

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 539
CS 70/2017

In the matter between:

THE ESTATE OF THE LATE

Plaintiff

FRANCINE VADIVELLO,

HEREIN REPRESENTED

BY HER EXECUTRIX, JENNY VADIVELLO

OF LA GOGUE MAHE

(rep. by Charles Lucas)

and

WARREN STRAVENS

1st Defendant

BELINDA STRAVENS

2nd Defendant

(rep. by Frank Elizabeth)

RONNY OTAR

3rd Defendant

(Unrepresented)

YVONNE OTAR

4th Defendant

(rep. by Nichol Gabriel/Kelly Louise)

ROBERT PAUL OTAR

5th Defendant

(rep. by Frank Elizabeth)

Neutral Citation: *The Estate of Late Francine Vadivello v Stravens & Ors* (CS 70/2017)
[2023] SCSC 539 (14 July 2023)

Before: Burhan J

Summary: Easement – Right of way – Article 685 of the Civil Code of Seychelles.

Heard: 11th July 2019, 11th December 2019, 26th April 2022, 5th July 2022, 6th July 2022, 10th January 2023 and 24th March 2023.

Delivered: 14 July 2023

JUDGMENT

BURHAN J

[1] The aforementioned Plaintiff filed an amended Plaint on the 28th of February 2022 claiming the following reliefs from the 1st 2nd 3rd Defendants jointly and severally:

- i) SCR 300,000 for loss and damage and to remove all debris from the footpath on Title V18067 which comprises the Plaintiff's right of way;
- ii) declaring that she and her successors in title V1240 are entitled to a right of way by footpath over title V18067;
- iii) issue a perpetual injunction to restrain the 1st 2nd 3rd and 5th Defendants, their servants or agents from obstructing the right of way or preventing the Plaintiff and her servants or agents from using it and
- iv) Interest and costs of this case.

[2] It would be best at the very outset in order to better follow and understand this case to set out the sequence of events that occurred in the hearing of this case.

[3] Initially on the 13th of July 2017, a Plaint was filed by Mrs Francine Vadivello the initial Plaintiff in this case, claiming the following reliefs from the 1st and 2nd Defendants:

- v) *SCR 300,000 for loss and damage and to remove all debris from the footpath on Title V18067 which comprises the Plaintiff's right of way;*

- vi) *declaring that she and her successors in title V1240 are entitled to a right of way by footpath over title V18067;*
- vii) *issuing a perpetual injunction to restrain the Defendants, their servants or agents from obstructing the right of way or preventing the Plaintiff and her servants or agents from using it and costs of this case.*

[4] The Defendants filed a plea in limine litis on the 02nd of October 2017. A ruling was delivered on the plea in limine litis on the 17th of November 2017 dismissing it. Thereafter the 1st and 2nd Defendants filed their defence on the 29th of November 2017.

[5] On the 5th of December 2017 an application was made to remove impediments on a footpath access and subsequently a locus in quo was conducted on the 12th of December 2017. In the report of the Locus in quo, it was ordered that existing obstructions on the disputed pathway be removed and that the Defendants permit the Plaintiff to use the said footpath until the conclusion of the said case.

[6] Thereafter an applications were made by Mr Ronny Francisco Otari and Ms Yvonne Otari together with a statement of demand on the 13th of March 2018 to be added as interveners in the case. Counsel for the Plaintiff did not object and proceeded to file an amended Plaint on the 21st of May 2018 including the interveners as the 3rd and 4th Defendants respectively. Counsel for the 1st, 2nd and 4th Defendant proceeded to file an amended defence dated the 5th of June 2018. Counsel for the 3rd Defendant proceeded to file his defence on the 20th of June 2018.

[7] In the said defence filed the 1st and 2nd and 4th Defendants seek the following relief in their prayer;

- 1) *Order the Plaintiff, her relatives, friends, employees or agents jointly and severally to pay damages to the 1st and 2nd Defendants for harassment, disturbance, persecution and annoyance in the sum of Rs.300, 000.00.*

- 2) *Declare that the Plaintiff has an alternative right of way and that her property is not enclaved.*
- 3) *Order the Plaintiff to pay costs of this action.*
- 4) *Make any other and further orders the court deems fit in all the circumstances of the case.*

- [8] Subsequently, the trial commenced on the 11th of July 2019. At the start of trial, an application was made by Learned Counsel for the Plaintiff that the Court visit the premises of the Plaintiff namely Francine Vadivello, to take her evidence as she was not in a proper state of health. Court visited the residence of the Plaintiff Francine Vadivello as requested. Upon arriving at the premises, Court questioned the Plaintiff but she was unresponsive. The Court was satisfied that her evidence could not be taken and made its observation that the Plaintiff was senile and therefore could not give evidence.
- [9] Accordingly, the trial proceeded and the Plaintiff called several witnesses. Marie-Claire Vadivello; the daughter of the Plaintiff, Sumita Andre Assistant Registrar Supreme Court Seychelles, Helene Vadivello; the daughter of the Plaintiff who resides with her and Rachel Joseph; the District Administrator for St. Louis. Learned Counsel for the Plaintiff closed the Plaintiff's case on the 11th of December 2019.
- [10] Thereafter, the matter was adjourned pending a settlement and interdiction proceedings commenced in respect of the Plaintiff who was senile. However, during this period the Plaintiff passed away and an Executrix was appointed. The Court was informed only on the 28th of July 2021 that Jenny Vadivello had been appointed by Court as Executrix of the estate of the late Francine Vadivello. The Plaintiff accordingly filed an amended Plaint on the 15th of October 2021 to amend the Caption of the Plaint concerning the Plaintiff.
- [11] A draft Judgment by Consent was tendered to Court in October 2021, however the proposed settlement failed. Thereafter, the 3rd Defendant sold his property to his brother Robert Paul Otter and an application dated 22nd November 2021 for leave of intervention of Robert Paul Otter was filed. There was no objection by the Plaintiff and an Amended Plaint was filed on the 28th of February 2022 by Counsel for the Plaintiff, including Mr

Robert Paul Otar as the 5th Defendant who filed a defence dated 2nd March 2022 and the case continued. The 5th Defendant in his defence seeks the following reliefs;

- 1) *Order the Plaintiff, the relatives of the late Francine Vadivello, her friends, employees or agents jointly and severally to pay damages to the 1st and 2nd Defendants for harassment, disturbance, persecution and annoyance in the sum of Rs.300, 000.00.*
- 2) *Declare that the proprietors of parcel V1240, the relatives of the late Francine Vadivello, her friends, employees or agents have an alternative right of way and that parcel V1240 is not enclaved.*
- 3) *Order the Plaintiff to pay the costs of this action.*
- 4) *Make any other and further orders the court deems fit in all the circumstances of the case.*

[12] Meanwhile the 4th Defendant Yvonne Otar who was now represented by Ms Kelly Louise informed Court that the 4th Defendant was unwell and had instructed her attorney to inform Court that she has no objection to the Plaintiff using the footpath vide proceedings 26th of April 2022 at 9.00 am. Mr Charles Lucas then informed Court that as he had no claim against her he would not be proceeding against her.

[13] The defence evidence commenced on the 26th of April 2022 and in defence the 1st, 2nd and 5th Defendant namely Mrs Belinda Stravens, Mr Robert Paul Otar and Mr. Warren Stravens gave evidence. Thereafter the Defence closed its case on the 6th of July 2022. Both parties thereafter tendered written submissions.

Evidence of the Plaintiff

[14] Ms Marie-Claire Vadivello testified that her mother (Plaintiff Francine Vadivello who was alive at the time she gave evidence) is completely blind and deaf and lying on the bed or sitting on a chair and incapable of understanding anything and would not be able to answer

any questions. Witness testified that she is aware of the issues relating to this case and that she can give evidence relating to the issues complained of by her mother. She stated that her mother Mrs Francine Vadivello is the owner of the land Title V1240 which the Court visited earlier before taking evidence. Witness further stated that the owner of the land over which the footpath she uses to reach her mother's house is Mrs Otar, Witness explained that when she leaves Mrs Otar's property along the footpath and continues on her way, she steps on small rocks and then reaches a flat part and from there, the footpath passes over the property of Mr Warren and Mrs Belinda Stravens (1st and 2nd Defendants). Witness Marie Claire Vadivello further explained that upon leaving the Stravens land, the footpath continues and where the 3 steps are, the footpath continues over the land of Francisco Otar, (3rd Defendant) also known as 'Tito'. She stated that she had used this footpath since her birth.

- [15] Witness testified that when she was 24 years old, a judgment of Judge Frank Wood confirmed that they have a perpetual right of way through this footpath. There was a sketch drawn by hand as there were no computers. The sketch showed the different directions of roads leading to her mother's house. On being shown a sketch by her Learned Counsel Mr Charles Lucas, she stated that she understands the sketch very well and explained where the land of her mother and where the land of Despilly Otar (the father of the 2nd, 3rd and 5th Defendants) was in the sketch. Witness confirmed that this is the sketch she was referring to. The judgment delivered by Judge Wood and a sketch was marked as items and witness clarified that the right of way granted was perpetual and life-long.
- [16] Witness Marie Claire Vadivello further testified that Despilly Otar was the father of Mrs Katheline Belinda Stravens and she had inherited all the rights and interests and obligations that are related to the land from him. Witness testified that when the judgment was delivered in 1982, there was no house on the property of Belinda Stravens. At the site where the existing house now exists, there were some rocks and wild vegetation. After the judgment in 1982 which confirmed her right of way and her footpath, she and her family, especially her mother, enjoyed the footpath without there being any objections.

- [17] Witness further testified that the trouble started when Mrs Stravens built her house and from then on, every now and then, Mrs Stravens and her husband would block their right of way with corrugated iron sheets. Witness testified that they had to seek assistance from the police and Planning Authority and when no remedy was forthcoming, she decided to file a civil case. Witness further stated that because of the Defendants' actions her sick mother could not be taken to hospital and this affected her treatment. Witness stated that they would swear at them when they used the footpath and try to obstruct them. She had written to them through her lawyer but they had not responded. The letter dated 20th June 2017 was produced as P1. Witness testified that earlier they were in good relationship with the mother of Mrs Stravens and the footpath would be kept clean. She further testified that there were no issues with Despilly Otar because he had the document from Court and knew that the witness had a right of way over the footpath.
- [18] Witness testified further that even though there is an interim order given the permission to carry on maintaining and using the footpath, they cannot do anything and cannot even clean it. She stated that her family has been to another Court relating to issues arising from her use of the footpath. Lately the 1st and 2nd Defendants took her to the 'Breach of peace Court' where she paid SR25/-. It appears from her evidence that several of them had been put on a caution by Court. She moved that the relief prayed for be granted to her.
- [19] Under cross examination witness Marie Claire Vadivello stated the family members who lived with her mother were her sister who is the carer of her mother. She stated she too stayed over to help out her sister and her niece and brother in law, also lived with her mother. Witness admitted that the problems in regard to access of the footpath started in 2017. Earlier all was peaceful because they had a good relationship with the mother. The relationship deteriorated when Mrs Stravens blocked their right of way on the 27th of May 2017. It appears according to her evidence that the problem arose after Mrs Stravens had built her house and moved in. On the 27th of May 2017, they had attempted to block the footpath by placing corrugated sheets, pieces of wood and an old chair on it. Only when the Court made the Order to remove the obstacles placed did they remove the obstructions.

- [20] Witness further stated that the judgment by Judge Wood stated her mother and all her people have a right of way for life over 3 different properties to access her house. Witness referred to the last page of the judgment from Exhibit P1 which reads as, *"I will also grant a perpetual injunction to restrain the defendant by herself, her servant or her agents from obstructing the right of way or preventing the plaintiff from using it."* She denied the suggestion that the right of way was for her mother only.
- [21] Witness admitted there was another road at the back where Cable and Wireless is situated and that there was a footpath that also lead to her mother's house. Witness testified that this road however is used by drug addicts and she has never used it and had heard that it is marshy when it rains, but she has never used that road. Witness stated she was unaware of the suggestion that the Government of Seychelles offered to give her a concrete pathway from the road from Cable and Wireless. She denied she was the cause of all the problem and further stated that by using the Cable and Wireless road, she might be trespassing on a 3rd parties properties. Witness under cross examination further stated that that she has been using this right of way for 45 years and that she is not passing on Mrs Straven's property but on the right of way that was given to her by Court.
- [22] Witness further clarified that ever since the judgment of Judge Wood in 1982, her mother and siblings plus visitors have been using the same footpath to reach the house. From 1982 until the death of Mr Despilly Otar who is a predecessor in title, she never encountered any problems whatsoever with the judgment and the right of way that she was using for the past 35 to 40 years. It was only when Mrs Belinda Stravens was building her house that problems occurred. The Plaintiff next called Mrs Sumita Andre Assistant Registrar of the Supreme Court who produced the judgment of Judge Wood which was certified by Mrs Lepathy Deputy Registrar as being a true copy as Exhibit P2. She stated that there was no attachment to the judgment in the file. Witness read the citation as follows: *Case number Civil Side 366 of 1982, Plaintiff Roy Norah, Franky Madeleine, Loretta Jacques and Francine Vadivello all of Roche Bois Mahe and the defendant Mrs. Berth Otar of Roche Bois Mahe.* The file and contents was marked as Exhibit P3. Witness further testified that the date of judgment was the 22nd March 1983.

- [23] The next witness Ms Helene Vadivello stated she lived with her mother the Plaintiff Francine Vadivello in her house all her life and she is her mother's carer since she was sick for the past 14 years. Her evidence corroborates the evidence of her sister Ms Marie Claire Vadivello in that Mr Despilly Otar was the father of the 2nd Defendant and the fact that they had used the said footpath for a period of 45 years. She too further corroborated the fact that the 2nd Defendant after building her house had begun to block the pathway. The events leading up to the case as narrated by Ms Marie Claire Vadivello were also corroborated by her. Under cross examination, she too denied that she was using the Cable and Wireless road as thieves and persons who smoke frequented that road. Witness denied causing any irritation or problems to the Stravens. Witness testified that she has made a lot of complaints to the police and even went to the Commissioner to discuss this problem.
- [24] The next witness Mrs Rachel Joseph testified that she has worked with the Local Government Department as a St. Louis District Administrator for the past 6 years. Witness testified that she is familiar with the tarmac road built by the District Administration at Creve Coeur, Roche Bois. There was a request from another family for the construction of an additional footpath or an extension to this main road. It was the Vadivello family. The site was visited by numerous officials from SLTA (Seychelles Land Transport Agency) and the Local Government Department. Witness testified that for such roads to be built the procedure is there must be a request from the community and thereafter a feasibility study for the road is made and if all goes well and consent and funding is available, then the construction may commence. Witness testified that in this case if the plan would have gone ahead it would have benefited four families including the Vadivellos.
- [25] The District Administrator further testified that she has gone to this site on numerous occasions. There was a sort of footpath but it was not conducive to be used by the residents who were accessing it. There were lots of roots and some rocks and small boulders. Witness stated if there was agreement they would all have benefitted by the building of this road. Witness further testified that Belinda and Warren Stravens already had access to their own property. Witness testified that the intended footpath would have been 1.5 meters wide, more than maybe 8 to 10 meters in length from the existing road. Witness further stated the footpath would have been on the border, the right hand side of their (Belinda and

Warren Stravens) property, it would have been around the border on the boundary of their property. Witness further testified that they would have been using a portion on the land owned by the Stravens, this is why their consent was required. Presently the footpath is on the same site but it's more in the middle of the property of Stravens not to the side of the property and not on the boundary. The footpath presently accesses through their property and if diverted to the boundary would have benefitted the Stravens. Witness further stated that building a fence between the footpath and their property or paying them some compensation for the little area taken was a possibility, if the Stravens agreed. But for all that consent of all parties are needed.

[26] Witness Rachel testified that she has visited both the footpaths including the one at Cable and Wireless but it was not conducive as the Cable and Wireless had bush trees and overgrown vegetation and the families have been used to using the other footpath for accessing their property.

[27] Witness further testified that the Cable and Wireless footpath was another option but it never came to them as an option because as she mentioned earlier, the Vadivello family were already using the other footpath and requested that the access be built from the existing one. Witness testified that there was a plan that was drawn for the tarmac road, the one in the front. Everything was okay until there was this new request for the extension of this road to the Vadivello family. Then all negotiations broke down because she could not get leave from the Otar and the Stravens. There was no issue with regards to the tarmac road except for the cleaning of the road which now is being cleaned by the Land Waste Management Agency. In re-examination witness clarified that the road she is talking about is the motor able access road; the road from the main road at Creve Coeur that leads all the way in front of the house of the Stravens place. It is the footpath from that motor able road that leads to the premises of the Vadivello and this is a footpath of 1.5 meters. Witness testified that they will still need Seychelles Land Transport Agency on board and consent from Planning Authority as well as the consent of all the parties whose properties borders the project to build a footpath.

[28] Thereafter the Learned Counsel for the Plaintiff closed his case.

Evidence of the Defendants.

- [29] In defence, Learned Counsel Mr Elizabeth called the 2nd Defendant Kathleen Belinda Stravens (nee Otar) who stated she was aware of the case brought by Francine Vadivello regarding the obstruction of the right of way of the footpath going over her land. Witness gave evidence and produced exhibits 2D1 to 2D3 to prove that the official search indicated that the parcel V5560 owned by her father Mr Despilly Otar and comprising 976 metres was subdivided into two plots V18066 and V18067. Plot V18066 extent 500 square meters was given to her brother Ronny Francisco Otar (3rd Defendant) and plot V 18067 extent 476 square meters belonged to her (2nd defendant) with her husband Warren Stravens (1st Defendant) who are the owner of half share each in title number V18067.
- [30] Witness produced cadastral plan which was marked Exhibit 2D4 together with the attachment which highlighted both properties belonging to her and her brother in pink and the Plaintiffs property in green. The following exhibits were also produced by witness. Exhibit 2D5 was admitted as a location plan to show the location to the Court. Exhibit 2D6 was the deed of transfer of V18066 by the 3rd Defendant to the 5th Defendant. Exhibit 2D7 and 2D8 were cadastral plans of V 18066 and V1240 respectively. These did not indicate there was a footpath.
- [31] Witness Belinda Stravens further testified that Yvonne Otar was her aunt who resided close to the main road. Witness was shown Exhibit 2D5 and testified that Plaintiff has to go through three properties to get to the main road namely V530, 18067, 18066, V5574 belonging to Mr Brian Hoareau. Witness was shown Exhibit P1 which is a letter dated 20th of June 2017 from Mr Charles Lucas who was acting on behalf of Mrs Francine Vadivello who passed away. Witness denied that V1240 adjoins to her property. Witness admitted that V1240 borders V5574 belonging to Mr Brian Hoareau but does not adjoin her property. Witness testified that between the road and her property there is another property which is V530 belonging to Yvonne Otar.
- [32] Witness Belinda Stravens denied that Mrs Francine Vadivello had been using the right of way but stated from 1975 they had been using the Cable and Wireless station road and they are very well aware of it. Witness testified that during that time there was no road and she

and her family were passing through the other adjacent road which is the riverside road; all of them were using the river side road which Mr Brian Hoareau is aware of.

[33] Witness admitted she had seen the judgment in 1983 namely Roy Nora & Ors v Bertha Otar in Civil Side 366 of 1982. Witness testified that Bertha Otar is one of her aunts who lived on property on 1115 (11515) Witness identified the property on the location plan. Witness testified that Mr Roy Nora whose property is V19335, is a neighbour on the other side of the road which is not adjacent to their property. Witness stated her father was not in the judgment, nor was he summoned for the case but her aunt was. Witness testified that the judgment of 1983 by Judge Wood makes no mention of her father's property at the time which had not been subdivided namely V5560. The right of way in that case was on the property of her aunt Berth Otar. Witness testified that she is not aware of the order in the judgment stating that the Judge made an order against a Defendant in that case Berth Otar ordering her to give a right of way over her property to the Plaintiff Roy Nora as well as all the neighbouring properties including that of her father.

[34] Witness was shown the sketch that is annexed to the judgment and she testified that she is not aware of the footpath or the plan. Witness testified that her father's land has now been subdivided and the part that is connected with Mrs Francine Vadivello land is V18066 belonging to her brother and after her brother's land is her land. The situation that existed in 1983 is not the same as it is now. Witness further stated that there has been the construction of the road and the foot path is not like a footpath, it is plenty of boulders and it is not stable. Witness stated that the Plaintiff and her family are not passing where the footpath is on the sketch but they are coming straight to the middle of the land of Despilly Otar which is 18066 and 18067 separating the land in the middle and that the family of the Plaintiff are passing on her property as well as using the Cable and Wireless road. The Cable and Wireless footpath reaches at the back of the Plaintiff's house. It is easier for them to use the Cable and Wireless house because her property is hazardous as the boulders are not stable. When the Plaintiff and family uses the Cable and Wireless footpath, they will not have to go on other people's property as this footpath leads straight to the back of house.

- [35] Witness testified that the Plaintiff is still using the footpath even though her mother has passed away. She is still living in the house where her mother was staying. Witness testified that her relationship with the Plaintiff is still hostile. Witness testified that she maintains that there is an alternative right of way for the Plaintiff. It appears from her evidence that the footpath used by the Plaintiff and family which goes through the middle of her property is causing difficulty in the development of her land and creates sanitation problems for her to get approval for her septic tank and soakage pit. She produced a letter from the health authorities as 2D9 dated 13 June 2018. She complained that the Plaintiff and family are crossing in the middle of her property and not on the borderline. She produced a letter dated the 10 July 2018 which is a reply to the letter of 13th June 2018 marked as Exhibit 2D10. She further testified that the access way of Cable and Wireless road is much more suitable for the Plaintiff to use because it goes straight to her house. Witness testified that the Plaintiff is not enclave because enclave means that someone is blocked and cannot get to their land. Witness testified that if the Plaintiff cannot use the footpath next to her house as she can use the Cable and Wireless or the other access road from Brian Hoareau's property.
- [36] Under cross examination she admitted she was the daughter of Despilly Otar and the sister of Paul and Ronny Otar. She stated her father was not a party to the case in 1983 mentioned in plan. Witness admitted that in 1988, the land was registered to Despilly Otar, no right of way as per registry, as per official search is done. Witness testified that she does not accept the judgment but admits that there was a Court case from Giorgi Otar regarding the right of way over the Cable & Wireless road. She denied that she used the same access road for her to go to her neighbour's place during the vacation to play with the kids there. Witness testified that she did not and that she does not recall if she ever went to Francine Vadivello's house. Witness testified that her father got on well with the Plaintiff because he had a mistress with their family. Witness maintained that the Plaintiff and her family were using the Cable and Wireless footpath for the past 40 years. It was suggested to the witness the Plaintiff had no right of way or easement over that land but were using the present right of way over her land as it had been created by a judgment. Witness testified she did not agree with the 1983 judgment as her father registered his land in 1988. There was no right of way over her father's land. Witness further stated she accesses her premises via a motor vehicle over her brother's land, the plot bordering the road. Witness stated that there were no

disputes between 1998 and 2017 because they were not using it on a frequent basis. In 2017 despite the fact that she was written a letter (Exhibit P1) and warned to remove all the obstructions, she did not because Planning gave her the letter of her development without a right of way shown on it and therefore she has total right to develop her property. Witness testified that she is not allowing the Plaintiff to claim the small footpath because they did not have any right of way on her land. They are trespassing on her land. She denied that she throws her rubbish onto the footpath. Further documents were produced by her 2 D11 to 2D15 which referred to the transfer of V 5560 and indicating that there was no registered right of way over the property V18067 and the affidavit of transmission by death in respected of the inherited property V5560 from her father to her brother and herself.

[37] The next witness the brother of Mrs Belinda Stravens Mr. Robert Paul Otar (5th Defendant) testified that he purchased title number V18066 from his brother Ronny Otar (3rd Defendant) on the 12th of May 2020. Witness was shown a Certificate of Registration which was marked as Exhibit D16. Witness testified that he knows the Plaintiff Mrs Vadivello. He stated that originally the Plaintiff Francine Vadivello and members of her immediate family used the road near the Cable and Wireless and riverside but now they are crossing over his land. Witness testified that next to him is V18067 is his sister's property. Witness states that the Plaintiffs crosses over from their house, over the property of Brian Hoareau, then his property V18066, his sister' Belinda Stravens V18067 property and then gets to the main road. Witness testified that he has never given the Plaintiff permission to cross over his property. Witness stated that the Plaintiff has an alternative right of way to reach her property from Cable and Wireless road and riverside.

[38] Under cross examination, witness testified that the Plaintiff and her immediate family passes over Brian Hoareau's land, then his land, then his sister's land, then Yvonne's land. Witness states that he is in the middle, his sister's land is next to him but the land is subdivided as it was originally his father's land. Witness testified that he passes on his other property V18064 which property borders the motor able access but the property of his sister does not. He too stated that the Vadivello family are not passing over the boundary of Belinda Stravens but over the middle of the land. Witness stated that he had asked the Plaintiff to trap their water because it is coming over to his land and affecting his house for

many years due to the gradient of the land. Witness further testified that whilst he was growing up he did not go to the Vadivellos place and cannot recall playing with their children.

[39] Mr Warren Stravens the 1st Defendant stated he is married to Belinda Stravens (2nd Defendant) for around 28 years and been living in the house at Roche Bois for the past four years since they built it. It took nine years to build the house. He stated he knew the Plaintiff Francine Vadivello but she has passed away now. He also knows her children. Witness testified that the main road is a motorable road. From the motorable road, the Vadivellos have to first cross Yvonne Otar's block, V530. They will walk probably 3 meters and then reach on his and his wife's land V18067 and thereafter cross in the middle of witness' property and they step onto Paul Otar's land which is V18066 and after Paul Otar's land they have to pass onto another person's land which is Mr Brian Hoareau's land plot number V5574. After Mr Hoareau's land, the Vadivellos then step onto their land over a step. Witness testified that although the Plaintiff has passed away the children still use her footpath.

[40] Witness testified that when he met his wife in 1994, he started frequenting Roche Bois and the only road he knew to get to his girlfriend's house was the riverside road which is a footpath from the dustbins down; one has to cross a river and get to the house and this road was being used by the Vadivellos, another family related to witness' wife and Mr Brian Hoareau also used this road. Witness explained that everyone he knew at that time were all going through this road and even his brother in law when it was time to sell the pigs used to use it. This was the only road used and the only footpath that they would take. Thereafter the motor able road was built on a footpath that goes straight up to Roy Norah's place.

[41] Witness testified that the Vadivellos started to use the footpath next to his house only when this new road was coming up as a shortcut that people used to take. Witness states that he too used this shortcut to bring up his building materials that is when the Vadivellos started using it. He states it had taken 9 years to build the house. Witness testified that the riverside road is still in existence and sometimes he uses this road to go and throw away garbage, it is a shortcut from the back, it is being maintained by his wife's cousin despite the fact it

goes over Brian Hoareau's property. Witness testified that the riverside road would have been convenient it belongs to Mr Brian Hoareau. He states that it is practical for the Vadivellos to use the river side road house except during rainy seasons. Witness testified that the Cable and Wireless footpath, goes directly to just one house and that one house is the Vadivello house and the only time that he passed on that road was when there was a locus in quo by this Court. Mr Charles Lucas refused to go because of his problem with his back, but he was able to go up a more difficult road with his back problem that same day. One does not have to cross over any one's property when one uses the Cable and Wireless road. He stated that he has frequented Roche Bois for the past 28 years and he knows Roche Bois very well and a lot of people know him and respect him and he respects them as well. He stated the Plaintiffs evidence that drug dealers and the drunkards frequented this road is incorrect as they are below, down on the lower side and not on the Cable and Wireless road.

[42] Witness stated the hostility between the Vadivello family and his wife started when they had moved into their new home after 9 years of building. The Vadivello changed their attitudes towards the witness and his wife. They would pass by and did not greet the witness and showed no courtesy. There was one time they were passing by and there was an altercation. Thereafter his wife put a corrugated iron sheet along the boundary and when they came back to get back to the main road, one of them kicked the corrugated iron sheet that was put and carried on their way and after that it always went on and on. Witness testified that Helene Vadivello has threatened his wife on the streets and threatened his daughter and witness had complained to the police.

[43] Witness identified and produced the letter he had sent to the Marie Vadivello as Exhibit D18. Witness stated Vadivello family were passing over dangerous terrain as water flowed from the Vadivello's land down to their land. There was falling debris and big boulders had begun to start rolling and he had no insurance cover for trespasses in the event of a mishap occurring. He produced photographs taken by him of the terrain and a plan as Exhibit D20.

- [44] Witness denied he was aware that his father in law had gone to strangle Berth Otar in 1982. Witness testified that the judgment P2 is in a case between Roy Norah and Berth Otar and Vadivello as mentioned in the document. Witness testified that the Judge in the said judgment had suggested two alternate roads but had not mentioned whether it was riverside or whether it was Cable & Wireless road. This very important bit was missed out. Witness testified that the Plaintiff is now going over his property. The drawing in the sketch is actually showing a way along the boundary which he admits is between their boundary and Yvonne Otar's boundary which the Vadivello family are not using but going through the middle of their property. Witness testified that he does not agree to a footpath being given on the boundary as he has his development which he has not completed yet and as his land is very small, it would affect his plans. He further stated the discussions with the DA and MNA regarding the footpath were only discussions and nothing materialised from it as the parties involved left their posts.
- [45] Witness Warren Stravens further admitted that the riverside road had boulders that you had to cross and this river road is even more dangerous than the actual path the Plaintiff and family member are passing on at present. This is because when it rains the riverside road becomes a river and water flows down. Witness further stated that when he opens a tap to wash some bottles, the way the terrain is, all the water goes to the road on which the Vadivello family are passing at present. Witness stated that on a day he was washing bottles, Madame Helen's concubine Mr Loven was coming up with his daughter and had seen the water coming down. Witness admitted that there was a proposition by the DA to pave that road. Witness testified that this is his land and he had a right to refuse the proposition by the DA and did so because the path goes through the middle of his land. He stated he intended to do developments for his three children as he is not expecting them to live under his roof when they all have their own family and his land is very small. He further admitted that the litigation of the Cable and Wireless road was with an uncle one Mr Churchill who was working for Cable and Wireless.

Analysis of the Evidence and Findings.

[46] It is clear to this Court from the evidence and documents produced by all parties that the parcel of land belonging to the late Plaintiff Mrs Francine Vadivello V1240 has three footpaths leading to and from the land. The first according to the evidence led, is the footpath given in the judgment by Judge Wood marked P2 and shown in the attached sketch. This according to the Plaintiff goes from their property V 1240 and thereafter goes over the parcel V18066 (Presently owned by the 5th Defendant Robert Paul Otar), then parcel of land V18067 (owned by Mr Warren Stravens and Mrs Stravens (nee Otar) and finally parcel of land V530 (owned by Yvonne Otar 4th Defendant) and leads to the motorable road leading to Creve Coeur. It is the contention of the Plaintiff that this footpath and right of way over it, was given by Judge Wood to the late Mrs Francine Vadivello (4th Plaintiff) in case 366/1982 and in his judgment dated 22 March 1983 and is clearly depicted in the sketch produced by the Plaintiff. The reason for giving such a footpath was because the land of Mrs Francine Vadivello was enclave at that time. I observe that in his judgment Judge Wood states *"I am satisfied that the parties are all enclave arising from a division of land and sale. There are at least four other land owners in the same position as the Plaintiffs who are not parties to this action."* It is the contention of the daughters of the late Plaintiff that they have been using this footpath since then and that they do not use any other footpath. This for the sake of convenience will be referred to as the footpath given by Judge Wood. It is the contention of the Defendants that this footpath never existed and even if it did so the footpath goes on the boundaries of their land but the Defendants are going through the centre of their property

[47] It is also the contention of the Defendants that the Plaintiff were and are still using another footpath referred to the Cable and Wireless footpath which does not go over any person's private property and also leads to another motorable road. At the inspection done by Court it was observed that this footpath existed and led to the boundary of the Plaintiff's land that was opposite to where the footpath given by Judge Wood began. However, although this footpath is level and referred by all as the Cable and Wireless footpath, according to both the Plaintiff and evidence of the Defendants there existed litigation and challenges from 3rd parties in respect of the use of this pathway. The Plaintiff's contention is that this

footpath was never used by them as drug addicts and other unsavoury individuals smoke on this pathway. Any person using this footpath would observe that this is a longer route to go to town than the footpath given by Judge Wood which is definitely a shorter route to the main motorable road to Creve Coeur. The Defendants especially Mr Warren Stravens also refers to a third footpath as the riverside footpath which also arises from the same boundary of the Plaintiff's parcel of land and passes over V5574 (owned by Brian Hoareau) which is a footpath that leads to the dustbins and one has to cross a river when one uses this footpath. The Defendant Warren Stravens states that this was the footpath that was always used by the Plaintiff from the very beginning but admits that it is dangerous and during rain time it becomes a river.

[48] It is the contention of the Plaintiff that they used the footpath given to them by Judge Wood since 1982. The Defendant Belinda Stravens denies this and further states that the Cable and Wireless footpath was used by the Vadivello family since 1975 but I am unable to believe this as the judgment given by Judge Wood P2 indicates that in 1983 the property of Mrs Francine Vadivello was enclave (surrounded by other properties) with no road access and it was for this reason that the said footpath and right of way on the sketch was given by him in his judgment. It is the Plaintiff's case that Despilly Otar and Francine Vadivello and their children when growing up were friendly and playing together and that Despilly Otar the father of the Defendants had no objections to them using the said footpath. This is denied by the 1st 2nd and 5th Defendants. However, it appears to this Court that this is supported even by the evidence of the 2nd Defendant Belinda Stravens herself who states that Despilly Otar had a mistress from the Vadivello family. It is the contention of the Plaintiff that all the issues in respect of the use of the said footpath arose when Belinda Stravens completed building her house in 2017. I am inclined to accept this evidence as even Mr Warren Stravens admits in his evidence that whilst he was building the house which took a period of nine years, the Vadivello family were using the said footpath to the motorable road to Creve Coeur.

[49] I will next deal with the judgment of Judge Wood dated the 22 of March 1983 and the attached sketch and the relevance to this case. At the very first paragraph of his judgment Judge Wood states as follows:

“This estate lies to one side of the Creve Coeur Road at Roche Bois. There is a footpath which on leaving the public road passes by a large out crop of rocks across the land of Elisa Hoareau, who is not a party to this action. It then crosses the property the property of the Defendant (Berth Otar) from where it leads to the properties of the third, first and second Plaintiffs to the left and five others to the right, one of whom is the fourth plaintiff. (Francine Vadivello). I am satisfied that the parties are all enclave arising from a division of land and sale.” Giving due attention to the words in the judgment, it is clear that the judgment of Judge Wood describes the footpath shown in the sketch and it is the view of this Court that the description of the footpath given by Judge Wood in his judgment in the said case is depicted in the sketch. The branching of the footpath to the left towards Berth Otar’s property and the third, first and second Plaintiff’s property (in case 366 of 1982) is seen in the sketch and branching of the footpath to the right leading to Francine Vaidvello’s property referred to in the judgment is also clearly seen in the sketch. In his judgment Judge Wood also refers to four other land owners being enclave but not parties in the case. It is clear that the footpath referred to in the judgment leading to the land of the Francine Vadivello passed over the lands of Despilly Otar, Yvonne Otar and others as shown in the sketch.

[50] It is the contention of the Defendants that the sketch clearly indicates that the footpath and right of way granted by Judge Wood is on the boundary of the property of Despilly Otar and Yvonne Otar but the Vadivello family is passing over the middle of their property. This was repeated very many times by the Defendants when they gave evidence. It appears to this Court that the Defendants too are relying on the sketch produced by the Plaintiff to prove this issue. It is to be borne in mind that a photocopy of the sketch was produced as the original in the file had disappeared. However, it appears that both parties to the case seem to rely on this sketch to further their case. Therefore, though the original was not formally produced and missing in the file, this Court could make reference to the photocopy sketch as it is relied on by both parties to the case and as the photocopy sketch is in line with the description given by Judge Wood in his judgment, it can be accepted by Court.

[51] Giving due consideration to the all the aforementioned facts and evidence this Court is satisfied that the Francine Vadivello family has been using this footpath shown in the

sketch since 1983 and it was only when the house of Belinda Stravens was completed in 2017, did she begin to obstruct the said right of way over the footpath.

[52] The Defendants next contend that the right of way and footpath given to Mrs Francine Vadivello was only for her use and not her heirs. I am unable to accept this as on a reading of the judgment of Judge Wood as the footpath was given as all the lands were enclave the use of such footpath would include not only the owner of the parcel of land but her heirs, servants and agents as well and all others using the footpath to come to her premises. Further the Defendants in the said order are permanently restrained from obstructing the said roadway. Therefore, I find no merit in the Defendants' contention that the footpath cannot be used by the children or heirs or servants or agents or family of Mrs Francine Vadivello.

[53] Giving due consideration to the facts before Court, though it is alleged by the Defendants that there are three footpaths being used by the Plaintiff, this Court cannot grant a right of way over the Cable and Wireless footpath as the Plaintiff demies using it and both parties admit that challenges exists in respect of the use of it and it is admitted by the Defendants themselves that the other footpath referred to as riverside path is dangerous due to flooding during the rainy season. It follows that the only footpath remaining to be used by the Plaintiff is the one going over the property of the 1st 2nd 4th and 5th Defendants property which this Court is satisfied has been in existence since the judgment of Judge Wood in 1983 and continuously used by Francine Vadivello and family since then. From the above findings it is apparent that Learned Counsel for the Defendants contention that in terms of Article 685 of the Civil Code of Seychelles the owner of the dominant tenement has not used the said footpath continuously for period of twenty years and has obtained an alternative access before the expiry of the period of 20 years bears no merit. Therefore, the Defendants prayer in their defence to *"Declare that the Plaintiff has an alternative right of way and that her property is not enclave"* cannot be granted and is dismissed.

[54] It is clear from the facts emerging at trial that the 4th Defendant Yvonne Otari (V530) has no objections to the Plaintiffs using the said footpath. Further it appears that Mr Brian Hoareau (V5574) has not intervened in the case nor filed objections to the use of the said

footpath by the Plaintiffs though it has been mentioned in the proceedings that the footpath goes over his land as well. When one magnifies the relevant parcel of lands in the Plan P4, it is apparent that Mr Brian Hoareau's land borders the land of the Plaintiff and therefore the Plaintiff would be passing over his land and then over V18066 but Mr Brian Hoareau has raised no objection to them passing over his land in this case. The existence of steps as described by witnesses when one goes along the footpath from a lower gradient to a higher gradient further clarifies the use of the footpath as a right of way.

[55] Therefore, for all the aforementioned reasons giving due consideration to the judgment of Judge Wood as well, I am satisfied that the Plaintiffs have established their right of way over the said footpath since 1983 on a balance of probabilities and can continue to use the footpath that passes over the lands of the 1st 2nd 4th and 5th Defendants in the case. The fact that Planning Department has not registered this footpath is not a reason why the right of way over a footpath used by the Plaintiff for years and given by a judgment of Court should be nullified resulting in the Plaintiff having no access to property V1240. I am satisfied that the judgment of Judge Wood is a written and formal document that creates a right of way over the land of the Defendants.

[56] I therefore proceed to give judgment in favour of the Plaintiff as prayed for as follows:

- i. I declare that the Plaintiff and her successors in title V1240 are entitled to a right of way by footpath over title V18067;
- ii. I issue a permanent injunction restraining the 1st 2nd 3rd and 5th Defendants, their servants or agents from obstructing the right of way or preventing the Plaintiff and her servants or agents from using it.
- iii. The 1st 2nd 3rd and 5th Defendants pay costs of this action to the Plaintiff.

[57] In respect of the claim for damages by the Plaintiff, considering the fact that the Plaintiff and heirs were able to use the footpath by moving aside the corrugated sheet and other temporary obstacles and because the Defendants have immediately adhered to the order of

Court given at the locus in quo, not to obstruct the roadway till final judgment was given in this case, I award damages in a nominal sum of SCR 5000 (five thousand) against the 1st and 2nd Defendants only who were the initial Defendants in the case and not the other Defendants who themselves intervened in the said case. As this Court has come to a finding that the Plaintiff did have a right of way over the lands of the Defendants, the Defendants acts of obstructing the said right of way were provocative and cannot be condoned and I see no merits in their counter claim for damages and proceed to dismiss same.

Signed, dated and delivered at Ile du Port on 14 July 2023



M Burhan J

