SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 368
C/S019/14

In the matter between:

Joan Nicette **Plaintiff**

of Mont Buxton, Mahe

(rep by Mr Chetty)

Vs

Cyril Payet **Defendant**

of Mont Buxton, Mahe

(rep by Ms Domingue)

Neutral Citation:	*Joan Nicette vs Cyril Payet* (*SC 19/14*) [2020] SCSC 368 (28 June 2021).
Before:	Govinden CJ
Summary:	Construction partly built on adjoining property**;** encroachment; application of Article 545 of the Civil Code;
Heard:	25th October 2020
Delivered:	28th June 2021

JUDGMENT

GOVINDEN CJ

INTRODUCTION

[1] The Plaintiff has filed this suit against the Defendant alleging that he has illegally constructed on two parcels belonging to her and has asked the court to declare the constructions as illegal and to compel him to demolish them. The Plaintiff avers that she is the Fiduciary and part owner of parcels V1184 and v2297 upon which is found a house and that the Defendant is the owner of an adjoining parcel bearing title V1215. She avers further that the latter has illegally and without her consent built or caused to be built part of his dwelling house; a septic tank and a retaining wall on her parcels of land. It is further averred that the Defendant acknowledged the rights of the Plaintiff on and to the encroached parcels in a letter written to him by the Defendant's Attorney.

[2] The Defendant on the other hand denies the claim and raised a Counterclaim. His defence consist of two preliminary objections, which are that the Plaint is time barred and that the Defendant has acquired part of parcels V1184 and V2297 by way of acquisitive prescription. On the merits, the Defendant does not dispute the Plaintiff's title to those plots. As to his title, he avers that in 1984 he purchased V1215 from his mother and siblings upon which was found the family home built by his father before 1974. He avers that in 1993 he demolished part of a house found on his land and rebuilt the existing house in the same location and added a wall. He denies building illegally on the Plaintiff's property and avers that as the original house and septic tank (as he only re-built part of the house and the wall in 1993) were built over twenty years ago, the Plaintiff's action is time barred and that at any rate he has been in continuous, uninterrupted, peaceful, public and unequivocal occupation of part of parcel V1184 and parcel V2297 for more than twenty years. The Defendant admitted that he did not seek the consent to build the wall however he avers that this was as a result of a genuine mistake on his part. He further accepted to have acknowledged that part of his structures were built unto the Plaintiff's property, however he avers that that was not an acceptance of liability but was made in the process of an amicable settlement.

[3] In the Counterclaim, the Defendant again raised the Defence of acquisitive prescription of part of parcel V1184 and parcel V2297.

[4] Accordingly, the Defendant request that the court declares him owner based on his plea and to dismiss the Plaint as being time barred.

[5] On her part the Plaintiff denies the Counterclaim and reiterates that the Defendant had acknowledged the rights of the Plaintiff as owner of parcel V1184 and part of the encroached V2297 by way of a letter. At any rate, the Plaintiff avers finally that the acknowledgment on the part of the Defendant has interrupted the flow of prescription.

The evidence

[6] According to the Plaintiff she is part owner and the Fiduciary of parcels V1184 and V2297 of which her neighbour, the Defendant, Cyril Payet has partly built upon. She produced the Official Search Certificates for the two parcels which shows that the said parcels are co-owned by her and her four children, she owns half and the other half are jointly owned between her and her four children upon the passing of her late husband. She testified that the Defendant has encroached on parcel V1184 with his house; a wall and a septic tank. According to her when the Defendant was doing these works her father had spoken to him and informed him of the encroachment and the former had informed him go to sleep and stop worrying as he (the father) was about to die. In 2011 she commissioned a Land Surveyor, Mr Michel Leong, to do a survey of which the Survey Plan, Exh P4, was produced in evidence and the plan shows an encroachment of about one hundred metre squares. She produced a letter that was written by the lawyer of the Defendant in which the latter admitted the Defendant's encroachment. She wants the Defendant to remove his wall; septic tank and give her back her land. She admitted that there was a house on the exact foundation of the existing house of Mr Payet, however she says that his current house that was built in 1993 is much bigger than the corrugated iron house which caused the encroachment and that at any rate the septic tank and the wall was not there before. The wall was built by the Defendant around 15 years ago. She went away and lived at her in- laws and came back to the family home when her father passed away. The Defendant would then throw dirt over unto her place and trespassed in order to mend his flowers from the encroached area. The Plaintiff denies that her father intentionally refrained to institute a case for the encroachment based on his good

relationship with the Defendant and claimed that the Defendant attempted to offer them another plot of land in exchange when the Surveyor spotted the encroachment. Having found out about the true state of affairs, the Defendant in October 2011 wrote to the Plaintiff and her brother a letter and tried to settle the matter. She accepted that she filed the suit in February 2014 and says that this could not have been 20 years out of time. She denies any animosity between her and the Defendant, though they are not on speaking terms.

[7] The 2nd witness called by the Plaintiff was Mr. Michel Leong. He drew a survey plan for verification of boundary beacons between the boundary of parcel V1184 and V 2297 belonging to the Plaintiff and V 1215. Having done so, he found that there was an encroachment on both parcels. He found them to be encroached by part of a dwelling house; a partition wall and a septic tank. The encroached area which is shaded on his plan is 100msq. The witness testified that a site plan submitted by the Defendant to the Planning Authority produced as D2, does not reflect the true locations of structures given the very small scale used. He cannot give the age of the encroachment. He is of the view that the positions of the beacons are correct. Exh P4 shows the Defendant's boundary wall and septic tank to have been constructed entirely on V1184 and his house to have been partially constructed on the said parcel. A retaining wall which abuts the public road is also built on parcel V229.

[8] The court visited the Locus in quo in the presence of all parties, examined the alleged encroachment and drew up a Report of the Locus in quo.

[9] The Defendant gave evidence. According to him, he has been living at Mont Buxton on parcel V1215 since he was born and he is the neighbour of the Plaintiff who is suing him for allegedly encroaching on parcels V1184 and V 2297. His property formerly belonged to his father, then his mother and siblings before being transferred to him in 1989. The property had an old house on it until he demolished it and built a new one after being granted planning permission. He also built a wall subject to planning permission. Before building the wall on an old foundation of steps that he took to go to the secondary road, he asked for permission from the parents of the Plaintiff who were the owners of the

properties. He denies the fact that the Plaintiff's father had objected to the building of the wall. He also built a Septic Tank, which is now in disuse, close to a previous one according to planning permission. He produced the Planning Permission and it was exhibited as Exh D6, which gave him permission to renovate house and build a security wall. Following the construction of the house; the wall and the septic tank the owner of the adjoining parcels did not complaint of encroachment. He became aware of the encroachment more than 20 years later in 2011 when a survey was effected by the husband of the Plaintiff. After he discovered this, he expressed his apology to the Plaintiff's husband and he attempted to settle the case outside court but this was in vain. This was followed by the Plaintiff and her family harassing him on a regular basis. He refuted any allegations of illegal encroachment and testified that he had the necessary permission and that at any rate he had been in peaceful occupation of all the areas for more than 20 years. In cross examination Mr Payet accepted that if the court was to find that he had not been in peaceful occupation for 20 years he would prefer that he be made to pay compensation rather than he be ordered to demolish the structures as he would be heavily prejudiced.

[10] Therese Zita Payet, the mother of the Defendant, testified in favour of the latter. Her evidence is similar to that of her son when it comes to the historical ownership of parcel V1215. She is of the view that her son had rebuilt his new house in the exact location as the previous one. The only new structures built by the Defendant were the septic tank and the wall. The witness disputes the location of the common boundary on the Survey Report. She had no boundary disputes with the previous owner of the parcel belonging to the Plaintiff.

The law

[11] The Plaintiff's case is based on illegal encroachment under the provisions of Article 545 of the Civil Code of Seychelles which is 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.*

[12] The application and scope of the application of this Article is now well settled in this jurisdiction, in the case *of Mancienne v Ah-Time* (2013) the Seychelles Court of Appeal reiterated the principles established in the case of *Nanon v Thyroomooldy* SCA 41/2009, in which it held:

> *"We reproduce the position of our law post-*Nanon *on encroachments, more particularly boundary encroachments as between neighbours:*
>
> *1) If one builds on someone else's property a structure which* entirely *stands within the boundaries of that property, it will be art 555 of the Civil Code of Seychelles under which the fate of the structure and the indemnity, if any, to be paid will depend.*
>
> *2) However if one builds* partly *on one's property and the structure goes over the neighbour's boundary encroaching on his land, art 555 finds no application.*
>
> *3) In such a case, the neighbour can* insist *on* demolition *of that part of the construction which goes over the boundary and the Court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment.*
>
> *4) The fact that the encroachment was done in good faith or brought about by mistake as to the correctness of the boundary would have no effect on the Court's duty to order demolition: see Cour de Cassation, D1970.426 (Civ 3º, 21 no. 1969); "Grands Arrêts de la Jurisprudence Civile" by Henri Capitant for French law;* Tulsidas & Cie v Cheekhooree *1976 MR 121;* Boodhna v Mrs R R Ramdewar*2001 MR 116;* Lowtun v Lowtun *2001 Int Court 1;* Thumiah Naraindass v Thumiah Avinash Chandra*2009 Int Court 82, for Mauritian law; article 992 of the Civil Code of Quebec and* Micheline Pinsonnault v Maurice

Labrechque *[1999] R.D.1 113 (C.S.) cited in* Boodhna v Mrs R R Ramdewar*[supra] for the law of Quebec.*

5) But where grave injustice may result in certain exceptional cases: for instance, for a small area of land encroached upon, part of a huge building would have to be demolished causing damage out of proportion to the value of the land encroached upon, the justice of the demolition will have to be tempered with mercy.

6) In such a case, the encroacher would need to show additionally that he acted in good faith, within the rules of construction, did not otherwise break any law and the demolition would cause great hardship.

7) In such a case, the Court would not order demolition and would allow damages and compensation commensurate with the extent of the encroachment.

8) Where the owner of the land insists on a demolition order in such a case of grave injustice, the encroacher may plead abus de droit as against the owner and insist on compensating him in compensatory damages for the encroachment.

[13] The Seychelles Court of Appeal went on to rule on what would be the exception to a demolition order upon a finding of a breach of Article 545 in the following manner;

"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."

[14] On the other hand, the Defendant sets up the defence of acquisitive prescription both in his defence to the Plaint and its counterclaim. The principles relating to acquisitive prescription is also firmly established in our law. The law relating to acquisitive prescription is founded on Article 2262 of the Civil Code of Seychelles and it is stated in the following terms;

Article 2262

> *All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.*

[15] The Civil Code provides in Article 712 that ownership may be acquired by prescription or by accession or incorporation.

[16] Acquisitive prescription is the acquisition of a property right through the effects of possession over time as outlined by Article 2229 which provides that to acquire by prescription, possession must be continuous and uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of an owner.

[17] Acquisitive possession of land without title, is possible after twenty years, by virtue of Article 2262 of the Civil Code.

[18] In the case of *Mancienne,* the Seychelles Court of Appeal alluded to the fact that such a defence might be available to a claim of illegal owner against an adjoining owner. Dhoma J in obiter held, *"As Hodoul JA, stated in* Nanon v Thyroomooldy *many land surveys are carried out without reference to established base lines. He repeated the example given by ex-Judge Sauzier: namely, if art 545 were applied in all its rigour, it is not inconceivable that one side of Victoria House may have to be pulled down on account of a few inches of encroachment on the boundary of Temooljee's complex. The only consolation we may have in this matter is that, after 20 years, any action will be time-barred by acquisitive prescription".* (emphasis is mine).

[19] It is to be noted that prescriptive acquisition may be interrupted. Article 2242 of the Civil Code prescribed that:

> *Prescription may be interrupted either naturally or by a legal act.*

[20] In ***Review Commissioner v Yangtze Construction Co Pty Ltd*** **[2018] SCSC 545,** the Supreme Court addressed the issue of prescription and what constitutes an interruption under the Civil Code. The Court noted:

> *It is the view of this Court that the defendant agreeing to pay the debt by monthly installments of SR 500,000.00 is an acknowledgment of the debt which occurred in October 2011. This is supported not only by the oral evidence of the prosecution witness Rovette Moustache but also by document, exhibit P2. The defendant had further written seeking a grace period of 6 months and that a waiver of the surcharge is granted as per letter P12 dated 27 May 2012, a letter admitted by the defendant.* ***This is a further indication in writing by the defendant not only acknowledging the debt but seeking further relief by seeking time to settle it. Therefore this court is satisfied that the prescription claimed by the defendant has been interrupted by the acknowledgment of the debt by the defendant.*** (emphasis mine)

[14] The case of ***Anglesey v Mussard & Anor (1938)*** **SLR 31** is also relevant. The case concerned a claim for recognition of a water right acquired by prescription. Before bringing the claim, the plaintiff had sent the defendant a letter asking for leave to repair certain pipes and a claim of right. In the last sentence, the letter offered to pay for a *'prise d'eau'*. The issue was whether this constituted an *'aveu extrajudiciaire'* on which the defendant could rely. In coming to its conclusion, the Court noted at p. 35 that:

> *The enjoyment must be uninterrupted, i.e. it must fulfill the essentials of acquisitive prescription. Possession must be continuous on the part of the proprietor of the dominant tenement, not interrupted by the proprietor of the servient tenement, peaceful, public and unequivocal, animo domini …*

> *There are two sorts of interruption: natural and civil. Natural interruption means deprivation for more than one year. This did not happen here.* ***Civil interruption occurs in various ways, amongst others when the person who is prescribing expressly or tacitly admits the right of the proprietor.***

Issues for determination

[21] The only issue to be decided by the Court is whether the Defendant has acquired ownership of part of Parcel V1184 and V 2297 through acquisitive prescription, the encroachment not being denied by the Defendant. This in fact being the defence and plea in *limine litis* raised by the Defendant – that he had been in occupation of the land for more than 22 years.

Analysis and determination

[22] The encroached area in this case consist of around 100sqm of land as revealed by Exh P4. The Defendant has admitted this encroachment in evidence. However, he claimed to have good title by virtue of prescription. In order to succeed in his claim the possession by the Defendant must be continuous and uninterrupted, peaceful, public, unequivocal and whilst he is acting in the capacity of an owner for 20 years. He built the house that had partly encroached on and lived in the house as owner. He built the wall over several months in the sight of the person having paper title. He planted flowers on the encroached portion. He cut the grass that was growing in the encroachment and he would sometime jump over the wall to tender to his flowers and to trim the grass. He was acting at all material time acting as owner in the eyes of the public and the Plaintiff.

[23] However, acting as owner is not sufficient for him to acquire the right by possession. He needed to have done that for a long time. In other words, he needs to prove physical possession for twenty years. In his own evidence, and this is uncontested by the Plaintiff, the Defendant acquired parcel v1215 in 1981. He needed to have had the ownership of this adjacent parcel for him to, in practice, have been able to act qua owner of the adjacent part of the parcels of the Plaintiff formerly the property belonging to his father.

After his father died the successors including his mother and siblings transferred it to him. In order to prove the twenty years possession the Defendant adduced evidence of his purchased of the property, the planning permission he was granted in 1992 and the building of his house; the wall and the septic tank without contest by the Plaintiff and her father. According to him he realised his error only in 2013 when following a survey he found out the encroachment. That would put his continuous possession for twenty years. To the extent that nothing had legally stopped or interrupted the flow of the prescription and to the extent that his evidence is true.

[24] The Plaintiff counters this state of fact and argued that the flow of the prescription was never continuous as it had been interrupted by an act of the Defendant. According to her in October 2011, the Defendant wrote to her and her brother a letter and tried to settle the matter after she discovered that her land had been encroached. In fact evidence led shows that two letters were in fact written to the Plaintiff regarding this case. They were produced and exhibited as Exh P3 and Exh P4. I refer to the content of these letters, which were not objected to by the Defendant given its importance to this case.

Exh P3 is to the following effect:

"Dear Sir,

*I act for **Mr. Cyril Payette**.*

My client is the owner of parcel V215 which is adjacent to parcels V1184 and V2297 which belongs to your sister Mrs Joan Nicette and her late husband Mr. Brian Nicette. Following a search done on these 2 parcels of land it appears that you are still the fiduciary for these 2 parcels of land and it is in this capacity that I am instructed to send you this letter.

I am instructed that after the death of your parents, Mrs Joan Nicette and her late husband bought all the shares which belonged to the heirs and they became the sole owners of parcels V1184 and 2297 in May 2011. After the purchase of the properties I am instructed that a survey of the properties was commissioner by Mr. and Mrs Nicette. This survey was conducted in the presence of my client. The conclusion of the survey was

that my client had encroached by building a retaining wall, part of his house, septic tank and water tank on Mr and Mrs Nicette's property.

My client instructs me it was only on the day of the survey that he knew for the first time that he had encroached on Mr and Mrs Nicette's property. I am instructed that my client made a genuine and bona fide mistake as had he known he would never have taken the risk of building on someone else's property. In fact my client has obtained planning permission and he has built his house since 1992. My client has never been approached and told that he had encroached on parcels V1184 and V2297.

My clients instructs me that he wishes to find an amicable solution to this matter. Consequently, my client would wish to have a meeting with the owner of the property and yourself, as fiduciary, in order to try to resolve this matter. My client understands fully that there will be a need for compensation and he is ready and willing to discuss this and any other relevant issues.

In the spirit of good neighbourliness I am instructed to request that you and/or Mrs Nicette contact me within ***fourteen (14) days*** *of the date hereof.*

In the event that I do not hear from either of you within this time period I will have no option but to advise my client that you do not wish to settle this matter amicably and I shall advise my client on his other legal remedies.

I trust it will not come to that and I look forward to us being able to settle this matter in an amicable and speedy manner.

Yours faithfully,

Karen Domingue"

This letter was followed by **Exh P4,** which is as follow;

"Dear Sir and Madam,

*I act for **Mr. Cyril Payette** and I refer to my letter of 4th October 2011, addressed to both of you. For ease of reference I am again attaching herewith the letter referred to.*

As per that letter my client had requested a meeting with both of you with regards to the encroachment issue addressed in my letter of 4th October 2011. I have received no response from either of you and in fact Mr Hoareau has neglected to collect his letter from the post office.

*I am again attempting to request a meeting with both of you in an attempt to resolve this issue in an amicable manner. Please contact me within **fourteen (14) days** of the date of this letter so that we may meet and hopefully settle this matter.*

Yours faithfully,

Karen Domingue"

[25] In those letters, the Defendant unequivocally admitted the rights of the Plaintiff to her lands. I find therefore that the possession was interrupted and not continuous. A Civil to legal interruption occurred in this case as the Defendant being the person who is prescribing expressly admitted the right of the proprietor. The two letters of the Defendant's counsel does precisely this. They admitted the rights of the Plaintiff as the lawful owner to the two encroached portion of land and offer to settle the issue of ownership, if need be by way of compensation. It amounts to an *'aveu extrajudiciaire'* .The effect of this admission stopped the time running against the Plaintiff as of the 4th of October 2011, leaving him short of the 20 years occupation.

[26] At any rate I find that even if there was no break by interruption from 1993 to 2011 is only 18 years and not twenty years as alleged by the Defendant in his defence and that would not avail to him the defence that he is pressing for.

[27] Further, the Defendant needed to prove the peacefulness of his possession and testified by saying that the former owner of the parcels never contested his occupation. However this is denied by the Plaintiff who stated that earlier on as soon as he started to build the

structures, the father of the Plaintiff contested the erections of the structures. In this regard I choose to believe the Plaintiff, I find that her father did relentlessly contest the Defendant's unlawful constructions on his properties but was rebuked by the latter. This took place shortly following the commencement of his project. The fact that the father was of old age was a state of fact that played in favour of the Defendant as it appeared to have lessen the resistance.

[28] Moreover, the writing of the above letters to the Plaintiff clearly reveals that the peaceful tenure of the properties by the Defendant were disturbed at least by October 2011 when he had to take the extraordinary step of instructing his counsel to protect his occupation and possession of the encroached areas from the Plaintiff's assertion of her titles and rights as the registered proprietor.

[29] I find that that possession was therefore not peaceful.

[30] The amount of land occupied by the Defendant should have led him to be aware that he was constructing on the neighbouring property. According to him his mistake was that he took Beacon B1 instead of beacon D1 as one of the boundary beacons between the adjoin properties. This is something which is supported by his mother. In order to buttress his evidence in that regards he has produced a Town and Planning Authority Substitute Plan which seems to show D1as the beacon. The expert witness Mr Leong contested the veracity of this plan. He was of the view that it was made in error. I believe the evidence of the Surveyor to disregard this plan as it is erroneous. The true beacon position is reflected by Exh p4. I have carefully examined the evidence of the Defendant in the light of the other evidence on record and I am of the view that he knew that he intentionally constructed the boundary wall; the septic tank and part of his house on V 1184 and the retaining wall on V2297.

[31] The Planning Permission granted to the Defendant in 1992 could not have given him a valid permission to occupy the adjoining parcel belonging to the Plaintiff. The Planning Authority,moreover, appears to have itself been either misled into acting or acted erroneously on the already erroneous substituted plan attached to the permission. In law,

the Defendant is not entitled to benefit from an acquisitive prescription based on a third party error.

[32] The next question that I now have to deal with is what would be the just remedy. The Plaintiff prays for the demolition of all illegal structures built by the Defendant. The Defendant on the other hand says that this will cause severe prejudice to him. In coming to my determination I bear in mind the principles established in the case of *Nanon* to the effect that once encroachment of such a nature as in this case has been proved, the neighbour can insist *on* demolition of that part of the construction which goes over the boundary and the Court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment. I also addressed my mind as to whether the encroachment was done in good faith or brought about by mistake as to the correctness of the boundary would have no effect on the Court's duty to order demolition. I am also cautious of the fact of where grave injustice may result in certain exceptional cases: for instance, for a small area of land encroached upon, part of a huge building would have to be demolished causing damage out of proportion to the value of the land encroached upon, the justice of the demolition will have to be tempered with mercy. And that in such a case, the encroacher would need to show additionally that he acted in good faith, within the rules of construction, did not otherwise break any law and the demolition would cause great hardship.

[33] The court has gone in locus which has given it an accurate view of the extent of the encroachment. Exh D 8 (C) shows this relevant area when it comes to the wall and part of the boundary wall. The part of the house which is buttressed by the boundary wall consist of a covered patio, the house can exist structurally without this extension. Moreover the septic tank is now in disuse. As to the retaining wall on parcel V2297, it is clearly retaining parcel V1184 rather than parcel V1215, though it is built by the Defendant.

[34] Accordingly, I find that no great injustice would be caused to the Defendant to order him to demolish the boundary wall and part of his house consisting of the patio which encroaches on parcel V1184 which I find were built in bad faith. The *de minimis* rule will not apply here as the use of his house by the Defendant as a dwelling house will not be

affected by this order. As to the retaining wall on parcel V2297, as it is beneficial to V1184, there would be no need to order its removal subject to the Defendant ending his unlawful occupation.

[35] I therefore order mandatory injunction compelling the Defendant to within six months herewith demolish any the boundary wall; the septic tank and part of his house described in this judgment and highlighted on Exh P4, failing which the Plaintiff can have them removed at the Defendant's cost.

[36] I issue a Prohibitory Injunction against the Defendant, personally and against his agents or any person authorised by him whomsoever from trespassing or encroaching on Parcel V1184 and V2297.

Signed, dated and delivered at Ile du Port on the …… day of June 2021

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Govinden CJ