

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 411

CS 46/2015

In the matter of:

LESLIE ALLY

(rep. by Mr. N. Gabriel)

Plaintiff

and

DAPHNE JULIE

(rep. by Mr. E Chetty)

Defendant

Neutral Citation: *Ally v Julie* (CS 46/2015) [2020] SCSC 411 (10 July 2020).

Before: Andre J

Summary: Encroachment – Applicability of the *de minimis non curat lex* principle

Heard: 10 June 2020

Delivered: 10 July 2020

ORDER

The following Orders are made:

- (i) The plaint is granted with conditions;
 - (ii) The defendant shall pay to the plaintiff the sum of SCR30,000 (Thirty thousand Seychelles Rupees)
 - (iii) Both parties shall bear their own costs.
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JUDGMENT

ANDRE J

Introduction

[1] This Judgment arises out of a plaint filed on 27 May 2015, wherein Leslie Ally (“plaintiff”), prays for orders that Daphne Julie (“defendant”), make good loss and damages in the sum of Three Hundred Thousand Seychelles Rupees (SCR300,000/-) with

interest and cost of the action arising out of an alleged encroachment on his land, name title number H 4413, by building a part of her house and installing sanitary appliances thereon, and also part of a retaining wall on an alleged right of way.

- [2] It is not clear from the pleadings who is the proprietor of the property on which the wall has allegedly encroached upon.
- [3] The plaintiff avers that the defendant was asked to demolish the alleged encroachment and failed to comply. As a result, the plaintiff is claiming Two Hundred Thousand Seychelles Rupees (SCR200,000/-) for loss of use of property, and Ten Thousand Seychelles Rupees (SCR 100,000/-) for moral damages for inconvenience, stress, trauma, verbal abuse, and depression. The plaintiff is also moving the court for a mandatory injunction against the defendant compelling her to refrain from further encroachment on the plaintiff's property.
- [4] The Defendant by way of statement of defence of 11 November 2015 avers that the structures were erected on the plaintiff's property by mistake and without any mala fide intention. It is further averred that the encroachment is *de minimis* and that, (i) the encroachment by the defendant's house cannot be removed without compromising the entire structure of the house and rendering the house uninhabitable, and (ii) the sanitary appliances constitute *de minimis* encroachment and cannot be moved to another location.

The Evidence

- [5] The Plaintiff testified and produced plans proving that the wall was built some (then) 10 years prior and encroaches partly on the road reserve (access reserve). That the access reserve appears to not be on his property. He did not deny that the wall does not prevent the use of the road reserve but stated that it causes inconvenience to him.
- [6] It is the plaintiff's evidence that when he purchased the property sometime in 1996 or 1997, the defendant was already on her property and her house was being constructed.
- [7] The plaintiff conceded that the encroachment extends to around one meter over his property and that he does "*not want her to demolish h house because it is not easy to demolish a house*", but she should remove the wall and pipes, the discharge from which

allegedly disturbs him. He also testified that he does not insist that defendant pays the Three Hundred Thousand Seychelles Rupees (SCR 300,000/-) claimed but she can cover the cost of what he spent to bring the suit, which he estimates to be Thirty Thousand Seychelles Rupees (SCR30,000/-).

- [8] Vincent Dubois and Lucianne Antoin, witnesses called on behalf of the plaintiff, testified that they are both neighbours of the parties. They both testified that there was an encroachment on the alleged right of way but no evidence of a legal or registered easement was produced by the plaintiff or these two witnesses.
- [9] Christopher Mellon, previously an Enforcement Officer with the Planning Authority testified that he was commissioned in 2014 to do some work concerning a complaint lodged by the plaintiff to the Planning Authority.
- [10] The defendant testified that she did not intentionally encroach on the plaintiff's property. She also testified that it was not her who built her house but the Seychelles Development Corporation (SHDC) and that she did not build a retaining wall. Further, she only found out about the encroachment when a beacon was placed at the side of her house and she was informed by the surveyor that there was a small encroachment.

The Law

- [11] The Seychelles Court of Appeal formulated the law regarding encroachment in the case of *Mancienne v Ah-Time* [2013] SLR 165 wherein it was held that-

[17] Article 555 of the Civil Code only applies to constructions entirely erected on someone else's property. It has no application where constructions are partly built on someone else's property. Article 545 applies to such cases of partial encroachments. The encroached owner can insist on the removal of the encroachment and the court must accede to this demand and cannot force the encroached owner to accept damages in lieu. Good faith or mistake does not excuse an encroachment and the court cannot take these into account.

[18] Where grave injustice will result from an order for demolition, the court will not so order, so long as the encroacher can show that he acted in good faith and within the law. Instead, the court will order damages commensurate with the encroachment. If the encroached owner insists on demolition in such a case, the encroacher may plead abuse of right on the part of the encroached owner and seek an order that the encroached owner be compensated in damages for the encroachment.”

[12] In the case of ***Dogley Josene Michel v Loze Brigitte & Anor (CS 21/2015) [2019]*** which also involved an encroachment of approximately one metre, the Court found that in the circumstances, the *de minimis* or negligible rule as enunciated in ***Mancienne v Ah-Time [2013] SLR 165*** and ***Pillay v Pillay (CS 59/2012) [2016] SCSC 171*** applied.

[13] In the ***Pillay case***, the Court held that the ‘*de minimis*’ principle -

“applies to all civil, criminal and even to constitutional claims, and its function is to place outside the scope of legal relief the sorts of injuries that are so small that they must be accepted as the price of living in society peacefully sharing our resources with our neighbour for a common good, rather than making a litigation out of it. In my view, judges will not and should not sit in judgment of extremely minor transgressions of the law particularly, when it is committed by one family member to the other - as it has happened in the instant case for the sake of administering mere technicality of the law unless justice demands otherwise. Law ought to be steered towards the administration of justice rather than the administration of the letter of the law. In doing so, the Courts cannot remain oblivious to the moral roots of the law, equity and good conscience and resort to the mechanical application of the law simply focusing on its niceties and technicalities. Any reasonable man, who is not connected to the law but to equity and good conscience would deem cases of this nature an utter waste of time and resources for all concerned”.

- [14] The Court in **Pillay** further held that compensation in cases of encroachment that fall within the ‘*de minimis*’ principle should be “*of a token nature*”.
- [15] The maxim of *de minimis non curat lex* is inapplicable to the positive and wrongful invasion of another's property or person. However, as the Court noted in **Thyroomooldy v Nanon (CS 05/2013) [2019] SCSC 1129**, citing the Seychelles Court of Appeal in **Nanon vs Thyroomooldy SCA41/09** and **Mancienne vs Ah Time (supra)**, 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 is minimal and or accidental or where the removal of the encroachment would consist of an “*abus de droit*” by bringing about a relatively disproportionate loss and injustice upon the owner who caused the encroachment. Therefore, where the encroacher has acted in good faith within the rules of construction and without breaking the law, and where demolition would cause great hardship, the insistence of the owner of the land in requesting demolition and refusing compensation may be deemed an abuse of right.
- [16] In **Mancienne (supra)** the Court further found as follows-

“Post-Nanon, the exception to the rule that demolition should be ordered in all neighbour boundary encroachments may be stated to be as follows: where the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, account taken of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher, the Court should, as an exception mitigate the consequences by an award of damages instead of a demolition. Nothing short of that would suffice. For the encroacher to escape the guillotine of article 545, he should show that, in refusing a compensation for the negligible encroachment and insisting on a demolition order in all the circumstances of the case, the owner is making an abus de droit.”

Legal analysis and discussion of evidence

- [17] In this matter, the defendant accepts that she has encroached on the plaintiff's property. She admits that the encroachment is minimal and was done without malice. The evidence adduced by both parties, in this case, shows that the encroachment must have taken place within the view and knowledge of the owners. The plaintiff testified that when he purchased the property there were no objections raised by any co-owners when the access road was overtly being built over a period of time before its completion. It was only after the access road was completed that the encroachment caused by building this access road became an issue.
- [18] The encroachment of the defendant's house on the plaintiff's property occurred before or around the time that the plaintiff purchased the property, around which time the defendant's house was being constructed. According to the defendant, the house was constructed by SHDC. In the circumstances, it is quite plausible that she had not been aware of the encroachment until much later. The plaintiff, as per the Plaint, brought this encroachment to the defendant's attention in 2014 and averred that he had only become aware of it a few months prior to that. However, the parties' testimonies suggest that the encroachment has been present for as long as the parties have occupied their respective properties. It seems improbable, but not impossible, that since the plaintiff only bought and began construction on his property after the defendant did hers, and that he had been oblivious to the encroachment for as long as he claims to have been. Further, the fact that he only raised this with the defendant in 2014, and the suit was brought in 2015, sheds doubt on his claim for the inconvenience.
- [19] With regards to the retaining wall alluded to in the plaint, the defendant denies having built the retaining wall. There is a lack of clarity as to whose land that the retaining wall has encroached on. An allusion is made to a right of way, but it also appears that the retaining wall has encroached on a reserve parcel and possibly a public access. In the absence of any evidence of a registered right of way and a claim from the actual owner, or proof that the defendant built the retaining wall, the latter should not be made to bear the cost of removing the retaining wall. In view of the lack of evidence on this, damages should also not be awarded to the plaintiff for this.

Conclusion:

- [20] Since there is no contention as to the existence of the encroachment, the issue to be decided upon is whether the alleged encroachment in the instant case falls within the scope of *de minimis* rule in law.
- [21] Both parties are in agreement that the encroachment extends to approximately one metre on the plaintiff's property. The plaintiff is not insisting on the removal or demolishing that part of the defendant's house that encroaches his property, so there seems to be no agreement that an order for removal would cause disproportionate loss and injustice to the defendant, as per the test in ***Mancienne (supra)***. The defendant also maintains that the sanitary facilities cannot be relocated either.
- [22] It is evident, therefore, that based on the analysis as illustrated that the *de minimis* rule does apply in this case and that the plaintiff has not proved any significant inconvenience or loss of enjoyment of his property.
- [23] Further, it is also evident that the plaintiff has not proved any stress, trauma, verbal abuse, and depression as claimed under the heading of moral damages in the plaint. Claims under these counts are therefore not granted.
- [24] Since the plaintiff has indicated in his testimony that he would be willing to accept compensation for the encroachment in the amount 10% of the amount claimed given the circumstances of this case, this sum should be awarded be as per the *de minimis* principle, and is "*of a token nature*".
- [25] This Court court, therefore, grants an award of Thirty Thousand Seychelles Rupees (SCR30,000/-) as compensation to the plaintiff and orders that both parties shall bear their own costs.

Signed, dated, and delivered at Ile du Port on the 10th day of July 2020.

ANDRE J

Judge of the Supreme Court