

SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 1130
CS 77/2017

In the matter between:

THERESIA CHANG PEN-TIVE **1st Plaintiff**
(rep. by Anthon Derjacques)

ALICE DORICE CHANG PEN-TIVE **2nd Plaintiff**

and

MARIE-ANDRE ALPHONSE **Defendant**
(rep. by Elvis Chetty)

Neutral Citation: *Chan Pen-Tive and Anor v Alphonse* (CS 77/2017) [2019] SCSC 1130 (4th December 2019).

Before: Pillay J

Summary: Encroachment – Right of Way

Heard: 9th May 2019, 10th June 2019 and 11th June 2019

Delivered: 4th December 2019

ORDER

The Plaintiff and the counter claim are dismissed

JUDGMENT

PILLAY J

[1] The Plaintiff by way of Plaintiff dated 21st July 2017 claims the sum of SCR 100, 000.00 from the Defendant and further for the Court to issue a permanent injunction compelling the Defendant to remove the said encroachment and to cease and desist from the trespass.

- [2] The Plaintiff's case is that the Plaintiffs are the fiduciaries acting for and on behalf of the co-owners of land parcel C570 situated at Anse Boileau, Mahe.
- [3] The Defendant is the representative of the estate of Heirs Pierre Francourt and the occupier of land parcel C1682 situated at Anse Boileau, adjoining parcel C5710.
- [4] The Defendant without discussion, authority or lawful cause has constructed and continues to build an earth embankment and earthwall on land parcel C5710 thereby encroaching on the said land parcel and depriving her of 40% of her said land.
- [5] The Defendant in answer denied that the Defendant was the representative of Heirs Pierre Francourt. The Defendant further denied that she had encroached onto the Plaintiffs land. She counter claimed against the Plaintiff for a declaration that she had a right of way over parcel C5710.
- [6] The first Plaintiff testified that she lives on parcel C5710. She was appointed executor to the estate of the late Antoine Gabriel Chang Pen-Tive and fiduciary for the co-owners of C5710. About 5 years ago the Defendant built the concrete road over her property. It was her testimony that Pierre Francourt is the father of her husband. She stated that she believed that it was the district administration that sent the Indian workers to build the road but she did not do anything to object because she was tired of it.
- [7] Beryl Faure testified on behalf of the Plaintiff stating that she grew up with her mother the first Plaintiff. It was her testimony that the concrete access road was built more than five years ago¹. She further testified that where the concrete access has been built there was a footpath there and it was used by everyone. But now everyone uses the new main road except for the Defendant and her family.
- [8] Michel Leong testified on behalf of the Plaintiff. He is a land surveyor. He surveyed parcels C1682 belonging to the Defendant and parcel C5710 belonging to the Plaintiff to verify the possibility of an alternative access road going through parcel C5710 to parcel C1682. He concluded that the existing drive could be re-aligned or in the alternative a parking area can be built on the eastern side of parcel C1682 which is bounded with the

¹ Page 16 of the proceedings of 9th May 2019 at 930am

motorable concrete road though his evidence was that on that side you cannot drive down to the level of the house.

[9] Benette Alphonse for the Defendant testified that the Defendant is his mother. It was his testimony that his mother does not own the land but that the land belongs to the heirs of Pierre Francourt. It was his evidence that when the government built the public road, they also built the access road going to the premises of Marie-Andre Alphonse when he was around 10 years old. The road was built halfway and the rest by the Defendant's daughter. It was further his evidence that upon a search conducted at the Land Registry he found that V1632 is still in the name of Pierre Francourt. No executor has been appointed since the death of his father.

[10] Yvon Fostel a Land Surveyor testified on behalf of the Defendant and agreed with the findings of Michel Leong that a motorable road could not be built on the eastern side of the Defendant's land, but a parking area with footsteps going down to the house in view of the steep incline.

[11] By way of written submissions dated 27th June 2019 counsel for the Plaintiff submitted that the Defendant does have access to a public highway in that part of her land lies on the public road therefore facilitating for a vehicular path to be constructed on her land.

[12] Counsel submitted that the Plaintiff's action is proven on a balance of probabilities.

[13] Issues before the Court:

(1) Did the Defendant unlawfully construct a right of way and encroach on the Plaintiff's land?

(2) Is the Defendant the representative of the Heirs Pierre Francourt and does she have standing to sue the Plaintiffs?

[14] In cross examination Theresia Chang Pen-Tive accepted that the government partially built the drive² and importantly the evidence indicates that the drive was built where the old footpath ran.

[15] The evidence is that the Defendant as well as everyone else living in the vicinity used a footpath where the current concrete access has been built supporting a claim by the Defendant for a right of way to her property across C5710. In fact the evidence of the Defendant is that the two parcels were part of one parcel belonging to Francourt who when he sub-divided it carved the access across C5710 in order to access the other parcels further inland including C1682.

[16] The Defendant's witness stated that his sister built the other half of the access though he did not elaborate on the extent of the part she built.

[17] There being no evidence that the Defendant is the author of the encroachment the claim for encroachment against the Defendant fails.

[18] As regards the counter claim for a declaration that the Defendant has a right of way over the Plaintiffs' land Article 682 of the Civil Code provides that

1. The owner whose property is enclaved 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...

[19] In the case of **Ragain v Nancy SSC Civ 171/1990. 3 February 1992** the Court explained that the word neighbour in article 682 means an owner of land, hence an action for the granting of a right of way should be brought against the neighbouring owner and not the occupier.

[20] Essentially an action under Article 682 lies between two co-owners, the owner whose property is enclaved and the neighbouring owner from whom a right of way is sought.

[21] There is no evidence of the ownership of C1682.

² Page13 of the proceedings of 9th May 2019

[22] In the circumstances, with regards to the counter claim, there being no evidence of the Defendant being the owner of the parcel C1682 she cannot bring an action against the Plaintiffs for a right of way.

[23] In as much as there are some very important issues that need to be resolved as well as the socio-economic impact on the Plaintiffs who wish to develop their land and the uncertainty of the Defendant as to the access to their property the Court cannot ignore the fact that the parties are not properly before the Court.

[24] In the circumstances the Plaint and the counter claim are dismissed.

[25] Each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on **4th December 2019.**

Pillay J