the Plaintiff's

property. This concrete structure has encroached upon and covered the beacon between the two properties. This has to be remedied by the Plaintiff.

(2) Whether or not there are any contested issues regarding the *"assiette de passage"* of this right of way.

[43] An *"assiette de passage"* is the actual physical route that the right of way occupies on the ground. It can be prescribed by use for at least 30 years. Vide, *Mirabeau v Camille (1974) SLR p158 and Azemia v Ciesaux (1965) SLR 199.* In this case the *"assiette de passage"* has been made used by the members of the public for over 30 years. The Plaintiff upon purchasing the property V12546 and developing it by building a three storey commercial building then started using this same *"assiette de passage"* in exercising her right of way. The Defendant, moreover, does not say that the route consisted of this passage is the wrong one or that there is an alternative shorter one. Hence, I find that the access route that is being used by the Plaintiff consist of the proper passage of the right of way over the Defendant's property.

[44] Determination and Order

[45] I accordingly find that the Plaintiff has proven this case on a balance of probabilities.

[46] I declare that the Plaintiff has a right of way across parcel V 12365 to access her property, land title V12546, to the public road.

[47] I further order the Defendant not to interfere with the exercise of such right by the Plaintiff.

[48] I order the Plaintiff to cause the beacon that has been covered by concrete to be reaffixed in accordance with the provisions of the Land Survey Act, (CAP 119) within 30 days from this judgment.

[49] I make no order as to cost.

Signed, dated and delivered at Ile du Port on this----35th----day of May 2019.

Govinden J