

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2019] SCSC ...  
CS20/2017

In the matter between

**MARYLINE DENOUSSE**  
*(rep. by Ms. Karen Domingue)*

**Plaintiff**

and

**GERMAINE DIXIE**  
*(rep. by Ms. Alexandra Madeleine)*

**Defendant**

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**Neutral Citation:** *Denousse v Dixie* (CS 20/2017) [2019] SCSC (1 July 2019).

**Before:** Twomey CJ

**Summary:** Easement – right of way –twenty years usage- alternative passages

**Heard:** 28 September 2017 – 15 May 2019

**Delivered:** 1 July 2019

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**ORDER**

The application for the right of way is dismissed

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**JUDGMENT**

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**TWOMEY CJ**

**The parties' pleadings and background to the case.**

[1] The Plaintiff, the owner of Parcel V11498, averred in a plaint that she had acquired a right of way by usage over twenty years over the Defendant's property, namely Parcel V2135.

[2] The Plaintiff further averred that she wanted a declaratory order to that effect and a demarcation of the alleged right of way in the face of the Defendant's threat to block the said right of way.

[3] The Defendant in her statement of defence raised a plea in *limine litis* that the plaint was an abuse of process. On the merits she denied the averments of the Plaintiff and stated that the Plaintiff's land was a subdivision of Parcel V1950 which had been accessed by a right of way over Parcel V2136 and that the Plaintiff's claim for another right of way over her property was not sustainable in the circumstances.

## **The Evidence**

### *The Plaintiff's Evidence*

[4] Maryline Denousse, a teacher, testified that the Defendant had been her neighbour over 25 years or so at La Louise. She had together with ex-partner Bernardin Bernard, owned a parent parcel of land, namely Parcel V1950 which had been sold to them by one Milicent Albest. In 1993, her ex-partner transferred his undivided share in the property to her. In 1994, she subdivided Parcel V1950 and had one of its subdivisions transferred into her sole name, namely Parcel V11498.

[5] She stated that she had always accessed Parcel V1950 and ultimately Parcel V11498 through the Defendant's property as her property was enclaved although there was neither a demarcated nor a registered right of way across Parcel V2135.

[6] The Defendant had threatened to close access to the path she used and the Plaintiff had asked the District Administrator for help. The Planning Authority had also visited but she had been advised to go to Court.

[7] She denied that she had accessed her property by using a path across Parcel V2136 belonging to Milicent Jeanne or that she had accessed her property through land (Parcel V1149 amalgamated with V2140) she had sold to a third party, namely Michel Talma. She denied that she trespassed on the Defendant's land or that she caused disturbances.

*Evidence of Julien Alexis, Director of Surveys*

[8] Mr. Alexis confirmed that there was no demarcated right of way on the cadastral plans of Parcel V11498. He surveyed the area and could not find any demarcated right of way apart for some steps going in that direction. There was no indication that the steps were being used by the Plaintiff. He confirmed that Parcel V11498 was enclaved. However, he could not confirm whether before Parcel V1950 was subdivided if it was enclaved. He surmised that the Plaintiff accessed her house through a footpath over Parcel V2135 or V2136.

[9] At a visit to the *locus in quo* with the parties present, Mr. Alexis pointed to an existing pathway on Parcels V2136 and V2135 which the Plaintiff was accessing to reach her property. The owner of Parcel V2136, Mrs. Millicent Jeanne accepted that steps on her land were used by the Plaintiff to gain access to her land. There was also an alternative path through Mrs. Chang Tave's land (V8622) abutting Parcels V2135 and V2136, which was also used by the Defendant to access her property).

*Evidence of Ivy Edmond*

[10] Mrs. Ivy Edmond testified that she had lived in the area for more than 50 years and knew both parties in the case. The land in the area had belonged to the Frichots and it was bounded by a river and during the rainy season it was difficult to access the surrounding land. As the District Administrator of Pleasance, she held meetings and it was decided to build a road to the land. The Defendant took a loan from the Ministry of Community Development to build some steps from the road that was constructed to her property and a retaining wall. The Plaintiff used different routes at *Kan Frichot* and *Tri-Star* to access her land. She stated that there could be obstacles on that road now and that in the past five years she was using the path through the Defendant's land. In cross examination she agreed that the Plaintiff had alternative routes to her property.

*Evidence of Milicent Jeanne*

[11] Mrs. Jeanne had lived in the area for about forty years and occupied Parcel V2136 which had the Defendant's house on one side, Mr. Talma on the other and the Plaintiff's behind. She stated that steps on the Defendant's land and a footpath had been built by both parties

in this case from the secondary road onto the Defendant's property and was used by the Plaintiff to get to her property. She was of the view that there was no other way for the Plaintiff to gain access to her property and that it was the shortest and most convenient route.

- [12] She stated that there was an access road from the secondary road to Mr. Talma's property but no continuation to the Plaintiff's land. In respect of the steps on her land she said it was only accessed by Mr. Talma before he built his own access road. She stated that she was involved in another right of way issue with Mr. Talma and Mrs. Laporte in Court and that no one had a right of way over her land.

#### *The Defendant's Evidence*

- [13] Germaine Dixie, the 72 year old Defendant, testified that she bought her property, Parcel V2135 from Robert Frichot on 25 October 1977. There was no registered right of way at any time over her property. She had purchased her property before the Plaintiff had purchased hers, about ten years apart. When her land was bought she accessed it via Peggy Chang-Tave's property (V8622) as there was no access road. She surmised that the Plaintiff got access to her own property through Mrs. Milicent Jeanne's property but which had been blocked to prevent it being used by Peggy Chang-Tave. At some point the Plaintiff started accessing her property by going through hers but she could not remember when it had started. She did not use any particular path and if told to desist from trespassing she would curse her and in the past she had been violent to her.

- [14] The Defendant added that she borrowed money to build a retaining wall and employed Robert Agathine to carry out the work. She had not stopped the Defendant from accessing her land through her property but did not want to grant a right of way to her. She agreed that she was not sure where the Plaintiff would pass to reach her property unless she used a path across her property.

#### *Peggy Chang-Tave's evidence*

- [15] The witness had lived at La Louise on Parcel V8622 for sixty-one years. The parties were her neighbours. Initially there was no road to the secondary road. She used a footpath to it next to the Plaintiff's house and then on to Mr. Talma's and Mrs. Jeanne's. This

happened for forty years and then coming from church one day found the pathway next to the Plaintiff's house barred. She then had to access her property through a different road.

[16] The Plaintiff had used the path through Mrs. Jeanne's property to access hers until the Defendant built steps. It was at that point that she blocked the pathway past her house for other users. They were now accessing their property through Chenard's, a much longer route.

#### *Francois Dixie's evidence*

[17] The witness is the Defendant's son and had lived on the property for 26 years. The Plaintiff had been accessing her property through different pathways – through Mrs. Jeanne's property, through Mrs. Chang Tave's property and through Mrs. Edmond's mother's property.

[18] The Defendant sometimes used Mrs. Jeanne's property or that of Mrs. Chang Tave to access her own before she built steps from the secondary road to her house. She also continued to use the other paths to her house and stated that the Plaintiff had caused her own land to be enclaved.

#### **Closing Submissions**

[19] No submissions were made by the Plaintiff but the Defendant made written submissions. With regard to the plea in *limine litis* taken on the issue of abuse of process, the Defendant's Counsel submitted that two previous Plaints namely CS 32/2013 and CS 61/2013 had been filed by the Plaintiff against the Defendant and both had been dismissed and that the present case constituted an abuse of process. She relied on *Gomme v Maurel* (2012) SLR 342 for the proposition that the Court cannot stay unconcerned to prevent abuse of processes and to prevent suits dragging on forever and have a defendant oppressed by successive suits.

[20] With regard to the Plaintiff's claim for a right of way over the Defendant's land, it was the Plaintiff's submission that such ought not be granted as the Plaintiff had caused the enclavement of her own land by the subdivision of her own property. Article 684 of the Civil Code provided that a passage may only be demanded by the enclaved purchaser

from the seller. She relied on the cases of *Azemia v Ciseau* (1978) SLR 158 and *George v Basset* (1983) SLR 177.

### **My observations and findings**

[21] The approval of subdivision of land in Seychelles without the provision of rights of way to enclaved land continues to be a concern for the Courts. It causes much mischief and neighbourhood disturbances. A study of the cadastral and aerial plans submitted in this case shows how the problem can be exacerbated in crowded areas such as *Kan Frichot*. It is almost unconscionable that there is no duty imposed on owners of land who subdivide to provide rights of ways to these subdivided plots of land and to have them registered.

[22] In the present case, the examination of the evidence convinces me that parties and their neighbours for a number of years used every possible path across each other's land to access their own until an estate or secondary road across *Kan Frichot* was built. The path from the Chenard Estate or from Kannu's shop (the Tri-Star Road) on the Plaisance Road across Peggy Chang Tave's land or through La Louise and then across Mrs. Jeanne's land seemed to have been used by all the parties until the Defendant built a few steps from the estate road to her own property. It would seem that the Plaintiff was subsequently allowed to use these steps and continue across the Defendant's land to her own. I also believe the Defendant's witnesses that the Plaintiff also used alternative paths and continues to use the path through Mrs. Jeanne's land.

[23] The documentary evidence in this case makes it clear that the Plaintiff owned Parcel V1950 which abutted Mrs. Jeanne's land (Parcel V2136) before she subdivided her land into Parcels V11498 and Parcel V11499 which she sold to Mr. Talma, the then owner of Parcel V2140 with the two parcels amalgamated to constitute Parcel V11500.

### *Plea in limine litis: abuse of process*

[24] With these background facts in mind, I now turn to the issues in this case. First, the plea in *limine litis* with regard to the abuse of process. CS 32/2013 was entered on 13 May 2013 and was dismissed presumably for want of prosecution on 12 July 2013 after the non-appearance of the Plaintiff and /or her counsel on two occasions. CS 61/2013 was entered on 7 August 2013 and was dismissed on 23 November 2015 again for the non-

appearance of the Plaintiff and/or her counsel. I also find that those two complaints are a verbatim of the present plaint.

- [25] In *Gomme v Maurel* (2012) SLR 342), Domah JA referred to the English case of *Bradford & Bingley Building Society v. Seddon Hancock & Ors.* [1999] EWCA Civ 944), to explain the difference between the rule of *res judicata* and that of abuse of process:

*“The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also, save in ‘special cases’ or ‘special circumstances.’ The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the Court being to draw the balance between the competing claims of one party to put his case before the Court and of the other not to be unjustly hounded given the earlier history of the matter.”*

- [26] Domah JA cautioned against conflating the two principles and explained that the rule of abuse of process encompasses more situations than the three requirements of *res judicata* (necessity that the thing sought is the same; that the application is based on the same cause; that the application is between the same parties, and formed by them and against them in the same capacity to the action; see *Hoareau v Hemrick* (1973) SLR 272).

- [27] In cases of abuse of process, the Court primarily guards against the oppressiveness of successive suits by one party against the other on party on the same issues. The principle is summarised by Sir Thomas Bingham MR as he then was, in *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 at 260:

*“The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.”*

- [28] Domah JA in *Gomme* (supra) saw *abuse of process* as including the re-litigation of a case which had already been decided upon.

- [29] In the present matter, previous actions on identical complaints had not been litigated as for unexplained reasons neither the Plaintiff nor its counsel had turned up on the date set for trial.
- [30] In *Ascent Projects (Sey) (Pty) Ltd v Fonseka* (CC 19/2017) [2018] SCSC 112 (09 February 2018) Govinden J, in a similar case where the Plaintiff had withdrawn its first action and did not turn up to prosecute its second which was consequently dismissed, relying on the authority of *D.P.P. v Humphrys* (1977 A.C. 1 at 46) found that there was no abuse of process as there was no oppression and vexation in the process.
- [31] Similarly, in the present case, although no explanation has been provided by the Plaintiff as to why she failed to prosecute the previous cases she had filed, I do not find that the issues raised in the complaint have been litigated. Whilst it is certainly vexatious to the Defendant to be sued on three separate occasions, it cannot be said at this juncture that the Defendant is oppressed by the suits. Moreover, the suit has been prosecuted and defended in *forma pauperis* and no expense has been borne by either party where in different circumstances an order for punitive costs may have been granted. My views may have been different were it not the case. I do not therefore find that there has been an abuse of process in this case. I hasten to add that further suits on the same issues are not unlikely, given the relationship between the parties, and these may in the event well be found to be oppressive.

*The grant of a right of way to Parcel V11498*

- [32] Insofar as the law is concerned, Article 682 (1) provides for a general right to a right of way over a neighbour's property where land is enclaved. Article 684 of the Civil Code also provides that:

*“If the non-access arises from a sale or an exchange or a division of land or from any other contract, the passage may only be demanded from such land as has been the subject of such transactions. However, if a sufficient passage cannot be provided from such land, paragraph 1 of Article 682 shall apply.”*

- [33] These provisions and Seychellois *jurisprudence constante*, namely the authorities of *Azemia v Ciseau* (1963-1966) SLR 199 Vol III (*Azemia 1*) *Vadivello v Otar* (1974) SLR



216, *Azemia v Ciseau* (1978) SLR 158 (*Azemia 2*) and *Georges v Basset* (1983) SLR177 maintain that where enclaved land is a subdivision and the enclavement arises from that fact, a right of way ought to be claimed from the land from which it is subdivided.

[34] The Plaintiff's land, namely Parcel V11498 is certainly a subdivision of Parcel V1950. It now abuts Parcel V2135 belonging to the Defendant, Parcel V2136 belonging to Milicent Jeanne, Parcel V11500 (an amalgamation of Parcel V2140 and Parcel V 11499, the latter having been sold by the Plaintiff) belonging to Mr. Talma and Parcel V8622 belonging to Mrs. Chang Tave.

[35] There is a demarcated but unregistered two metre right of way on the east side of Parcel V2136 which runs to Parcel V11500 belonging to Mr. Talma and which abuts the Plaintiff's land. I note however that the right of way ends at Peg ME269 at the south eastern corner of the Plaintiff's land. That was also the case before the subdivision of Parcel V1950 into Parcels V11498 and V 11499. Hence the Defendant's submission that the provisions of Article 684 should apply in terms of the provision of a right of way for the Plaintiff is erroneous.

[36] My observations at the *locus in quo* which is supported by the evidence adduced generally is that the Plaintiff has no one single passage to her property. She reaches her house by walking over the properties of all her neighbours, namely the ones I have mentioned in paragraph 34 above. There is certainly no demarcated right of way over the Defendant's property whether registered, on cadastral plans or visibly. I only observed some steps on the Defendant's land but these only go as far as the Defendant's house. They certainly do not extend either by further steps or by a pathway to the Plaintiff's land.

[37] The Plaintiff's assertion that she has a right of way by twenty years' usage is not supported by the law. I also do not find that the alleged *assiette de passage* as claimed by the Plaintiff has been supported by any evidence to that effect. Further, I did not find the evidence of the steps being blocked as alleged. In the circumstances the Plaintiff has not been able to support her claim for a right of way over the Defendant's land by any

evidence. Having visited the terrain, I also do not find that it would be convenient to grant the right of way as proposed by the Plaintiff. It certainly is not the easiest access to her house as there is a steep incline from the road up the steps and onwards to her house.

[38] Having studied the documentary evidence in this case, especially the cadastral plans and having visited the *locus in quo* it seems to me that the best access to the Plaintiff's land would be through the demarcated right of way on the east side of Parcel V2136 which could be extended onto Parcel V11500 to the Plaintiff's land.

[39] The owner of Parcels V2136 and V11500 have not been joined to this suit and I cannot make an order in respect of such a right of way for the Plaintiff without notification to them and an opportunity to respond. In the circumstances I cannot make any order in this respect.

[40] The plaint is dismissed.

Signed, dated and delivered at Ile du Port on 1 July 2019.

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**M. Twomey**  
**Chief Justice**