

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 1129
CS05/2013

In the matter between:

JANINE THYROOMOOLDY

(rep. by Mr Basil Hoareau)

Plaintiff

and

MICHEL NANON

(rep. by Mr Nichol Gabriel)

Defendant

Neutral Citation: Thyroomooldy v Nanon CS05/2013) [2019] SCSC1129 (6 December 2019).

Before: Govinden J

Summary: Encroachment from a third party's property; Article 545 of the Civil Code; Defendant ordered to remove encroachment and pay compensation to Plaintiff

Heard: 14th March 2019

Delivered: 6th December 2019

JUDGMENT

GOVINDEN J

Introduction

[1] The Plaintiff is the registered owner of the land comprised in title H6440, situated at Quincy Village, Mahe, whilst the Defendant is the owner of the adjoining plot comprised in title no H5355. The Plaintiff avers that the Defendant without her permission and consent has encroached onto parcel H6440 by partly constructing two structures on the said parcel and illegally cultivating thereon.

[2] The Plaintiff therefore seeks orders from this court to the following effect; declaring that the Defendant has encroached and trespassed on her property; ordering the Defendant to remove the encroachment; issuing an injunction compelling the Defendant to refrain from further encroachment; ordering the Defendant to pay SR 50,000 with interest and cost as damages to the Plaintiff.

[3] On the other hand, the Defendant denies the encroachment and avers that he has not encroached onto the Plaintiff's land, neither by building nor by cultivating thereon. The Defendant had also raised a plea in limine litis, that the action was res judicata and amounted to an abuse of process. This plea was dismissed by the court.

Case for the Plaintiff

[4] The Plaintiff testified in support of her case. She said that she has been living at Quincy Village for about 13 years and that she is the owner of parcel H6440, whilst the Defendant is the owner of an adjoining and contiguous property bearing title H5355. The Plaintiff testified that she bought her property from the brother of the Defendant in 2002 and that her land is being occupied by herself and the Defendant, as the latter has partly built his house and is cultivating crops on her property.

[5] The Plaintiff testified that the cultivation on her property by the Defendant consists of sweet potatoes; cassava; bananas; papaya and sugar cane and that the latter started his unlawful occupation at the end of 2004. According to her, upon noticing the encroachment she said that she commissioned the Land Surveyor Michel Leong to carry out a survey and it was as a result of that survey that she fully realized the extent of the encroachment. Consequently she said that she approached the Defendant on the issue but that the latter rebuked her and informed her to bring a case before the court and that he continued in his illegal occupation. It is her testimony that the occupation of the Defendant continued despite of him being further formally notified by her lawyer on two different occasions to cease the occupation.

[6] The Plaintiff produced a set of printed photographs depicting what she claimed to be the Defendant's house and the encroaching plantation. This was produced as exhibit P5.

- [7] The Plaintiff further testified that the encroachment did not come from parcel H5355, but rather from parcel H1798 which does not belong to the Defendant. She claimed that this parcel belongs to one Giselle Estro, the sister of the Defendant. She insisted that she did not approach the owner of parcel H1798 for the latter to remove the encroachment as it was not this person that did the said encroachment.
- [8] As a result of these acts of the Defendant the Plaintiff claimed that she has succumbed to moral pain and suffering and on this basis she wants the court to avail her of all the prayers that she had averred in her Pleint.
- [9] The second witness for the Plaintiff was an expert witness. He is Mr Michel Leong, a Land Surveyor. Mr Leong evidence was led by the Plaintiff in an attempt for her to make available expert opinion on the existence and extent of the existence of the encroachment. This witness, whose expertise was not challenged, testified that he was first instructed by the Plaintiff in the year 2011 to see whether there was an encroachment on parcel H6440. From his survey he said he discovered that the parcel was encroached by two buildings and that the encroached area was then 125 sqm. According to his evidence the two building are built mostly on parcel H6440 and partially on parcel H1798. Mr Leong produced a plan that he had drawn following this survey that shows the encroachment. It was marked as exhibit P6. He testified on the content of the said plan.
- [10] The witness said that he was instructed a second time by the Plaintiff to do a second survey in 2017, regarding the encroachment. Following the new survey work, he drew a survey plan on the 2nd of May 2017. This time the witness testified that beside the encroachment by the two buildings he noted and drew a further encroachment by a cultivation activity. This new survey plan was produced as exhibit P7. The witness gave his testimony on the content of the plan and he identified the area where he saw the fresh encroachment.
- [11] The second witness called by the Plaintiff was the Registrar of the Supreme Court, Mrs Juliana Esticot, who delegated the Assistant Registrar, Mrs Sumita Andre to testify on her behalf. The witness produced the records; pleadings and the proceedings in the Supreme Court case no C/S 60 of 2018 previously brought by the Plaintiff against the Defendant

based on the same cause of action. These court documents were collectively marked as exhibit P8.

[12] The last witness called by the Plaintiff was Ms Corrine Rose. She is a Compliance Officer employed by the Registration Division. She gave evidence on registered ownership under the provisions of the Land Registration Act. She confirmed that parcel H5355 is registered on the name of the Defendant; that Parcel H6440 is registered on the Plaintiff and that parcel H1798 is registered on one Giselle Daniel Estro.

The Defendant's case

[13] The Defendant also testified in support of his case. In his testimony he says that he bought his land from his brother Remy Nanon and that he and the Plaintiff are neighbors, living on the adjoining parcels H5355 and H6440, respectively. He says that the problems regarding the boundary between them started as a result of the PUC damaging one of the beacons between the two parcels and that it was then that the Plaintiff started making troubles and brought the case to court. The Defendant claims that the Plaintiff would asked the Land Surveyor to come and carry out the survey works whenever he was not present. In his Examination in Chief he denied having trespassed on to the Plaintiff's land and of doing any activities on her land. He says that the Plaintiff has brought him to court out of sheer jealousy and that the land upon which he is cultivating is his.

Submissions

The Plaintiff's submissions

[14] In his written submissions learned counsel for the Plaintiff submitted that the only disputed evidence in the case is the issue of illegal cultivation by the Defendant on parcel H6440, the Defendant having admitted that the two houses that he has caused to be built have been built on parcels H6440 and H1798. In respect of the cultivation, the Learned Counsel submitted that the following establishes the case of the Defendant;

- (1) That from the photographs it can be observed that the cultivation emanates from the structures which the Defendant has illegally built partly on parcels H6440 and H1798.

The said cultivation being closer to the structures erected by the Defendant than to the Plaintiff's house.

(2) The fact that the Defendant has encroached on parcel H6440 by causing the said structures to be partly built on the said parcel add weight and credence to the evidence of the Plaintiff that the Defendant has also encroached on the said parcel by illegally cultivating thereon.

(3) The demeanour of the Defendant whilst being cross examined about the illegal cultivation shows that he was lying.

[15] Regarding the pleadings of the Defendant the Learned Counsel submitted that the Defendant has, contrary to section 71(d) and section 75 of the Seychelles Code of Civil Procedure, not pleaded that he had a lawful right to enter unto parcel H6440; that the structures that have been built on parcel H6440 and on a property belonged to his brother or that the encroachment is bona fide or by mistake; or that only a small portion of land has been encroached upon and that grave injustice would result if the court was to order the demolition of the structures.

[16] Learned Counsel submitted with regards to pronouncements made in judgments given in cases based on the same facts between the same parties, namely *Nanon vs Thyroomooldy SCA 41 of 2009 and Thyroomooldy vs Nanon SCA 01/05*. According to him based on these decisions this court is free to make any orders that it considers fit and that this court is not prohibited from applying article 555 of the Civil Code, if it considers that this article is applicable.

[17] In the alternative, the Learned Counsel submitted that the present case may not meet the conditions which would render article 555 applicable, in that the Defendant has not constructed the buildings partly on Parcel H6440 and partly on his property. The evidence, according to him, has not clearly established that the Defendant has not carried out any construction on his parcel, namely H5355, but instead has constructed the buildings partly on parcel H1798, belonging to Giselle Estro and partly on parcel H6440 belonging to the Plaintiff. According to him the Defendant has neither pleaded nor

adduced any evidence that he had been authorized by Giselle Estro to construct the buildings on parcel H1798.

The Defendant's submissions

[18] It is the Learned Counsel for Defendant submission that evidence shows in no uncertain terms that at no point did owner of H5355 use his parcel of land to encroach onto the Plaintiff's parcel. According to his submission the evidence shows that the encroachment came from parcel H1798 which does not belong to the Defendant. Learned Counsel further submitted that no evidence was adduced as to whether or not Counsel for the Respondent before the Court of Appeal was the owner of parcel H1798 and therefore should have been made a necessary party to the proceedings by the Plaintiff.

[19] In his further submission he accepts the applicability of article 545 of the Civil Code in this case. However, notwithstanding this perceived applicability of this article, Learned Counsel submitted that the Defendant cannot be faulted for any act of encroachment as this article applies with regards to cases where a neighbour builds partly on another's property and the building comes over the neighbour's property from that of the adjoining owner. According to counsel, the Defendant is not the owner of H1798, being the parcel from which the encroachment originates and as such he could not have been the neighbour who build over parcel H6440.

The law

[20] The provisions of the Civil Code that have their relevance in this case are articles 555 and 545 of the Civil Code. These two articles has over the years creates heavy jurisprudence in the area of neighbourhood encroachment, that can be summarized as follows;

[21] When the cultivation; construction; erection; and works has been effected entirely on the property of another, without any intrusion from one property over another, the owner of the encroached property is given a choice under article 555 of the Civil Code to either keep the cultivation; construction; erection and works wholly or partially, minus a sum in compensation or he can asked the trespasser to remove the encroachment at the trespasser's cost.

- [22] When the cultivation; construction; erection and works partially emanates from one property and encroaches unto the property of another. That is when they proceed from one's property and protrudes over that of another. Here the law has provided for the demolition of the intruding cultivation; construction; erection and works through the application of article 545 of the Civil Code. The owner of the encroached property can insist on the removal of the encroachment and the court must accede to this request and cannot compel the encroached owner to accept damages in lieu.
- [23] It has been held that these principles are based on the necessity to protect owners of property against expropriation of property, which can only be done in pursuance to a law and in the public interest under the Constitution.
- [24] In this day and age it is sometimes hard to believe that we can unintentionally build on a neighbouring property. However this is a common occurrence. The challenging nature of the topography of the contiguous land parcels; inadequate or lack of surveyed lands and the lack of boundary beacons are some of the reasons that are given for a neighbour to partially or wholly construct or cultivate on another neighbour's property. However, the law as it is presently stand does not consider the motive that prompted the encroachment to be relevant. Article 545 is applied *stricto sensu*, irrespective of the intent of the defaulting party or parties.
- [25] However, in some civil jurisdictions, such as France, the courts are increasingly, ordering for payment of damages instead of removal of the encroachment under Article 545. This happens when the encroachment has been done in good faith and are minimal and are accidental or where the removal of the encroachment would consist an "*abus de droit*" by bringing about a relatively disproportionate loss and injustice upon the owner who caused the encroachment. This principle was enunciated in Seychelles in the Seychelles Court of Appeal case of *Nanon vs Thyroomooldy SCA41/09 and Mancienne vs Ah Time (2013) SLR 165*.

Issues for determination

[26] I have scrutinized the pleadings and submissions of counsels in this case in the light of the facts of the case. Having done so I consider that the issue that has to be the subject matter of a determination by this court is whether the Defendant encroached on parcel H6440, belonging to the Plaintiff by building and cultivating thereon. Connected with this issue is whether the encroachment came from and emanated from a property of a third party or that of the Defendant and if that be the case, what is the legal implications of an encroachment that emanates from the property of a third party.

Discussions and analysis

Article 555 or Article 545 ?

[27] The learned Chief Justice of the Supreme Court had heard this case before in the case *Janine Thyroomooldy VS Michel Nanon (C/S 60/08)*. He gave judgment in favour of the Plaintiff and against the Defendant. The Defendant appealed to the Court of Appeal on numerous grounds in the Court of Appeal case of *Michel Nanonvs Janine Thyroomooldy (SCA 41 of 2009)*. The Court of Appeal gave judgment in favour of the Appellant and dismissed and reversed the Supreme Court judgment. In the penultimate paragraph of its judgment that court held as follows, “*The learned Chief Justice erroneously applied Article 555 instead of Article 545 which is the correct article of the Civil Code applicable in this case. Such an error in respect of such a fundamental question is fatal; it has vitiated ab initio all the findings resulting from the application of the incorrect article*”.

[28] Accordingly, this court finds that it is bound by the decision of the Court of Appeal. The apex court has heard and made a determination on a point of law on an appeal from the Supreme Court. This Court is subject to that decision in pursuant to article 120 (1) of the Constitution. That finding was the basis of the reason for the decision of that appeal, accordingly this court finds itself legally bound to follow. Though there is no binding precedent in the Constitution, this court finds that another bench of the Court of Appeal would most probably not revisit this decision in view of the clarity of their findings and the manifest error of the Learned Chief Justice. Hence, though the court has been invited to consider otherwise by Learned Counsel for the Plaintiff, I would not seek to reverse

this determination of the Court of Appeal. I accordingly find that the correct article of the Civil Code that will be applicable in this case is article 545.

The encroachment

[29] First and foremost this court has to decide whether or not there is an encroachment. In that respect I find that the following are uncontroverted evidence on record. Parcel H6440 is owned by the Plaintiff; parcel H5355 is owned by the Defendant; Parcel H1798 is owned by Giselle Estro, the sister of the Defendant. Further that the Defendant has built or caused to be built two structures , one in corrugated iron sheet another in bricks and that the Defendant cultivated an area with banana; cassava and pawpaw trees. The exact location of the impugned structures and cultivation are however disputed by the parties.

[30] The Plaintiff testified that the two houses have been built by the Defendant partly on H1798 and partly on H6440 and that a cultivation has been carried out by the Defendant on her property. The Defendant on the other hand denies this fact. However his evidence under cross examination, taken as a whole, is that he does not know whether or not he has encroached on parcel H6440 as he build the two structures prior to the Plaintiff purchasing parcel H6440. Here is some of this testimony in that regards;

Q. *“I put it to you that the two houses which you’ve built on the parcel of Mrs Thyroomoldy you’ve built them without the consent of Mrs Thyroomoldy?”*

A. *When I was building the house she was not how I get the consent of Mrs Thyroomoldy. This is a family land he received a small part of that land so you know when you received a small and she wants a bigger part of it. Because where my brother sold her she has built a big wall.*

Q. *“Now I put to you also that where you had been cultivated on her land, growing and cultivating the cassava trees , the papaya trees’ banana trees you have done so without her consent?”*

A, *“When she came I was already there on the land how can I ask her for consent when I was already there living on that land*

Q, *Now I put it to you that where you had been cultivating on her land growing and cultivating the cassava trees, the papaya trees, banana trees, you have done without her consent*

A. *When she came I was already there on the land how can I ask her for consent when I was living there.*

A. *In fact Mr Nanon you started encroaching on her parcel building the two houses and cultivating on the Parcel around year 2004, 2005 correct it was during that time that you started illegal encroachment?*

A, *That I don't know I was already there when she came to live on that land. I don't know if it was in 2004, 2005 or 2006.*

Q, *In fact you did MrNanon after the judgment of the Court of Appeal in April 2011 you took liberty to now further extend your encroachment on to parcel H6440 this is what you did , is that correct?*

A, *That I don't know because I don't really know anything about papers like I've already stated earlier when she came to live on that property I was already there living on the land”*

[31] As regards the plantation, the Defendant claims that the plants found on his property are planted by him, whilst those near on the Plaintiff's property have grown up by themselves and not of his doings. The Defendant was cross examined on the content of exhibit P5, which shows the plantation. The following proceedings are relevant in that respect;

Q. *“ So this is your house?*

A. *Yes the one shown with red roof it is my house.*

Q. *Now this is a clear picture, we see in front of a corrugated iron house we see a number of plants. We see banana tree, papaya trees. We see what I will see look like cassava trees is that correct?*

A, *Yes I can see.*

Q, *What are these plants?*

A, *I only see papaya and cassava tree.*

Q, *And who planted these trees?*

A, *There are some that was planted by me but there are some that grow by itself.*

Q, *The cassava plants from the photographs when one look at it, it is clear they are being well maintained and I will be correct to say that you are the one who planted those cassava plants and you are taking care of them?*

A, *No you have been paid to come and tell this. These cassava grew by themselves the only I have shown was it the one I have planted.*

Q. *You are telling the court that these cassava plants have not been planted by you but they grow by themselves? This is what you are telling the court?*

A. *The one you are showing to me it was not planted by me it just grew by itself. But as for the papaya trees and the banana trees are concerned I was the one who planted it. But there are some near my house, the cassava trees I was the one who planted it.”*

[32] The Defendant pleads of ignorance of whether or not the encroachment was his doing goes contrary to the averments in his own Statement of Defence in his evidence in chief in which he denies the encroachment categorically and accusing the Plaintiff for blaming him out of sheer jealousy.

[33] To my mind, the evidence of the Defendant taken as a whole is evasive; inconsistent and incoherent. His demeanor shows him to be a person who is trying in vain to try and hide his misdeed. I find that he did cultivate onto parcel H6440. The plants found on parcel H6440, as shown by exhibit P5, shows that they have been cultivated. Their state give the impression that they have been planted on purpose and had been subject matter of some attention; tender and care. They do not show them as being wild growth. They have been

planted. This support the evidence of the Plaintiff. Moreover, the only person planting the same plants, such as cassava, is admittedly the Defendant himself. Albeit that he says that he is only planting on one side of the boundary. I find this hard to believe, as the plantation on H6440 appears to be the natural extension of the plantation outside the boundary of H6440. I therefore find that it is more probable than not that it would be the Defendant himself who would been cultivating on that part of the Plaintiff's property.

[34] As regards the two encroached buildings, I find it was the Defendant that did caused the two structures to be built on parcels H6440 and H1798. From his evidence and his demeanour it is my opinion that he took it upon himself that he could assume a greater right to occupy and developed the said parcels including that of the Plaintiff as he was there in occupation before the Plaintiff came to live on parcel H6440. The fact that this parcel was formally that of his brother appear to have further embolden his enthusiasm. He looked at the Plaintiff as an intruder that has of late come interfere into a family circle.

[35] Furthermore, the court benefitted from an expert evidence in this case. Mr Michel Leong drew a survey plan in 2011 and it shows an encroachment by two buildings on parcel H6440 and to an extent of 125 sqm. It is his evidence that those two structures have been built mostly on parcel H6440 and partially on H1798 and that this encroachment is reflective in another plan that he had drawn for the Plaintiff in 2017. On that second plan he had also indicated a fresh encroachment in the form of a cultivation and to him the total area of the encroachment has now grown to 625 sqm. From the evidence of Mr Leong I am satisfied that at least as far as from the year 2011 an encroachment existed on parcel H6440, in the form of two buildings that had been partially built unto parcels H6440 and H1798. This intrusion got larger by 2011 with the addition of a plantation which was carried out from H1798 on to H6440.

[36] Accordingly, I find as proved on a balance of probabilities that the Defendant has built or caused to be built two buildings straddling parcels H6440 and H1798, partially on the latter and mostly on the former. I am further satisfied that as at least from the year 2011

the Defendant started to cultivate the Plaintiffs land with several trees including cassava trees.

[37] I further find that the Defendant did not made used of his property to effect this encroachment but instead used the property of Giselle Estro, his sister, in order to encroach unto H6440. To my mind the constitutional nature of the right being deprived of by the Plaintiff through the action of the Defendant coupled with the character of article 545 of the Civil Code, makes the fact that the intrusion came from the property of a third party to be irrelevant. If anything, I am of the view that it further aggravates the case of the Defendant. By making used of a third party property the Defendant is shown to have acted callously with little regards as to whether through his action he was bringing a third part into disrepute.

[38] The Defendant in this case has not pleaded bonafide encroachment. He has not pleaded de minimis encroachment or otherwise that the order of removal of the encroachment by this court would consist of an “abus de droit” and would cause grave injustice to him. The court would accordingly, not consider such defences as this will be ultra petita. At any rate the facts of this case does not show that these mitigating circumstances are present in the case.

Final determination

[39] In my final determination I therefore make the following orders;

- (a) That the Defendant has encroached unto parcel H6440 belonging to the Plaintiff by building two structures and cultivating a plantation thereon and that the encroachment is of 625sqm.
- (b) I order the Defendant to remove the two structures and the cultivation that are encroaching unto parcel H6440 within six months from this judgment.
- (c) I issue a Prohibitory Injunction prohibiting the Defendant from carrying out any other or further such encroachments.

(d) I order the Defendant to pay to the Plaintiff Seychelles Rupees fifty thousand (SR50,000) as compensation with interest and cost of this action within 30 days of this judgment.

(e) The structures and cultivation that the Defendant needs to remove from the Plaintiff's property is attached herewith to this judgment, on exhibit P7 and are shaded in orange.

(f) I rule accordingly

Signed, dated and delivered at Ile du Port on 6 December 2019

Govinden J