SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC ...9
CS 22/2019

In the matter between:

LYDIA SINON **Plaintiff**
(rep by Mr. N. Gabriel)

and

AQIN WANG **Defendant**
(rep by Mr. G. Ferley)

Neutral Citation: *Sinon v Wang* (CS 22/2019) [2021] SCSC ...9... (18 January 2021)
Before: Andre J
Summary: Claim of damages – Encroachment rule
Heard: 4 December 2020
Delivered: 18 January 2021

ORDER

The following orders are made:

(i) The plaint is partially granted as follows.
(ii) The Defendant is to pay to the Plaintiff the sum of Seychelles Rupees Ninety-five Thousand (SCR95,000/-) as compensation for the encroachment on her property namely title No. H 3125;
(iii) No award as to moral damages is made for reasons given;
(iv) No demolition order is granted for reasons given; and
(v) Costs are awarded in favour of the plaintiff.

JUDGMENT

ANDRE J

Introduction

[1] This Judgement arises out of a Plaint of 29 January 2019 by Lydia Sinon (Plaintiff) as against Aqin Wang (Defendant), wherein the plaintiff is claiming the sum of Seychelles Rupees One Million (SCR1,0000,000/-) as loss and damages for alleged loss of use of

property, moral damages for inconvenience, stress, trauma, and depression arising out of an alleged encroachment of her property namely, title H3292 by the Defendant.

[2] The Defendant by way of statement of defence of the 4 April 2019 admits the encroachment but avers that it happened inadvertently with no bad faith on her part and denies liability as claimed but that she is willing to pay to the Plaintiff current market value for the small part of the Plaintiff's property on which her wall stands.

Plaintiff's case

[3] The Plaintiff is the owner of land parcel title No. H 3125 and testified that she purchased the land from the Government of Seychelles in 1995 but nothing has been constructed on the land to date.

[4] That on a date unknown to her, she discovered that a wall was being built across the boundary of her land, which adjoins the property of the defendant, namely, land parcel H 3192. She then did the necessary to contact the Defendant and requested compensation be paid to her for the said encroachment.

[5] She further testified that she had asked her brother, one Mr. Patrick Sinon, to organize and negotiate that a sum of Seychelles Rupees One Million and Three Hundred Thousand (SCR1,300,000/-) as compensation.

[6] The Plaintiff testified that she further contacted the Planning Authority to enquire as to whether or not the Defendant has permission from the Planning Authority for the said encroached wall. There were no records that the Planning Authority had authorized the construction of the wall.

[7] She testified that she then requested a land surveyor namely, Mr. Michel Leong, to compile a report on the encroachment and in that report, the extent of the encroachment was 53 square meters and valued at Seychelles Rupees Ninety-five Thousand (SCR95,000/-). She, however, testified that she was claiming more than the valued amount because her son who is studying in Australia is planning on building a house on the land and she wanted to be free of all encumbrances so that they can get the full use and potential of the land, hence claiming Seychelles Rupees Nine Hundred Thousand

(SCR900,000/-) for loss of use of the property and Seychelles Rupees One Hundred Thousand (SCR100,000/-) for moral damage of inconvenience, stress, trauma, depression plus the demolition of the encroached part. Also, the Plaintiff is claiming for a mandatory injunction compelling the Defendant to refrain from further encroachment.

[8] Mr. Patrick Sinon, the Plaintiff's brother testified on her behalf also in a gist that he was the one undergoing negotiations with the Defendant for compensation. That after he had suggested the amount of Seychelles Rupees One Million and Three Hundred Thousand (SCR1,300,000/-), the defendant refused and instead offered the sum of Seychelles Rupees One Hundred Thousand (SCR100,000/-). However, the plaintiff did not accept this counter-proposal of the defendant.

Defendant's case

[9] The Defendant testified that the overstepping of her boundary was done inadvertently by her contractor in 2001 and that she did not act in bad faith and that she is willing to pay the sum of Seychelles Rupees Ninety-five Thousand (SCR95,000/-) as quantified by the Surveyor of the Plaintiff.

[10] Defendant testified further, that she purchased her property in 1996, and for approximately 20 years no one had approached her to tell her about any issues relating to an encroachment.

[11] She further testified that in 2001 no planning permission was required for the construction of a retaining wall and that is why there is no record to that effect. She accepted that the encroachment exists, however, she insists that it was not done in bad faith and the area encroached was only 53 square meters.

[12] To ascertain the extent of the encroachment, the court held a locus in quo and neither the Plaintiff nor her Counsel were present albeit notified. It was found on locus that there was an encroachment by a wall as averred by the Plaintiff and admitted by the Defendant and it was observed that the wall was at the boundary of the Plaintiff's land securing the house of the Defendant, hence demolition would cause gross risk to the structure of the Defendant's existing house on her property. The Plaintiff's land (supra) is vacant and

used as a vegetable plantation and the encroachment, noting its location on the property, does not impede any future development that may be anticipated by the plaintiff as testified in evidence.

Position of the law regarding the question in controversy

[13] The provisions of article 1384 of the Civil Code provides that, *"a person is liable for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody"*,

[14] Further, article 1149 of the Civil Code provides directly relevant to moral damages that, *"damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss of any of the amenities of life."*

[15] Now noting the above principles relating to liability for damages, directly linked to the current matter are the provisions of articles 545 and 555 of the Civil Code providing as follows:

> *Article 545:*
>
> *"No one may be forced to part with his property except for a public purpose and in return for fair compensation. The purposes of acquisition and the manner of compensation shall be determined by such laws as may from time to time be enacted."*
>
> *Article 555:*
>
> *"When plants are planted, structures erected, and works carried out by a third party with materials belonging to such party, the owner of the land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them.*
>
> *2. If the owner of the property demands the removal of the structures, plants, and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of the land.*
>
> *3. If the owner elects to preserve the structures, plants, and works, he must reimburse the third party in a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of*

such reimbursement, after taking into account the present conditions of such structures, plants, and works.

4. If plants were planted, structures erected and work carried out by a third party who has been evicted but not condemned, owing to his good faith, to the return of the produce, the owner may not demand the removal of such works, structures, and plants, but he shall have the option to reimburse the third party by payment of either of the sums provided for by the previous paragraphs.

5. Where an owner, who is subject to a condition subsequent, has caused plants to be planted, structures erected, and works carried out, he shall be presumed to have acted in good faith, unless he knew when such acts were performed that the events, which was the subject of the condition, had already occurred. This rule shall not apply to a usufructuary or a tenant unless specific permission to plant, erect, or construct had been given by the owner."

[16] 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:

"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. Where grave injustice will result in an order of 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 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 for the encroachment."

[17] Further, in the case of ***Josene Dogley Josene Michel v Loze Brigitte & Anor* (CS No. 21/2015) (2019)**, which also involved an encroachment of approximately one meter, 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 No. 59/2012) (2016) SCSC 171** applied.

[18] In the ***Pillay*** case (supra) it was 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 neighbor for common good, rather than making 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 the technicality of law unless h 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 equity and good conscience would deem cases of this nature an utter waste of time and resources for all concerned."

[19] The court in *Pillay case* further held that compensation in cases of encroachment that fall within the *de minimis* rule principle should be token in nature.

[20] However, the court in ***Thyroomooldy v Nanon* (CS No. 05/2013) (2019) SCSC 1129**, citing ***Nanon v Thyroomooldy* (SCA 41 of 09)** and ***Mancienne v Ah-Time*** (supra) held:

"in some civil jurisdictions, such a France, the courts are increasing, 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 it's minimal and or accidental or where the removal of the encroachment would consist of "abus de droit" by bringing about relatively disproportionate loss and injustice upon the owner who causes 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 hardship, the insistence of the owner of the land in requesting delimitation and refusing compensation may be deemed an abuse of right."

[21] Further along the same lines, the court in the ***Mancienne*** case (supra) further ruled:

"post-Nanon, the exception to the rule that demolition should be ordered in all neighbor 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 should suffice. For the encroacher to escape the guillotine of article 545, he should show that, in refusing 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."

[22] Further in the case of ***Leslie Ally v Daphne Julie* (CS No. 46/2015 (2020)** Andre J held:

"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. Both parties are in agreement that the encroachment extends to approximately one meter on the plaintiff's property. The plaintiff is not insisting on the removal or demolishing of 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. 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. 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. Since the plaintiff has indicated in his testimony that he would be willing to accept compensation for the encroachment in the amount of 10% of the amount claimed given the circumstances of this case, this sum should be awarded be as per thede mininis principle, and is "of a token nature".

[23] Now, noting the above principles as enunciated by our courts vis-à-vis the application of the provisions of article 555 as read with article 554 of the Civil Code, it is clear that in this case, the dissenting judgment of Domah JA in the *Mancienne case* (supra) should have a proper application (paragraph [22] refers).

[24] It is evident from the evidence of the plaintiff herself that the extent of the admitted encroachment covers only 53 square meters out of a total of 1340 square meters and is located at its northern boundary adjoining parcel H 3192 belonging to the defendant.

[25] Further, the survey report of surveyor Michel Leong *(exhibit P2)* as read in line with (*exhibit D1)* reveals that the estimated value of the encroachment is at Seychelles Rupees Ninety-five Thousand (SCR95,000/-). Noting that the scope of the encroachment in issue falls within the *de minimis* rule as clearly confirmed upon locus in quo, the court allows compensation to the plaintiff in the stated amount as estimated by surveyor Leong. In that light, the claim of the Plaintiff is grossly exaggerated in all the circumstances of the case.

[26] Further, the court declines to consider ordering any demolition of the said encroachment for as observe upon locus in quo it is supporting the foundation of the existing house of the Defendant and is of no adverse consequence to the Plaintiff as claimed hence to insist

that the said demolition is an *abus de droit* on the part of the Plaintiff given the circumstances.

[27] The court further does not award any moral damages to the plaintiff as claimed for the simple reason that it has not been proven to the required standard noting further than the encroached property is vacant and used as a banana plantation and the Plaintiff does not reside near the said property.

[28] Further, the court declines to entertain and consider the *pleas in limine* as raised by the Defendant at the late stage of written submissions after all pleadings had been officially closed and also due to the obvious reason that entertaining same would at this late stage harm the right to a fair hearing of the Plaintiff not having had the opportunity to answer to the points of law as raised.

Conclusion

[29] In the result, based on the above analysis as illustrated based on the facts of this case, the following orders are made:

(i) The plaint is partially granted as follows.

(ii) The Defendant is to pay to the Plaintiff the sum of Seychelles Rupees Ninety-five Thousand (SCR95,000/-) as compensation for the encroachment on her property namely title No. H 3125;

(iii) No award as to moral damages is made for reasons given;

(iv) No demolition order is granted for reasons given; and

(v) Costs are awarded in favour of the plaintiff.

Signed, dated, and delivered at Ile du Port on 18 January 2021

ANDRE J