

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC ...
CS100/2017

In the matter between:

James Low-Kion Low Hang
(*ep by F Elizabeth*)

Plaintiff

vs

Thailamai Karipagam Senthil Kumar
(*rep by R Rajasundaram*)

Defendant

Neutral Citation: *James Low-Kion Low Hang v Thailamai Karipagam Senthil Kumar*
(CS100/2017) [2022] SCSC (7 April 2022)

Before: Govinden C J

Summary: Breach of Article 545 Civil Code; faute; award of compensation

Heard: 22nd February 2019; 4th October 2021

Delivered: 7 April 2022

ORDER

[1] The court orders that the Defendant pays the following damages to the Plaintiff;

- (1) For trespass to the Plaintiff's property SCR 100,000.00
- (2) For obstruction to the Plaintiff's property SCR 100,000.00
- (3) For loss of use and enjoyment of property SCR 100,000.00
- (4) For inconvenience and mental anguish SCR 100,000.00
- (5) For emotional distress and misery SCR100, 000.00

The total sum payable to the Plaintiff being the sum of SCR 500,000.00.

JUDGMENT

GOVINDEN CJ

Background

- [2] The Plaintiff is and was at all material times the owner of title number V18154 situated in the district of Plaisance, Mahe and Defendant is the owner of the adjoining plot of land V 3644 both of which was supposed to have a sea frontage. The Plaintiff avers that on a date unknown to him, the Defendant, her employees, servant, agents or *preposee*, illegally and without his prior permission, consent or authorisation trespassed on his property, constructed some concrete slabs, thereon and put a gate at the entrance of the property, which is permanently locked. The Plaintiff avers that as a result of this, he has been deprived of the possession, use and enjoyment of his property and that this consist of a *faute*, which the Defendant has to make good. It is his case that he has made several requests for the Defendant to remove the slabs and the gate for him to gain access to his property, but the Defendant has failed, refused or neglected to do so. As a result he makes the following claim for loss and damages, (a) damages for trespass to property SCR 200,000.00;(b) damages for obstruction to Plaintiff's property SCR 200,000.00, (c) damages for loss of use and enjoyment of property SCR 200,000.00; (d) moral damages for inconvenience and mental anguish SCR 200,000.00; (e) moral damages for emotional distress and misery SCR 200,000.00; which came to a grand total of SCR 1,000,000.00.
- [3] On the other hand, the Defendant does not deny the Plaintiff. She denies the fact that the land of the Plaintiff has a sea frontage and she describes parcel V3644 as a small plot, which is not buildable or could be used for any purpose. She denies having trespassed unto the Plaintiff's land either, personally or through her agents and to have installed a permanent gate and slabs. Yet at the same time she says that as the Plaintiff's land was a breeding ground for mosquitoes and rodents and harboured thieves and given that the

Plaintiff was not an ordinary resident of Seychelles, she took action by placing a temporary barricade at the road frontage of the Plaintiff's property. She further denies the fact that the Defendant has ever attempted to contact her. As such, she says that her action cannot amount to a *faute* in law and hence she dispute the claim for damages.

The law

- [4] This is case of trespass to land, which would consist of a *faute* if it fulfils the requirement Article 1382 (2) namely, if it is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It can be defined as an error of conduct measured against the standard of a reasonable man, as a failure to behave as a *bonus pater familias* or a "*bon pere de famille*". Furthermore, in our law, in order to commit a tort, one does not necessarily need to be conscious of the wrongful nature of one's behavior. In Seychelles law, as compared to English law, there does not have to be a specific duty of care towards the plaintiff - the proof of fault, damage and causal link is sufficient for a claim for damages. It is a largely subjective notion and the courts have therefore a lot of discretion in attaching liability in particular circumstances of the case.
- [5] The general rule as set forth by Article 1382 of the Code provides that "*any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it*", would then apply. In considering the presence of a *faute* in this case, the court is conscious of the fact that Article 1383 provides that "*One shall be liable not only by reason of one's acts, but also by reason of one's imprudence or negligence*". Therefore, a fault may result either from the commission of an act or from the omission to perform an act.
- [6] The wording of Article 1382 clearly shows that three elements are necessary to engage liability: -a fault -a damage –and a causal link between the two. The burden of proof of all these elements falls on the Plaintiff on a balance of probabilities.
- [7] The general provision of Articles 1382 and 1383 have consistently been found not to contain any *a priori* limitations on the scope of Art 1382. In principle, all rights and

interests are protected. In this case the right to property as guaranteed by Article 24 of the Constitution would hence be one of the right protected, the right consist of the Plaintiff's right to use, enjoy and disposed of his property, as he feels like it. It is this right that the Plaintiff claims has been breached by the Defendant when it comes to parcel V18154.

[8] As to damages, they must actually exist and be certain, and it must be directly related to the plaintiff. In order to further protect plaintiffs, the case law has developed in the last decades a specific injury called "loss of an opportunity", or "loss of a chance" (*perte d'une chance*).

[9] This notion is used when the damage consists in the loss for the victim of an opportunity to obtain an advantage or to avoid a loss. To fulfill the criteria of directness and certainty, the opportunity has to be real and serious (*reelle et serieuse*) and not only hypothetical. Liability only arises from a fault if there is a direct causal relationship between the fault and the damage. Neither statute nor case law has given a precise definition of what constitutes a direct causal relationship. The courts have therefore broad discretion. However, one may note that causation is sometimes viewed in the light of two requirements concerning damage, namely directness and certainty.

[10] If rights arising in the right to property are breached they would amount to a *faute* as per Article 1382 of the Civil Code. The following two Articles of the Civil Code are relevant in this case;

Article 544

Ownership is the widest right to enjoy and dispose freely of things to the exclusion of others, provided that no use is made of them which is contrary to any laws or regulations.

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.

- [11] These two Articles have been reinforced by the provisions of Article 26 (1) of the Constitution that has elevated the civil right to property to the level of constitutional right by providing that, *“Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others”*.

The facts

- [12] The Plaintiff testified that he presently live in Australia and he is retired. He is the owner of parcel V18154 situated in the district of Plaisance, Mahe. This is supported by a Certificate of Official Search. His property adjoins that of V3644, belonging to the Defendant and their road frontage entrances are on the Les Mamelles road. According to him, his land is sandwiched between two of the Defendant’s properties. That the last time he came to Seychelles was in 2011. When he took notice of some buildings going up on the Defendant’s other property of which he took some pictures but he could not access the inside of his property as it had a gate and was locked. He claims that it was then that he noticed that his sea frontage had gone because the Defendant reclaimed it in order to allow her to use the reclaimed area to carry building materials to the other property. He produced to the court photographs that he took showing the locked gate with a padlock and what he said was a driveway and concrete gutter being built on his plot. He also produced photographs that show what he alleges to be workers making a path for lorries with materials to drive through and reclaim his sea frontage. He stated that he never gave permission for people to come on his property in order to work. The witness produced a letter of demand addressed to the Defendant, written by his counsel, which remained unanswered. He also reiterates the claims that he had made in the Complaint regarding the damages he suffered and the fact that he lost the chance of selling his property as a result of these actions which caused him mental stress. Up to the time of the hearing, he could not access his plot. Under cross-examination, the witness admitted that in 2010 offer was made by relatives to the Defendant to purchase his land for RS 60,000 but he refused.

Following the failure to negotiate, he went back to Australia and came back to instruct his counsel in 2017. He stated that whilst he was here he was not informed by the Defendant that there were thieves that used his property.

[13] The Defendant's case was put forward by the Defendant herself. Unfortunately, the court recording system could not capture her testimony in its totality on the 13th of February 2020. Hence, she was recalled with the mutual consent of both counsel to testify. She did so on the 4th of October 2021.

[14] The Defendant testified that she lives at Le Niol and is a business entrepreneur. She denies committing any trespass on the Defendant's land. According to her, her only intention was to reclaim the back area of her plot V3644. They got the Planning Authority's approval as requested and in order to do so they also got permission to reclaim the back area of Plaintiff's land V18154 and to use Plaintiff's land to convey reclamation material to reclaim the foreshore of Plaintiff's property being the sea front of parcel V3644. In the process, they had to install a concrete slab to cover an open drain on Plaintiff's property, in order to allow their trucks carrying materials from the roadside up to the sea frontage. She described the Plaintiff's land as small, approximately 160msq on which nothing could be developed. She describes that the slab posed no nuisance to the Plaintiff. At any rate, she claims that the property was a breeding ground to rodent as well as harbouring thieves and other anti-social activities. She accepted to have put the gate that she described as a temporary barricade and she did that for her safety and common interest. However, she denies putting the lock on the gate. She further denies seeing the Letter of Demand and to have spoken with the Plaintiff before the case was instituted. Finally she denies being liable to compensate the Plaintiff for breaches of right.

[15] Under cross-examination the witness admits that the Plaintiff's land is sandwiched between V3644 and V5318, the latter being a piece of land in which she has proprietary interest. She first refused to acknowledge that in order to reclaim her two properties she should have reclaimed Plaintiff's land as this was a buffer area between the two and she could not have moved from one to the other without reclaiming the middle part. However, she later admits that this was the case. The witness further denied failing to

comply with a condition of her planning approval in that she has obstructed the property of her neighbour by placing a gate across the front of his property. At any rate, it is case that at the time of the reclamation she was unaware as to who the registered owner of parcel V18154.

- [16] The Court had the benefit of going to a Locus in quo in this case in the company of counsel of both side. The court noticed that the entrance giving upon the Les Mamelles road to parcel V18154 was closed by a gate, which was locked by a padlock. Inside the said parcel, the court could see dumped detritus of plant materials and other debris. The court could not accessed inside that parcel. The visit then proceeded to the sea front side of the properties, this was effected through parcel V3644, belonging to the Defendant. There the court noticed that the sea front of parcel V3644, V18154 and V5318 had all been reclaimed so that none has sea frontage.

Discussions and determination

- [17] I have thoroughly considered the pleadings in this matter in the light of the whole facts and circumstances of the case. I have also given due consideration to the submissions and arguments of the Counsels in this case, whilst bearing into consideration the applicable law. Special consideration has been given to the credibility of both the Plaintiff and the Defendant's testimony, especially during the course of cross-examination. In doing so I find that the Evidence of the Plaintiff was cogent; consistent and convincing. On the other hand the Defendant's evidence was not convincing and was full of inconsistencies at all. A case in point being the fact of her accepting reclaiming the land so as to join both V3644 and V 5318 which in cross examination she in the same breath denied and then accepted.
- [18] Having done so, I find that overwhelming evidence shows that the Defendant, without any colour of rights, did encroach unto parcel V18154 belonging to the Plaintiff. In the Pleadings itself the Defendant makes an admission that amounts to an *aveu judiciaire* of the Plaintiff's case. She admitted that she caused her agents to enter unto the Plaintiff's land in order for her to use this land so as to build upon and improve her own properties. After she had done so she put up a structure which she called a 'barricade', which the

court saw was a gate to prevent persons, from accessing into the Plaintiffs property. It is clear therefore that on the very admission of the Defendant the right to peaceful enjoyment of his property was taken away when his property was being exclusively used by the Defendant. This amounts to a *faute* and it needs reparation.

[19] To make matters worse a padlock was put on the gate. During testimony, the Defendant denied that she put the padlock. However, after having analysed the whole facts of the case I draw a necessary inference that the person who had put the gate had also put the padlock. This would fall in line with the Defendants version that she was attempting to deny anti-social elements unto the property. I find that only a locked gate could have achieved this purpose. I am of the view therefore that it was the Defendant that put the padlock. This padlock kept the Plaintiff out of his property. Ownership is the widest right to enjoy and dispose freely of things to the exclusion of others, this mean that at all material time the Defendant had actually, by her act, not only enjoy the used of the Plaintiffs' land but has by this action excluded the Plaintiff from the used and enjoyment of his lad, which is a usurpation of the Plaintiff's right of ownership,

[20] It appears that this was not the only things that happened to worsen the situation, the constitutional and civil right to dispose of parcel V18154 was taken away by the Defendant's action as the Plaintiff was prevented to sell it for a good offer. This, according to the Plaintiff, denied him a fair opportunity to sell his property to a willing buyer, who as a result became disinterested.

[21] I note further that the Defendant has enriched herself by her action whilst the Plaintiff has been impoverished. This is so because as a result of her using her latter's property in the way she did she managed to construct two sea frontage to two properties, one in which she holds propriety interest V5318and another belonging to herself V3644 and she built a buildings on those properties. Whilst the Defendant lost out by losing a sea frontage and was effectively locked out from his land, making him lost an offer to purchase.

[22] The reasons put forth by the Defendant to justify her actions, namely, that she could not locate the owner of V18154; that the property was very small; that it was attracting rodents and bad elements and that they had the approval of the Planning Authority cannot

be good reasons in law to deny the Plaintiff the use and enjoyment of his land. The use of his land could only have taken place with his consent and at any rate after fair compensation was given.

[23] I find that the action of the Defendant to have consisted of a callous disregard to the right of her neighbour. She gave the impression that she could assert her authority at will given that the land was small and the owner could not be found. In doing this, she committed a *faute* which has led to damages of which she must make good.

[24] I find that there exist a causal relationship between the *faute* and the damages caused and the damages averred and prove are real and certain. I therefore make the following orders.

Order

[25] I order the Defendant to pay the following damages to the Plaintiff;

(1) For trespass to the Plaintiff's property SCR 100,000.00

(2) For obstruction to the Plaintiff's property SCR 100,000.00

(3) For loss of use and enjoyment of property SCR 100,000.00

(4) For inconvenience and mental anguish SCR 100,000.00

(5) For emotional distress and misery SCR 100,000.00

[26] The total sum payable to the Plaintiff being the sum of SCR 500,000.00.

[27] The Defendant shall bear the costs of these proceedings.

Signed, dated and delivered at Ile du Port on day 7 April 2022

Govinden CJ