

SUPREME COURT OF SEYCHELLES

Reportable/Not Reportable / Redact

[2020] SCSC139

CS31/2016

In the matter between:

JEANETTE ALBERT & ORS

(rep. by Alexia Amesbury)

Plaintiffs

and

DIDIER ETHEVE & ORS

(rep. by Elvis Chetty)

Defendants

Neutral Citation: *Albert Jeanette & Ors v Etheve Didier & Ors*(CS 31/2016) [2020] SCSC 139
(20 February 2020).

Before: Andre J

Summary: Right of way – Articles 686, 701, 1382 (1) of the Civil Code of Seychelles
Act (Cap 33)

Heard: 4 December 2019

Delivered: 20 February 2020

ORDER

The following Orders are made:

The plaint is partially granted with costs and the defendants are jointly and severally liable.

JUDGMENT

ANDRE J

Introduction

- [1] This Judgment arises out of a plaint which concerns a dispute between family members regarding a right of way. The parties are all related, Jeanette Albert (“first plaintiff”) is the sister of Didier Emmanuel Etheve (“first defendant”), Leonel Jean Etheve (“second defendant”), and Flavien Etheve (“third defendant”) (cumulatively referred to “the defendants”), and France Albert (“the second plaintiff), is married to the first plaintiff. Originally, the land in question was owned by the parties’ father (and father-in-law of the second plaintiff), Philip Etheve, who is now deceased (“the deceased”). Prior to his passing away, the deceased divided the land, Title PR1503, into plots which he then transferred to his children (Exhibit P1).
- [2] The first plaintiff’s property, Title PR5116 was one such plot. It is the plot furthest away from the road and faces the sea. The plaintiffs subsequently subdivided the plot into two namely, PR6273 and PR6274 (cumulatively referred to as ‘the property’), on which they built several units.
- [3] There is a right of way of three meters wide which runs down the side of each of the plots, making each one accessible to both the road at one end and the beach at the other. This right of way was provided for by the deceased when he transferred the plots to his named children. In 2015, a dispute arose regarding the right of way which unfortunately was not resolved and it is now the subject matter to be adjudicated upon by this Court.

Plaintiff’s case

- [4] The plaint filed on 14 April 2016 clearly illustrates the background to the subdivision of the property of the deceased and the provision for a right of way. The plaint avers that on 30 November 2015, the defendants illegally blocked the right of way by unloading a pile of material (crusher dust/macadam) on the driveway. When this was removed, the plaintiffs’ boats owned jointly or severally by the defendants or their servants/agents were left in the right of way. The plaintiffs additionally aver that the defendants trespassed and damaged the plaintiffs’ property on the night of 30 November 2015, and damaged the boundary wall being constructed by the plaintiffs.

- [5] The plaintiff seeks an Order from this Court that the defendants remove the boats from blocking access to the property forthwith. The plaintiff also sets out the particulars of the alleged loss and damage suffered by the plaintiffs, and requests that the defendants be ordered to pay for the same accordingly. A further request is made for any other Orders that this Court deems fit.
- [6] It is to be noted at this juncture that the Court in the interim granted an Order upon a request of the plaintiffs ordering the defendants to remove the boats blocking the right of way pending the hearing of the merits of the case and said Order is dated 28 April 2016.

The Defence

- [7] The defendants through their filed statement of defence of 2 November 2016, avers that the property of the plaintiffs is not bound by the high tide mark but rather borders on its eastern side to a parcel of government land (public domain). The defence denies the allegations in the plaintiff that the defendants have illegally blocked the right of way. The defence also denies the other allegations in the plaintiff regarding trespass and damage to property. The defence seeks that the Court dismisses the plaintiff with costs.

Issues to be determined by Court

[8] The following issues are to be considered by this Court in this matter, namely, (1) whether the defendants deposited crusher dust in the right of way; (2) whether the defendants left boats in the right of way; (3) whether the defendants caused damage to the plaintiffs' boundary wall; and (4) whether the defendants trespassed and/or caused damage to the plaintiffs' property. The issue of the groin and whether the plaintiffs have acquired the land between the sea and the property, which previously was public domain, is also addressed at the outset.

Analysis of evidence

(1) Whether the defendants deposited crusher dust in the right of way

[9] With regards to the first issue of determination (supra), it is not disputed that on 30 November 2015 a truckload of macadam/crusher dust was deposited on the right of way. Photos presented to the Court taken by the second plaintiff shows this and also indicates that the person responsible was Mr. Flavien Etheve (third defendant) (Exhibit P3), who admitted the same. According to the third defendant, the crusher dust was put there by him to lay out after work. After being called by the police about the obstruction, the material was moved to the side to allow cars to pass. However, when he came back the dust had been removed.

[10] There was certain issues regarding the amount of time that the pile was left in the right of way. The first plaintiff gave evidence that the crusher dust was there for more than a day, though her evidence was vague. It is clear on the basis of the evidence adduced by both parties that the crusher dust was removed within a day. This is consistent with the particulars in the plaint which states that, "*the second plaintiff avers that on 30th November 2015, the defendants placed or caused to be placed a truckload of crusher dust/ macadam, illegally blocking the access to 'the property'. Soon thereafter so as to facilitate access for the construction workers and themselves, the plaintiffs aver that they managed to remove the macadam/crusher dust and cleared the access road. But later on the same day, 30th November 2015, around 9.30pm, 3 boats owned jointly or severally by the defendants, their servants and/or their agents were unlawfully and maliciously placed on the access road cutting off the plaintiffs, and the workers, access to the property completely.*"

[11] The fact that the pile of crusher dust was removed within a day is supported by the testimony of Mr. Flavien Etheve, who complained to the Court that the plaintiffs had taken his crusher dust without cause.

[12] The Court thus finds that the crusher dust was deposited in the right of way thereby interfering with the plaintiffs' use of it, but only for a short time, that is within a matter of hours.

(2) Whether the defendants left boats in the right of way

- [13] With regards to the second point for consideration with respect to the boats left on the right of way, again, it is not disputed that boats were left in the right of way on or around 30 November 2015. This is supported by photographs produced by the second plaintiff (Exhibit P4). However, the issues arising are namely, firstly, the timing that the boats were removed after the Court Order, so the maximum amount of time that they were in the right of way is from around 30 November 2015 until April 2016,
- [14] Secondly, with regards to the ownership or management of the boats. One of the boats, Beuchat, belongs to Flavien Etheve, which was admitted in his evidence. Another boat belongs to one Yvon Esther, (Exhibit D2). The only other defendant to give evidence was Didier Etheve (first defendant), and he testified that he did not own any boats. It is not clear therefore who owned the other boats. Nevertheless, there is evidence, which is accepted by the Court, that the defendants or their agents removed the boats after the Court Order. This indicates that the defendants knew who owned the boats or who had left them there, even if they were not theirs. The Court also accepts the testimonial evidence of the plaintiffs that the son of the first defendant prevented the second plaintiff from removing the boats when he tried to do so. The Court thus finds that in addition to at least one of the boats being owned by the defendants, the defendants were responsible for the parking of the boats in the right of way.
- [15] Thirdly, the question in issue is whether the boats obstructed the right of way. The boats were left in the driveway so that the plaintiffs could not access their property. Flavien Etheve testified that his boat was left on the side of the right of way, so it was not obstructing the right of way, that is, a car could still pass. This is not strictly clear from the photographs produced as exhibits. Even if a car could pass, the parking of the boat there constituted an interference with the right of way. Moreover, at least some of the boats were obstructing the right of way. It is thus sufficient in light of the above finding and the Court finds that the defendants are responsible for obstructing the right of way in respect of the boats.

(3) Whether the defendants caused damage to the plaintiffs' boundary wall

[16] With respect to the third issue for consideration, namely whether the defendants caused any damage to the plaintiffs' property, it is to be noted that it is not at issue that the brick wall built by agents of the plaintiffs was damaged by the defendants on at least one occasion. (Exhibit P5), shows clearly the extent of the damage to the wall. The evidence supports a finding that the wall was broken down by Lionel Etheve (second defendant) once (admitted by defendants) and another time by Flavien Etheve as admitted in evidence. Flavien Etheve testified that he broke the wall because it was being built on the right of way. Even if that were so, which it doesn't appear to be the case, this would make it a matter for the planning authorities, not the defendants. The Court thus finds that the defendants have intentionally caused damage to the wall constructed by the plaintiffs on at least two occasions.

(4) Whether the defendants trespassed and/or caused damage to the plaintiffs' property.

[17] With regard s to the fourth issue of determination, namely the alleged trespass and property damage, namely in damaging and cutting off electrical wires and windows broken on the plaintiffs' property, the evidence adduced by the plaintiffs establish that, the property suffered damage, including by having its electrical wiring cut and stones thrown through the front window. Photographs of the damage were presented to the (Exhibit P6) which clearly illustrates the electrical wiring of the house cut and rocks thrown through the window. The second plaintiff testified that Lionel Etheve admitted directly to him to do these things when he was drunk, but he could not recall when exactly. The defendants present, Flavien and Didier Etheve, both, denied breaking the windows or cutting the wires.

[18] Based on the above illustration of evidence adduced by the plaintiffs with respect to the alleged trespass and damage, this Court does not consider that it has enough evidence before it to make a finding on this matter. The first plaintiff herself admitted she was not sure who caused the property damage. For instance, counsel for the defendants cross-examined the first plaintiff if she knew who cut the wiring and she could not be sure that it was her brothers but she said she had no other 'enemies'. This is not sufficient to satisfy the required standard of proof.

[19] With regards to the allegations of trespass, the evidence of the first plaintiff was that Lionel Etheve did not trespass, and Flavien Etheve did so only very rarely. The allegation appears to be primarily directed, therefore, at Didier and Stephan Etheve (his son). Didier Etheve admitted that he had trespassed by crossing over the rock armoryng, or where that is not possible, by the wall. The Court thus finds that the defendants have trespassed, though no property damage (aside from to the wall) has been shown to have been caused as a result.

The issue of the groin and whether the plaintiffs have acquired the land between the sea and the property, which previously was public domain, is also addressed at the outset.

- [20] The issue of the groin was not raised in the pleadings of either party, but arose at the locus in quo, hence the issue is not directly relevant to determining the legal issues properly before the Court as determined above. However, for the sake of completeness, the Court makes the following findings based on a careful examination of the evidence before it.
- [21] The area in front of the plaintiffs' property used to be the public domain. It is common knowledge, however, that this area and the property itself has suffered from erosion.
- [22] To protect the property, the Court accepts that the plaintiffs created a rock armory. This costed about SR50,000/-, which was paid for by the plaintiffs. The application dated 23 May 2011 for permission from the Town and Country Planning Authority for rock armoring of PR6570/- is (Exhibit P11). The plaintiffs also reclaimed the property that was public domain from the government. This is confirmed by (Exhibit P10), which contains a letter of approval dated 29 April 2016 regarding the land reclamation of Parcel PR6570 from the Ministry of Land Use and Habitat by the plaintiffs. The letter notes that, *'Before we can finalize the registration of the above property under your name you are requested to pay a fee of SR98.00 ... at the above Ministry...'*. Attached to the letter is a receipt of payment from Mr. Albert for SR98.00, an approved plan of 16 March 2016 and a Notice of First Registration for the parcel (PR6570) in the names of the plaintiffs, dated 20 June 2016. These documents appear to be originals.
- [23] The Court accordingly, based on the above analysis of the evidence on records, finds that the land in front of the property, Title PR6570, is not public domain, but is owned by the plaintiffs, having been legally reclaimed by the plaintiffs from the government.

Legal analysis and damages

- [24] The plaintiff claims for loss and damage amounting to SR510,000/-. For the reasons set out below, the Court is not in a position to grant this sum of damages, awarding instead a smaller sum. It is noted at the outset, that damages in cases such as this are very fact-specific. The following Orders are therefore based on the evidence before the court.
- [25] The right of way subject matter of this case was established by title and is not disputed. The law relating to rights of way is set out in the Civil Code ("the Code") more particularly Article 686 thereof.

- [26] Regarding the crusher dust pile and the boats, Article 701 of the Code provides that, *'The owner of the servient tenement shall do nothing which may tend to impair the use of the easement or to render it more inconvenient.'* The evidence reveals clearly, it is that the defendants have interfered with the right of way by making its use more inconvenient for the plaintiffs. Specifically, the defendants interfered with the right of way by depositing material and leaving boats in the right of way. In respect of this interference of the right of way, the plaintiff seeks an order for damages of SR50,000/- for loss of use, though counsel for the plaintiff noted in Court that the obstruction is not continuing, and invited the Court to adjust the figure accordingly. The right of way was obstructed by the crusher dust pile for less than one day, and by the boats from around 30 November 2015 until the court order of 28 April 2016, so for around 5 months. In these circumstances, the Court considers that damages of SR5,000/- are reasonable.
- [27] The plaintiff also seeks damages of SR150,000/-, for delays in the completion of construction works, presumably also owing to the problems with the right of way. The first plaintiff submitted that the disruptions caused by the loss of the right of way delayed their building project, which ended up taking 4.5 years to build when it should have taken 2.5 years. However, her testimonial evidence was that the building started in 2015 and it was fully completed in September 2018, which is less than 4.5 years. Nevertheless, the obstruction was only for five months of the period of construction, so clearly the delays were not entirely attributable to the obstruction. She admitted this, but she said that most of the delay was attributable to the trouble caused by her brothers. The Court does not accept this contention. Given the period of the disruption, it cannot have been the main reason for the delays. The Court therefore grants a sum of SR50,000/-.
- [28] Regarding the damage to the wall, Article 1382(1) of the Code provides that, *'Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.'* Sub-Article 2 on its turn, further stipulates that, *'Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest'*. Clearly, the plaintiffs are entitled to damages. The plaintiff seeks SR150,000/- for the broken wall and damaged building blocks, but details as to how the plaintiffs arrived at this figure were not provided. In the absence of this, the requested amount seems excessive. The Court grants an award of SR50,000/-.
- [29] The plaintiff also sought damages for the broken window SR15,000/-, and for illegal trespass SR45,000/-. In light of the findings above, the former is not addressed. An award of SR2,500/- is awarded for the illegal trespass, given the findings above which indicate that the trespass as proven was minor.

[30] Finally, the plaint also seeks moral damages of SR100,000/-. The first plaintiffs testified that she suffered depression and had to go to Australia for help, though for what reason specifically the Court is unclear. She described the stress and hurt she has suffered as a result of what her brothers have done to her. The impression gleaned from the testimonial evidence and site visit is that the plaintiffs have been subject to ongoing trouble on the part of the defendants and their children. Awards of moral damages are not usually high, a perusal of the moral damages granted in personal injury claims attests to this. That being so, the Court considers it appropriate to award SR10,000/-.

[31] The plaintiffs abandoned the prayer to order the removal of the boats as they were moved after the initial Court Order in 2016 (supra).

Conclusion

[32] In the end result, the Court orders that the defendants shall pay to the plaintiffs as follows:

- (a) SR5,000/- ,for loss of use of the right of way;
- (b) SR50,000/-, for the delay to the completion of construction work;
- (c) SR50,000/- for damage to the wall;
- (d) SR2,500/- for the illegal trespass; and
- (e) SR5,000/- for moral damages.

Making it a total of S.R. 112,500/- as damages awarded in favour of the plaintiffs.

[33] The defendants are jointly and severally liable for the above damages with costs.

Signed, dated and delivered at Ile du Port on the 20 February 2020.

ANDRE J