

**Denise v Heirs Suzanne & Ludovic M Sullivan & Ors
(2003) SLR 127**

Danny LUCAS for the Plaintiff
Philippe BOULLE for the Defendants

Judgment delivered on 28 February 2003 by:

JUDDOO J: The Plaintiff is the owner of parcel V4884 which she claims is an enclaved portion. She had filed the instant suit against three Defendants claiming a right of access to the public road. The First and Second Defendants have resisted the claim and denied that the Plaintiff has a right to seek access over their respective property to her land. The Third Defendant has no objection to its property being used a motorable access way by the Plaintiff. The Fourth and Fifth Defendants were added as parties to the suit by virtue of a Court Order have not resisted the Plaintiffs claim. All the Defendants own parcels of land which are found in between the Plaintiffs plot of land and the public road.

The unchallenged relevant plans produced (Exhibits P7, P8 & K) show that the Plaintiffs parcel of land, V4884, is an enclaved plot. It has no access to any road and is enclosed on all sides by other plots of land. Accordingly, the Plaintiffs claim falls to be decided under Articles 682 & 683 of the Civil Code of Seychelles (Cap 33) and which read as follows:

Article 682:

The owner whose property is enclosed on all sides and has no access or inadequate access to the public highway either for private or business use of his property shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property subject to his paying compensation.

Article 683:

A passage shall generally be obtained from the side of the property from which access to the public highway is nearest. However, account shall be taken of the need to reduce any damage to the neighbouring properties as far as possible.

The Plaintiff claims that the only way she can get to her property from the main road is through the Defendants' properties. She averred that since 1991 she had been using a motorable road over parcel V8593, over V7838 along its boundary with parcel V6399 and V4371 and over parcel v 4885" to get access to her land. The identified parcels of land belongs to the following parties respectively; V8593 to the 3d Defendant, V7838 to the First Defendant, V6399 to the Fourth Defendants, V4731 to the 5th Defendant and V4885 to the Second Defendant.

The Plaintiff is entitled to a right of way, by operation of law, under Articles 682 & 683 of the Civil Code on the side on which access would be the shortest way to the public road and at a place at which it would cause the least damage to the person on whose land the crossing was made. It has been established in a string of cases that once the enclave has been proved the burden lay on the Defendant (or Defendants) on whose land access was being sought by the Plaintiff to prove that the shortest and least damageable way to the public road was not through his property. - vide *Potter v Cable & Wireless* (1971) SLR 334, *Azemia v Ciseaux* (1978) SLR 158.

The evidence on record shows that one passage to grant access to the Plaintiff would be through the path of what is termed by the Plaintiff as a motorable road used by the latter as averred in her plaint. This passage, as it presently stands, has been demarcated in the sketch plan produced as exhibit K and labeled as "Drive". It starts from the public road and encroaches along Parcels V8593, V6399, V4731, V7838 (which is incorrectly labelled as V9838 in Exhibit K) and V4885 in order to access the Plaintiff's land.

The other possibility canvassed has been from the public road through v 8593, onto the reserved access V8597 and/or onto parcel V6399 where part of the reserved access proves impracticable, onto V4731 and leading to the Plaintiff's land.

There is no denial from the evidence on record that the motorable access labeled "Drive" in exhibit K is one that is currently used by the inhabitants of the land in the area including users of parcel v 8593 (Third Defendant) which is itself an access road, the occupants V6399 (Fourth Defendant), parcel V4731 (Fifth Defendant), V4885 (Second Defendant), and was used by the Plaintiff to access her plot of land (V4884). The "Drive" encroaches over Parcel V7838 (belonging to the Defendant) but is not used as an access road by the owner of the said parcel who has its own access directly to the main road. Part of the "Drive" is of solid concrete structure.

The Plaintiff gave evidence that the most accessible way for her to reach her plot of land from the public road is by being allowed the use of motorable access which she was using for the past years but is now unable to do so by virtue of certain obstructions caused by the occupants of the surrounding plots of land.

The other possible access route runs from V8593 at V8597. It does not in its present state link to Parcel V4884 which belongs to the Plaintiff. Jeffrey Wamyna testified that this planned access reserve belongs to the third Defendant "but this Government access stops on the boundary between V4731 and V6399". The witnesses added that the reserved access plot V8597 was demarcated in order to serve the adjoining plots of V2687 and V2686 but it had not been intended to go further and access other plots including V4884 belonging to the Plaintiff.

Yvon Fostel gave evidence that there is a stream which runs over the demarcated access reserve V8597. In his own words:

- Q. What did you find on the site....?
- A. There is a stream as indicated on the plan. This stream runs between that bit which is between the drive and the boundary to V2687.
- Q. Would it be fair to say that the stream occupies most of that right of way in terms of the lands between V8597 and V6399?
- A. Yes.
- Q. How feasible would it be for someone to use that access?
- A. From my observation it seems that the stream doesn't make it all that easy.
- Q. It is not feasible at all.
- A. Although we can construct on a stream but I would say it is difficult.
- Q. If we cannot access V8597 from the drive then that would make the official access way worthless.
- A. Yes, I would say so, unless one is to spend enough money. There is a stream there. Myself I wouldn't construct there..."

The evidence as disclosed above clearly shows that the demarcated reserve access parcel V8597 could be of little practical use given the major impediment of there being a stream which runs across a significant part of that parcel. This also goes to explain why the reserved parcel V8597 had not since been used as a motorable access to reach the parcels which were intended to benefit therefrom, namely V2687 and V2686. Moreover, I am not convinced by the argument that the passage over part of parcel V8597 could be moved sideways onto parcel V6399 in order to avoid the stream. Even if this were so, the access route to parcel V4884 belonging to the Plaintiff would have to cross parcel V4731 belonging to the Fifth Defendant over a part of the land where the dwelling house is situated. This access would inevitably require that the veranda to the house on the said land be demolished to give way to a motorable road adjoining the house itself. I find this alternative not be the shortest way which causes the least damage.

From the overall evidence on record, I find that the shortest motorable access from the Plaintiffs laid (V4884) to the public road which will cause the least damage to the adjoining properties remain the access track labelled "Drive" in the sketch plan produced as exhibit K. This motorable access as per the demarcation in the plan is to cross over parcels V8593 (belonging to the Third Defendant), V6399 (belonging to the Fourth Defendant), V4731 (belonging to the Fifth Defendant), V7838 (belonging to the First Defendant) and V4885 (belonging to the Second Defendant) respectively. I do not find that the Defendants have satisfied the Court that the passage on their respective parcel of land is not the shortest and least damageable motorable access from the public road to parcel V4884 belonging to the Plaintiff. Accordingly, I grant the Plaintiffs claim and declare that she has a motorable right of way over the Defendants' properties complying in as much as possible with the passage labelled as "Drive" in the sketch plan produced before this Court, Exhibit K. Accordingly, the motorable access is to cross over parcels V8593 (Third Defendant), V6399 (Fourth Defendant), V4731 (5th Defendant), V7838 (First Defendant) and V4885 (Second Defendant) respectively. There is to be no hindrance and obstruction to the said access by the Plaintiff.

Each party to bear its own costs.

Record: Civil Side No 214 of 1996