

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2020] SCCA ...
SCA 43/2017

In the matter between

MARISA BANTELE-LEFEVRE
(*rep. by Divino Sabino*)

Appellant

and

VERONICA LANZA
(*rep. by Alexandra Benoiton*)

Respondent

Neutral Citation: *Bantele-Lefevre v Lanza* (SCA 43/2017) [2020] SCCA 16 October
2020

Before: Fernando (PCA), Twomey (JA), Robinson (JA)

Summary: Judgment by consent: judgment entered by the court suo sponte and not
reflective of parties' intention – setting aside by appeal- right of way is a right
in rem and applies to the dominant tenement and not a person

Delivered: 16 October 2020

ORDER

The Supreme Court Order of 16 May 2018 is set aside and the case is remitted to the Supreme Court for rehearing or for entering judgment by consent in terms of section 131 of the Seychelles Code of Civil Procedure.

JUDGMENT

M. Twomey (J.A)

1. I have read my sister JA Robinson's judgment and I am largely in agreement with her findings on the facts, the law and the ensuing orders in the instant appeal.
2. My views however on the "judgment by consent" entered by the learned trial judge are of a different nature. I reserve my opinion on whether a judgment by consent and a *contrat*

judiciaire are different and whether the latter is applicable in our jurisdiction as I am not of the view that this debate or its resolution is determinative of the issues raised in the present appeal.

3. It is common ground that in the course of proceedings the Respondent's daughter testifying on the Respondent's behalf indicated she was desirous of giving a right of way across Parcel V5587 to Parcels V18928 and V18929. In this regard, she tendered in evidence, a document, dated 4 September 2017, exhibit P7, which contained the conditions to which the proposed right of way would be subjected.
4. It is also common ground that the learned trial judge then enquired of the parties what their wishes were. The Respondent indicated that they wished the right of way to be granted in accordance with conditions they had stated in Exhibit P7 whereas the Appellant simply stated that they wanted a right of way granted.
5. Subsequently the learned trial Judge, in his orders granted a right of way as proposed by the Respondent and subject to the condition, inter alia, that the "*right of way would end if Mrs Marisa Bantele Lefevre decides to transfer parcel V18929 onto any other persons or amalgamate the said parcel to any other parcels.*"
6. It is clear from the transcript of proceedings and the submissions of the parties during the course of this appeal that there was no consensus *ad idem* on the agreement for a right of way; thus the judgment entered by the Court was not a judgment by consent of the parties but rather a judgment entered by the Court based on its interpretation of what the parties had agreed. This judgment was not only afool the provisions of section 131 of the Seychelles Code of Civil Procedure but also a misrepresentation of the parties' common intention. Whether viewed as a *contrat judiciaire* or a judgment by consent it is clear that there was neither contract nor consent of the parties.

7. Moreover, the specific condition outlined above in paragraph 5 imposed on the right of way by the learned trial judge is not lawful as it limits the right of way impermissibly. Article 688 provides as follows:

“Easements are either continuous or discontinuous .Continuous are the easements the use of which continues or could continue without human intervention; such are water mains, drains, ancient lights and other easements of that kind.

Discontinuous are those which need human intervention for their use; such are rights of way, drawing water, grazing, and others of a similar kind. (Emphasis added)

8. A right of way binds a dominant tenement and not its ownership by a particular person (see Articles 697, 698, 701 of the Civil Code). The extinction of rights of way are provided by Articles 703 *et seq* of the Civil Code. There is *jurusprudence constante* that rights of way are rights *in rem* and not *in personam* (*Sinon v Dine* (2001) SLR 88, *Leite v Republic of Seychelles* (1981) SLR 191, *Barbier v Morin & Ors* (SCA 17/2017) (appeal from CS 28/2014) [2019] SCCA 37 (23 August 2019). In *Leite*, the Court of Appeal specifically held, *inter alia*, that an easement is a right granted in favour of a dominant tenement and not its owner, against a servient tenement and not its owner, and that it is a right appurtenant to the dominant tenement, and the benefit of such right accrues to the transferee or grantee of the dominant tenement. Hence, the right is appurtenant to properties and not to parties having ownership of the properties.
9. In the circumstances, I grant the appeal and quash the Court Order of 16 May 2018 of the learned Judge, in its entirety, and remit the case to the Supreme Court for rehearing or for entering a judgment by consent in terms of section 131 of the Seychelles Code of Civil Procedure, as the case may be.

Signed, dated and delivered at Ile du Port on 16 October 2020



M. Twomey
Justice of Appeal