

SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 458
CS 70/2013

In the matter between:

JULIE VANNIER

Plaintiff

Rep. by Rassin Sinon
(rep. by Anthony Derjacques)

and

MAUREEN HOAREAU
(rep. by Elvis Chetty)

1st Defendant

CLIFFORD TOUSSAINT
(rep. by Elvis Chetty)

2nd Defendant

Neutral Citation: Julie Vannier v Maureen Hoareau and Anor (CS 70/2013) [2019] SCSC 458.
(5th June 2019)

Before: Pillay J
Summary: Right of way – enclaved property
Heard: 21st November 2017, 16th January 2018, 25th September 2018
Delivered: 5th June 2019

ORDER

Case dismissed against the first Defendant.

Plaintiff is granted a right of way over the land of the second Defendant

JUDGMENT

PILLAY J

[1] The Plaintiff in this matter seeks a judgment of the Court against the first and second Defendants as follows:

(1) Ordering the first Defendant to remove the said physical obstructions and structures.

(2) To allow the Plaintiff the quiet and peaceful use of the said right of way.

(3) Ordering the Defendant to pay Plaintiff the sum of Rs30,000/- with costs and interests.

(4) Alternatively to grant the Plaintiff a right of way over land parcel H8688, belonging to the 2nd Defendant.

[2] The Plaintiff averred that she is the owner of parcels H714 and H583 situated at Ma Constance.

[3] She further averred that the first Defendant is the owner of the adjoining parcel of land H8687 on which is demarcated a right of way in favour of the Plaintiff.

[4] The second Defendant is the owner of a neighbouring parcel of land known as H8688.

[5] The Plaintiff avers that the first Defendant has obstructed the Plaintiff's right of way by placing physically barriers and structures preventing her from getting access to her land hence rendering her land enclaved.

[6] The Defendants denied that the Plaintiff's property is enclaved and also denied that there was a right of way demarcated on the first Defendant's property.

[7] The evidence of Rassin Cliff Sinon Vannier is that his mother Julie Sinon Vannier is the owner of two properties at Ma Constance being parcels H583 and H714. Her neighbours are Clifford Toussaint ad Maureen Toussaint the Defendants. Clifford Toussaint is the owner of parcel H8688 and Maureen Toussaint is the owner of H8687. In 1976 when the Plaintiff bought the land the owner allowed her to choose her access and she chose to go through the middle of the property which was the easiest way. In 2004 after the Plaintiff's tenant died Mr. Vannier went to check the property and found the road was blocked by rocks. He met Mr. Toussaint who maintained the access was still there. Then in 2009 the access was blocked completely with corrugated iron sheets. When he went to see Mr. Toussaint, Mr. Toussaint told him that he had no access on his property.

[8] Following that Mr. Vannier attempted to get engineers and architects to come up with an access road from his property to the main road. His application to Planning Authority was refused on the basis that the land was unstable.

[9] The Defence's evidence is that the Plaintiff has no right of way over their property. The first Defendant testified that the Plaintiff was using a footpath from the main road on the FEBA property which is just below the second Defendant's property.

[10] Mr. Francoise from Planning Authority confirmed that the Plaintiff submitted an application for the construction of a house which included an access, a private drive and parking area which was refused on the basis that the land was unstable. (page 2 of the 16th January 2018 proceedings)

[11] The issues for the Court to decide are as follows:

(1) Is there a right of way over the first Defendant's property, H8687, in favour of the Plaintiff's property, H583?

(2) It the Plaintiff's property enclaved?

(3) Should the Plaintiff be granted a right of way over the second Defendant's property?

(4) Has the first Defendant physically obstructed the Plaintiff's access to her property?

[12] Starting with the first issue before the Court, the law with regards to right of way was explained in **Ramgasamy v CEO Planning Authority SCSC 865** as follows

[39] The principles that we can distil from all the above provisions read together are that an agreement among owners can create a right of way but that the agreement shall only have effect if created by a document of title, which is registered. In addition, based on Articles 639 and 682 (supra), where land is enclaved the owner of the dominant tenement may apply to the court to have a right of way across a servient tenement. Court orders in this respect are also registered.

[40] There is also jurisprudence constante that a right of way requires a document of title or an order of the court (see Hoareau v Ah-Tive (1979) SLR 38, Payet v Labrosse and another (1978) SLR 222 and Delorie v Alcindor and

another (1978-1982) SCAR 28, Sinon v Dine (2001) SLR 88, Laurette v Sullivan (2004) SLR 65, Umbricht v Lesperance (2007) SLR 221).

[41] *The law is also clear on the fact that it is incumbent on the person who seeks the right of way to prove it by registered title deed or to claim it in court. The owner of the servient tenement need not prove anything and the dominant tenement is only burdened by registered easements arising from title or court orders (see article 682 above).*

- [13] The evidence of Mr. Vannier itself answers the first question. On being asked where the person who rents his mother's property passes to get to the house his answer was "Actually not a place that the person goes through, I think it's through good will that he lets the person go through. And if ever Mr. Toussaint wants the person not to go through anymore he can." (page 8 of the proceedings of 21st November 2017).
- [14] Furthermore in cross examination Mr. Vannier accepted that there is no demarcated right of way for his property across the Defendant's property. (page 19 of the proceedings of 21st November 2017)
- [15] On the evidence the first question can be decided without much difficulty, there is no evidence of document of title or Court order granting a right of way across the first Defendant's or second Defendant's property in favour of the Plaintiff.
- [16] With that said the Court cannot order the first Defendant to remove the physical obstructions and structures there being no right of way. To my mind the relief sought would have been for an order that the Plaintiff be granted access over the first Defendant's property to get to the Plaintiff's property. But that is not the relief sought and the Court cannot frame a case for the parties or grant relief not sought.
- [17] For that matter the Court cannot order the Defendants to allow the Plaintiff the quiet and peaceful use of the said right of way, there being no right of way.
- [18] Nor is there basis for the Court to order 'the Defendant to pay the Plaintiff the sum of Rs30,000/- with costs and interests.'

[19] The only issue then left for the Court to consider is whether the Plaintiff should be granted a right of way over the second Defendant's land on the basis that the Plaintiff's land is enclaved.

[20] Article 682 of the Civil Code of Seychelles provides in relevant part:

“1. The owner whose property is enclosed on all sides, and has no access or 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.”

[21] Article 683 provides that:

A passage shall generally be obtained from the side of the property from which the access to the public highway is nearest. However, account shall also be taken of the need to reduce any damage to the neighbouring property as far as possible.

[22] I note the following paragraphs from the judgment of Karunakaran J in the case of **Umbricht v Lesperance (CS 127/2000) [2007] SCSC 132 (06 August 2007)**

.... it is pertinent to note what the Court held in Azemia v Ciseau (1965)SLR 199, which runs thus -

(i) The land owner whose property is enclave and who has no access whatever to the public road can claim a right of way over the property of his neighbour for the exploitation of his property, conditioned on giving an indemnity proportionate to the damage he may cause.

(ii) A property may be deemed to be "enclave" not only from the fact that it has no access to the public road but also in the case where such road is impracticable.

(iii) If the accessibility is the result of the property having been divided by sale, exchange, partition or any other contract, a right of way can only be asked for over the properties affected by such contract.

[23] I find of relevance too, the finding in **Laurette v Sullinvan (2004) SLR 65** that:

“where the property of a plaintiff is enclaved and the only practical possibility of having access to the main road is across the property of the defendant, the plaintiff is entitled to a right of way over the defendant’s property”

[24] Mr. Francoise testified that due to past mass movement of soil in the area the land is not stable to sustain any development. He was very candid, explaining that “engineering wise development are possible in most circumstances.” However he explained that the question was the impact of that development. He explained that the site is not stable to sustain future development due to past incidents of land slide.

[25] On a visit to the site I noted the embankment that Mr. Francois spoke of.

[26] The first Defendant in her testimony spoke of a footpath that the Plaintiff used. With the evidence of Mr. Francois even a footpath would not be practical on that embankment.

[27] Noting Mr. Francois’s testimony and following our visit on site, I accept that in spite of the fact that the Plaintiff’s property borders the main road it is impractical, venturing on the impossible, for the Plaintiff to have access to the main road directly from her property.

[28] I therefore find that the Plaintiff’s land is enclaved within the meaning of Article 682 of the Civil Code and is entitled to a right of way across the second Defendant’s property.

[29] On the visit to the site Mr. Vannier indicated the access that was used by his tenants and which has now been blocked by the first Defendant’s wall, at the seaside boundary of the property. In fact the wall on that side of the property has a gate with steps going down to a path which leads to the public road (secondary road). To my mind that would have been the best access for the Plaintiff, right at the edge of the property. But let us not dwell on that since there was no prayer for a right of way to be declared over the first Defendant’s property.

[30] During the site visit Mr. Vannier also indicated the access that was being used presently by his tenant. The access was right past the front door of the second Defendant's house with the car being parked right next to the bedroom window of the second Defendant's house.

[31] I also noted during the site visit that the second Defendant is in the process of walling off his property. Other than those two access ways mentioned that was indicated no other possibilities were indicated.

[32] On the basis of the above I enter judgment in favour of the Plaintiff as follows:

(1) I declare that the Plaintiff has a right of way for the private and business use of her property over the second Defendant's property H8688 along the existing access road.

(2) I order the second Defendant not to interfere with the exercise of the said right of way by the Plaintiff.

(3) The claim against the first Defendant is dismissed.

(4) Each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on 5th June 2019

Pillay J