

IN THE SUPREME COURT OF SEYCHELLES

Reportable

CS72/2022

In the matter between

COLVY UNDERWOOD

(rep by Guy Ferley)

Plaintiff

and

JEAN-CLAUDE POOL

(rep. by Carine Dick)

Defendant

Neutral Citation: *Colvy Underwood v Jean-Claude Pool* (CS72 /2022 (26 February 2024))

Before: Vidot J

Summary: Encroachment and Trespass by failure to give notice of survey as per 12 of the Land Survey Act

Heard: 18th September 2023

Delivered: 29 February 2024

JUDGMENT

VIDOT J

Background

- [1] This case concerns an alleged encroachment by the Defendant/Counterclaimant (hereafter “the Defendant”) over the land of the Plaintiff. The Plaintiff is the registered owner of land parcel V829 and the Defendant owner of parcel V5668 and V4357. The Plaintiff alleges that the Defendant encroached on his land by constructing a wall and part of a house on his land. The Plaintiff further avers that the encroachment is of 26 square meters

and 70 square meters. He further complains that the Defendant in bad faith relocated the beacons along the eastern boundary to disguise the encroachment.

- [2] The Plaintiff states that he requires the areas which have been encroached upon to build his own house and seeks the demolition of and removal of the encroachment from his land. He also demands that the Defendant restores the beacons to their correct and original positions.
- [3] As a result thereof, the Plaintiff also makes a claim for damages in the sum of Seychelles Rupees Three Hundred Thousand (SR300,000.00).
- [4] In his Statement of Defence, the Defendant denies encroachment over the land of the Plaintiff as alleged or at all and counterclaims that the Defendant instructed Sinon Surveys (Pty) Limited to enter and trespass over his land without proper notification and unlawfully tampered with beacon J79 in an attempt at establishing that the Defendant had encroached on his land. He claims that the action of the Plaintiff and his surveyor had caused the Defendant stress and anxiety and as result thereof claims damages for the sum of Seychelles Rupees One Hundred and Fifty Thousand (SR150,000.00) and an additional Seychelles Rupees One Hundred and Fifty Thousand (SR150,000.00) for trespass amounting to a total sum OF Seychelles Three Hundred Thousand (SR300,000.00).
- [5] The Plaintiff rejects the Counterclaim and prayed that it be dismissed.

The Testimonies

- [6] Mr. Pool testified that he had known the Plaintiff since the latter small boy and by then he already had his property. The Plaintiff acquired his parcel V829 much later. On 22nd September 2022, he was served with a copy of the Plaint and was shocked to learn of allegations that he had encroached on the Plaintiff's land by 26 square meters and 70 square meters. So he enlisted the services of a surveyor, a Mr. Prosper, to survey the land. It was discovered that beacon J79, had been moved to a new position. Later a visit was conducted by officers of the Seychelles Land Survey Division and the retained surveyors and it was concluded that the allegations of encroachment as alleged by the

Plaintiff did not exist, though he admits that there was a small encroachment of the eaves of a roof on his property that over hanged Mr. Underwood's property. This encroachment is insignificant as seen on exhibit D6 which is a report including plan that was made by Land Surveyor, Mr. Yannick Radegonde. The latter was hired by the Defendant to conduct a survey.

- [7] Prior to that, on joint visit of Mr. Sinon and Mr. Prosper was conducted and Mr. Sinon apologised for the mistake which he committed in regards beacon J79. In fact he produced a letter dated, dated 31st January 2022, (exhibit D2) whereby Mr. Sinon acknowledged the mistake he made and presented his apologies.
- [8] Mr. Pool claims that this dispute has affected his health. He had a heart surgery in November 2014. He states that he was disturbed by the case. He also claims that Mr. Underwood hire Mr. Sinon to conduct a survey but he was not informed and they trespassed on his property.
- [9] Mr Yannick Radegonde is the Surveyor retained by Mr. Pool to carry out a survey. He said that when he carried out the survey he noticed that the eaves of two buildings encroached on the Plaintiff's property but that the same could not be identified just by observing the boundary line. There was also a small wall as well that partly encroached over the Plaintiff's property. These encroachment was totally insignificant. Mr. Pool explained that he got people to remove these encroachments. Mr. Radegonde also commented that previous survey was erroneous.
- [10] Mr. Underwood stated that he purchased the property on 30th September 2021. He was advised to have the land surveyed and he enrolled the services of Mr. Sinon. It was Mr. Sinon who relocated beacon J79 and informed him that part of Mr. Pool's house was on his land. He wanted to know where the boundary runs as he wanted to build his house. He states that he relied on the professionalism of Mr. Sinon. Therefore he denies that he is liable to Mr. Pool for any stress suffered. He further avers that he did not know of the error made by Mr. Sinon before he filed his case. He states that it was only after the case was filed that he came to know that Mr. Pool had a survey conducted. A meeting on site

was conducted with the parties, the surveyors and officers of the Land Survey Department.

Damages for Stress and Anxiety

- [11] Counsel for Mr. Underwood suggested that the Plaintiff could not be made liable for an error committed by Mr. Sinon. This Court does not agree with that conclusion. Mr. Sinon was hired by Mr. Underwood and as a result of that work performed, he filed a case against Mr. Pool. This should be evident when Article 1384 of the Civil Code is considered. Mr. Sinon had been retained by Mr. Underwood to perform the survey of his land and Mr. Pool states that Mr. Underwood acted on that report and sued him for major encroachment. The case was filed and caused him stress and anxiety. Nonetheless, the Defendant needed to prove the damage.
- [12] The defendant claims damages for stress and anxiety. In fact there are three types of damages for dilictual harm; corporal damage, material damage and moral damage; see **Civil Construction Company Limited v Frederick Leon & Ors SCA26/2016**. This case concerns moral damage which can be described as moral and / or psychological suffering, pain, trauma, stress and anguish suffered by the victim as a result of the delict.
- [13] The Defendant relied on **Calais & Ors v Cerf Properties Limited (CS63/2019) [2023] SCSC 153**, wherein the Defendant claimed inter alia SR50,000.00 for moral damages for anxiety, emotional distress inconvenience. That case too concerned an encroachment that was substantial and extending over number of years. In that case, the Court found that *“the Defendant did not specifically contest that sum but moved the Court to award a reasonable sum as the claims being made by the Plaintiffs are exorbitant. The third Plaintiff in her testimony testified that the stress and emotional stress and anxiety of herself and her siblings upon learning of the existing situation. Her testimony on that aspect was not contradicted. I therefore award the Plaintiffs SR50,000 each as moral damage.”*
- [14] Counsel for the Defendant argues that since Counsel for the Plaintiff failed to file a submission (as he was instructed by Court) contradicting the quantum of damages

pleaded, therefore, the Defendant is entitled to the SR150,000,00 damage as pleaded in the Counter-Claim. Contradiction of the quantum will not arise out of a submission. Though, filing of a submission by Counsel would probably have assisted Court in arriving at a decision; the absence of the same should not affect this reasoning of this judgment in any way. However, in the answer to Counter-Claim the Plaintiff had challenged the Defendant's claim that since he had heart surgery in 2014 and due to his age he suffered anxiety and stress as a result of the Plaint filed by the Defendant. Even in cross-examination, Counsel tried to traverse his claim of emotional damage due to stress and anxiety. Counsel was therefore suggesting to Court that the quantum of damages being claimed under that head is not maintainable.

- [15] It is unfortunate that Mr. Pool could not fully substantiate such claims when he testified, No link between his heart condition and this case was established. His heart operation was in 2014 which is prior to this dispute. However, I do appreciate that due to his mature age, he would have been emotionally affected since as he states he has never been sued before. Mr. Pool is 73 years old. This case should never have reached Court if the Plaintiff had not relied on his Surveyor's report. Nonetheless, Mr. Sinon had written a letter (Exhibit D2) acknowledging that he had made a mistake in relocating beacon J79. However, an insignificant minor encroachment still existed which seems to have been removed by Mr. Pool. Once that acknowledgement by Mr. Sinon was expressed, the case should have been withdrawn. The answer to this case requiring Counsel would have definitely have some effect on Mr. Pool.

Trespass over Defendant/ Counter-Claimant's Property

- [16] The Defendant also makes claim of SR150,00.00 for trespass over his property. He testified that that happened when the Plaintiff and Mr.Sinon came onto his property and the latter conducted a survey of the land. Though denied in the Answer to Counter-Claim, I find that this is not a contentious matter. Counsel for Mr. Pool referred to section 12 of the Land Survey Act which provides that;

“(1) All owners of land whose right may be affected by a survey shall have a right to be present at such survey;

(2) *A land surveyor before performing a survey shall summon such owners to attend the survey at a place, date and time to be specified in the summons. The summons shall be sent by registered post to the last known address of the owner in Seychelles and shall be posted seven days before the survey. The owner of the land under the survey at whose instance the survey is to be performed need not be summoned as provided under the subsection. ”*

[17] Despite the Plaintiff denying the same in the defence to counter-claim, they did not adduce any evidence at the trial to refute the allegation. Therefore, in the absence of any evidence, that averment is deemed to have been accepted. However, I find the claim of SR150,000.00 under that head of damages to be exaggerated and ridiculous in the circumstances. There is no evidence of any physical damage being done to Mr. Pool's property. I nonetheless acknowledge that they place a beacon in the wrong position that was eventually corrected.

Award of damages

[18] The evidence did not support the quantum of damages that was claimed. As I stated, I do recognise that due to his mature age, the fact of having to answer to a plaint in court occasioned Mr. Pool some stress and anxiety. However, there not an iota of evidence that shows that it was serious. Therefore, I award him SR7,000.00 under that head and a sum of SR1000.00 for the trespass.


Observation

[19] Both Counsels in this case did not advice their clients competently. It is most necessary that when Counsels advice clients, that they are honest in their advice to clients regarding the prospects of the case. It is wrong to give false expectations to clients. It is also that important that counsels study the documents in their possession when arguing their case. In this case, I believe that Counsels could have been more professional in presenting their client's case.

Conclusion

[20] I therefore order a judgment in favour of the Defendant against the Plaintiff in the sum of SR8,000.00 with interest and cost.

Signed, dated and delivered at Ile du Port on 29 February 2024.

A handwritten signature in blue ink, appearing to read 'M Vidot J', is written over a horizontal line.

M Vidot J