

IN THE SUPREME COURT OF SEYCHELLES

(1) **Mr. Roald Nilsen and**

(2) **Mrs. Kari Nilsen**

(Herein represented by Mr. Roald Nilsen)

Acting as fiduciary for Himself and Mrs. Kari Nilsen

Both of Amitie, Praslin, Seychelles

Plaintiffs

Vs.

(1) **Mr. August Confait**

(2) **Mrs. Flavie Confait**

(Both of Amitie, Praslin)

Defendants

Civil Side No.106 of 2001

Mr. P. J. R Boullé for the plaintiffs

Mr. P. Pardiwalla for the defendants

D. Karunakaran, J.

JUDGMENT

The plaintiffs are admittedly the co-owners of an immovable property registered as parcel PR10 situated at Amitie, Praslin, whereas the defendants are the co-owners of an adjacent plot of land registered as parcel PR11. The plaintiffs have now come before this Court with the instant suit alleging that the defendants have encroached on their property unlawfully and without consent and have destroyed a beacon on the boundary between the said two parcels of land. As a result of the said encroachment, the plaintiffs claim that they have suffered loss and damage in the total sum of R33, 189. 71. Therefore, the plaintiffs pray this Court for a judgment:

- (i) *Ordering the defendants to demolish all construction on the plaintiffs' land parcel PR10;*
- (ii) *Ordering that in the event of failure to demolish the constructions within 30 days of the date of judgment, that the plaintiffs shall be authorized to effect all*

necessary demolitions, and for that purpose shall be given the assistance of a process server if requested by the plaintiffs;

- (iii) Ordering the defendants to cease all further acts of trespass; and*
- (iv) Ordering the defendants to pay to the plaintiffs the sum of R33, 189. 71 with interest and costs.*

On the other side, the defendants deny the alleged encroachment. In their statement of defence, the defendants have averred that their building did not encroach onto the plaintiffs' land. In the alternative, the defendants aver that if at all there had been any such encroachment, the plaintiffs have acquiesced and consented to it. According to the defendants, the plaintiffs themselves were responsible for destroying the beacons on the boundary as they built a wall on their own along the boundary line. Hence, the defendants contend that they did not commit any fault or trespass nor are they responsible for any damage whatsoever the plaintiffs claim to have suffered. Besides, the defendants in their statement of defence have raised a counterclaim against the plaintiffs stating that the plaintiffs were the ones, who have encroachment on the defendants' property unlawfully and have constructed part of a building after destroying the beacons on the boundary between the said parcels of land. As a result of the said encroachment by the plaintiffs, the defendants claim that they suffered loss and damage in the total sum of R131, 250. 00 as particularized thus:

<i>(i) Loss of use of land at SR 50/- per day and</i>	
<i>continuing from June 1996</i>	<i>SR 106,250. 00</i>
<i>(ii) Moral damage</i>	<i>SR 25, 000. 00</i>
<i>Total</i>	<i><u>SR 131, 250. 00</u></i>

Therefore, the defendants make a counterclaim contending that the plaintiffs are the ones liable in tort and should compensate the defendants for the said loss and damage that resulted from the encroachment by the plaintiffs. Hence, the defendants pray this Court to dismiss the plaintiffs' action, allow the defendants' counterclaim and enter judgment in favour of the defendants as follows:

- (i) *Ordering the plaintiffs to demolish all constructions on defendants' land, parcel PR 11;*
- (ii) *Ordering that in the event of failure to demolish the constructions within 30 days of the date of judgment, that the defendants shall be authorized to effect all necessary demolitions, and for that purpose shall be given the assistance of a process server if requested by the defendants;*
- (iii) *Ordering the plaintiffs to cease all further acts of trespass; and*
- (iv) *Ordering the plaintiffs to pay the defendants the sum of SR 131, 250/- with interest and costs.*

The facts of the case as transpire from the evidence on record are these:

The plaintiffs, the Nilsens are undisputedly the owners of the parcel of land registered as PR 10. It is a rectangular plot of land of an extent 1241.4 square meters, having the high water mark - on the seaside - as its southern boundary and stretching lengthwise towards the edge of the Grand Anse-public road on the mountainside as its northern boundary. The defendants namely, the Confaits are the owners of an adjacent parcel of land PR 11 of an extent 1277.8 square meters lying parallel on the eastern side of PR10. Both parcels have a common boundary connecting the beacon AH4 (the corner common point located on the southern boundary) and the beacon AH10 (the corner common point located on the northern boundary) of the said two parcels of land vide exhibit D6; that is, the cadastral survey of the said parcels registered on 1st August 1966 and transferred to the New Land Register on 30th August 1967.

The Government of Seychelles was originally the owner of both parcels. The plaintiffs purchased their property PR10 in 1979, whereas the defendants purchased their property PR11 in 1988 - vide exhibit P8 - from the previous owners. Since then the parties have been living therein having peaceful possession and enjoyment of their respective properties. In fact, the plaintiffs have their residential house on PR10 and the defendants have their residential house as well as some "chalets" or "guesthouse" for their tourism-business. The plaintiff Mr. Nilsen (PW1) testified that when he purchased his property PR10 in 1979, he physically checked the beacons on all four corners of the property. He found all four beacons

were in place including the one AH4 located on the southern border - on the seaside - demarcating the boundary between his property and that of the defendants. He also verified the diagram in the cadastral plan, which also showed the seaside beacon AH4 located about 6 to 8 meters from the high water mark.

According to the plaintiff, in or around 1995, his neighbour - the defendants - started running a guesthouse business on their property. As a result, the plaintiffs noticed a lot of tourists were frequenting that place. In order to protect his privacy, the plaintiffs wanted to put up a boundary wall in between their properties. Therefore, the plaintiff Mr. Nilson asked the defendant if he could share the cost for the construction of a boundary wall in between. The defendant did not agree. He declined to share the cost and told the plaintiff that if the latter wanted to build a wall for his own privacy he can do so on his property. Hence, the plaintiff decided to construct a wall at his own cost - inside the boundary line - on his property, leaving a gap of two feet from the actual boundary line. Accordingly, the plaintiff obtained the necessary planning permission from the Government and constructed a concrete wall well within his land so as to secure privacy for his residence.

Two years later; that was in 1997, while the plaintiff was out of the Republic for about two months, the defendant Mr. Confait constructed a chalet on his property for tourism-business. The defendant used the plaintiffs' wall as part of the said construction. He in fact, made use of the plaintiffs' protective wall to serve as the main wall for the kitchen attached to the chalet. He also put up a roof on top of the kitchen. The roof rested on the plaintiffs' wall and also extended beyond protruding a bit further onto plaintiffs' property. Upon his return to Seychelles, the plaintiff noticed the defendants' encroachment on his property in that, the defendant had - unlawfully and without consent - constructed part of his building, the chalet on plaintiffs' property having destroyed the common beacon AH4 located on the seaside boundary of the said two parcels of land. The plaintiff immediately, went to see the defendant in his premises and objected to the encroachment. The defendant Mr. Confait got angry, called the plaintiff names and drove him out of his premises. The aggrieved plaintiff wrote a letter dated 3rd September 1997 - in exhibit P2 - to the defendant again objecting to the encroachment alleging that the new construction of the defendant had encroached onto the plaintiffs' property, 2 to 3 meters across their common boundary line. However, the defendant did not respond to that letter nor did take any measure to remedy the situation. Since the beacon had also been destroyed/removed from its place, the plaintiff reported the matter to the police in vain. Again, by a letter dated 2nd October 1997 - in exhibit P4 - the

plaintiff informed the Seychelles Licensing Authority about the encroachment by the defendant and requested them to intervene but of no avail. The plaintiff again by a letter dated 18th June 1999 made a complaint to the Ministry of Land Use and Habitat about the encroachment by the defendant. In response, the Ministry through its land technician wrote a letter dated 5th August 1999 in exhibit P5, to the plaintiff, which inter alia, reads thus:

“During our visit to Praslin on the 26th July 1999, we visited your premises to determine the nature of your complaint. We have found that Mr. August Confait has constructed on your boundary wall. Since no beacons were to be found it was therefore impossible to ascertain the possibility of an encroachment.... You are therefore advised as a remedial solution, to employ a private surveyor to identify the beacons in order that appropriate action may be taken by the Planning Authority”

Following the above advice, the plaintiff engaged a private firm “G & M Surveys” to survey the property, relocate the missing beacon AH4 and assess the nature and extent of the alleged encroachment. According to the plaintiff, the G & M Surveys through their technicians surveyed the property, relocated the beacons, inspected the properties and concluded that the defendants’ new construction had encroached on the plaintiffs’ property crossing the boundary by an average distance of 0.43 meter inside the plaintiffs’ land over a stretch of 4.5 meters along the boundary line. The plaintiff also produced in evidence a survey plan dated 31st August 2000, drawn by G & M Surveys - exhibit P2 - showing the relocated beacon AH4, the boundary line between the two parcels and the encroached part of the defendant’s construction on the plaintiffs’ property. The plaintiff had to pay a total sum of Rs.8189.71 to G & M Surveys for their services in this respect vide invoice in exhibit P6 and P7. Moreover, the plaintiff testified that since the roof of the encroached portion is protruding on his property, the water flowing therefrom also causes continues damage to his land. The roof, the gutters and the water heater installed thereon by the defendant not only has obstructed the view of the plaintiffs’ house but also has adversely affected its aesthetic value. As a result of the said encroachment and the subsequent rude and highhanded behavior of the defendant - who called the plaintiff names in the public - the plaintiff claimed that he suffered moral damage estimated in the sum of Rs 25,000/-

Besides, Mr. Royston Meriton (PW2), director for Land Development from the Planning Authority, Ministry of Land Use and Habitat testified in essence, that the defendant by an application dated 3rd November 1997 applied to the Ministry for planning approval for the

extension of a building and to put up a first floor on an existing building on PR11. The approval was granted in principle on the 24th June 1998 subject to certain conditions vide exhibit P8. He further testified that as per the planning rule no construction of building is allowed on the boundary wall or very close to the boundary line unless the owner of the adjacent property has consented to any exception to that rule. Generally, the developer is required to construct the approved structure at a distance of about 2.7 meters away from the boundary line, unless the owner of the adjoining property consents to any variation of such distance. When the defendant applied for the approval, he did not provide any information or site plan to the Planning Authority indicating clearly that he was going to use the existing boundary wall of the plaintiff for the proposed extension of his building vide exhibit P8.

Mr. Michel Leong (PW3), the Land Surveyor of the firm G & M Surveys testified in substance that he was the one who compiled exhibit P1, the survey plan showing the encroachment of the defendants' construction on the plaintiffs' land. He compiled and drew the diagrams based on the technical notes and data given by his technicians, who actually carried out the survey-work upon his instructions. According to Mr. Leong, the total area of encroachment of the defendants' construction on the plaintiffs' property is 18 square meters. Mr. Pardiwalla, learned counsel for the defendants cross-examined this witness at length on the issue as to a slight variations found in the areas of both parcels of land, when calculations are based on the coordinates used in the cadastral plan of 1966 (exhibit D6) and the one based on the defendant's personal measurements of distances on the boundary lines. However, Mr. Leong maintained his findings on the issue of encroachment, although he admitted in cross-examination that such slight variation is normal and negligible given the fact that the reference points used in the old cadastral plans to measure the distance and direction are now replaced by new Control Points, which are set up by Government as reference points on mountain tops for survey purposes. In the circumstances, Mr. Leong maintained that his finding on encroachment is correct, which cannot be faulted for any slight variation in the area mathematically calculated for the parcels in question.

In view of all the above, Mr. Boullé, learned counsel for the plaintiff in his final address submitted in essence, that the findings on evidence of the expert Mr. Leong (PW3) on the crucial facts are not controverted by any other expert-evidence or otherwise by the defendants. Hence, Mr. Boullé contended that the plaintiffs have proved their case to the required degree in civil law and so urged the court to enter judgment for the plaintiff granting

the prayers first-above mentioned and dismissing the counterclaim made by the defendant in this matter.

On the other side, the defendant Mr. Francois Confait (DW1) testified that the plaintiff constructed his wall in 1995, when the defendant was away from the Republic. According to the defendant, the plaintiff never consulted or asked him to share the construction cost of any boundary wall nor did mention to him about the need to have a wall between their properties. The defendant further testified that in 1997 while he was building a bungalow for his tourism-business, some tourists requested him to add a little kitchen to the bungalow. Although the defendant admitted that about 10 feet of the kitchen-roof, which he has put up on the structure rests on the plaintiffs' wall, he denied the allegation that he destroyed or removed the beacon in question. According to the defendant, he did not see any beacon *in situ* as it could have possibly been covered by barrage of leaves. Moreover, the defendant testified that he did not encroach on the plaintiffs' land. As regards the counterclaim of the defendant alleging encroachment by the plaintiff on defendants' land, the defendant candidly admitted in his evidence-in-chief that he did not know whether the plaintiff has encroached on his land or not, though it is pleaded so in his statement of counterclaim.

In the circumstances, Mr. Pardiwalla, learned counsel for the defendants submitted that the finding of Mr. Leong (PW3) on the issue of encroachment is not correct, which cannot be relied and acted upon as he has taken a measurement of the distance from beacon AH1 to AH10 on PR11 wrongly as 27.41 meters, instead of 26. 8 meters. According to Mr. Pardiwalla, when his client Mr. Confait (the defendant) himself actually measured that distance on the property, it measured only 26. 8 meter, not 27.41 meters as testified by Mr. Leong. Learned Counsel further contended that this discrepancy showed that the surveyor Mr. Leong did not have the right Control Points and coordinates to ascertain the distances and the relevant beacons. Moreover, Mr. Pardiwalla submitted that if one calculates the area of the defendants' land applying the coordinates and the measurements used by Mr. Leong, the said area should be 1277. 6 square meters. However, according to the actual measurements, which the defendant took and the calculations he made, the said area was found to be only 1239. 4 square meters. Because of the variation found between these two areas namely, the one derived by Mr. Leong and the other derived by his client Mr. Confait, it is contended by Mr. Pardiwalla that the expert-evidence given by Mr. Leong cannot be relied and acted upon by this Court in view of its inherent defects. In addition, Mr. Pardiwalla submitted that the defendant has the right to use the defendants' wall and to insert

beams or joints to support or rest his roof on that wall in terms of article 657 of the Civil Code of Seychelles. Therefore, he contended that the defendants have not encroached on the plaintiffs' land or trespassed on the plaintiffs' wall. As regards the plaintiffs' claim for damages, Mr. Pardiwalla submitted that the plaintiff has not shown how he has suffered damage because of the alleged encroachment. For these reasons, Mr. Pardiwalla urged the Court to dismiss the plaintiffs' action in entirety.

I diligently analyzed the entire evidence on record including the documents adduced by the parties. I gave meticulous thought to the final submissions made by counsel on both sides on points of law and on facts. Before I proceed to identify the live issues for determination, for the sake clarity and convenience, I prefer to examine first, the counterclaim made by the defendants against the plaintiffs in this matter. Although the defendants have pleaded a counterclaim in their statement alleging that that the plaintiffs were the ones, who have encroachment on the defendants' land unlawfully and have constructed part of a building after destroying the beacons on the boundary between the said parcels of land, as I see it, such allegation is not at all supported by evidence on record. Indeed, the defendants have miserably failed to adduce any positive evidence either oral or documentary or that of another expert, to substantiate this allegation of encroachment by the plaintiffs. The defendant Mr. Confait in his evidence in chief stated that he himself was not sure of that allegation. Obviously, there is no evidence at all on record except the defendants' guesswork that beacon AH4 should have been at a different point, not at the point pegged by the expert Mr. Leong. The argument advanced by Mr. Pardiwalla relying upon his client's guesswork, measurements and calculations of areas, in order to assail the expert- evidence, does not appeal to me in the least. It is truism that expert opinion evidence may be contradicted and cross-examined to, like any other evidence and the attack may include cross-examination going to credit *vide Murphy on Evidence at p366*. However, in this particular case, the defendants have not contradicted the expert- evidence by adducing any other evidence to prove their counter-allegation of encroachment by the plaintiffs on the defendants' land. In the circumstances, I conclude that the defendants have failed to discharge their evidential burden to prove the counterclaim pleaded against the plaintiffs. I therefore, dismiss the defendants' counterclaim in its entirety in this matter.

I will now proceed to examine the plaintiffs' claim in this suit. Whatever be the arguments advanced by counsel for and against on various facts-in-issue, in my view, the fundamental questions before the Court for determination in this suit are these:

- (1) *Have the plaintiffs proved on a balance of probabilities that the defendants have encroached on the plaintiffs' land PR10 having constructed part of their building crossing the boundary line between PR10 and PR11?*
- (2) *If so, did the plaintiffs ever consented or acquiesced to such encroachment by the defendants? and*
- (3) *As a result of such encroachment if any, did the plaintiff suffer any damage? If so, what is the quantum of damages the plaintiffs are entitled to?*

As regards the question of encroachment, it is abundantly clear that the evidence of the plaintiff Mr. Nilsen and that of the expert Mr. Leong (PW3) on the crucial facts, as rightly submitted by Mr. Boullé, are not controverted by any other expert-evidence or otherwise or by any other evidence adduced by the defendants in this matter. On a meticulous analysis of the entire evidence, I find that the following crucial facts have been proved more than on a balance of probabilities and to my satisfaction:-

- (i) the beacon AH4 on the boundary line between the two properties had been pegged and remained in its place ever since the plaintiff purchased his property PR10 in 1979. This beacon had been missing - to say the least - since 1997 the defendants started construction on the plaintiffs' wall. I believe the plaintiff's version in this respect and reject that of defendant and hold that only the defendants through their construction caused the destruction or removal of that beacon from its place.
- (ii) In 2000, at the request of the plaintiff, the G & M Surveys did survey the properties in question properly and ascertained the point AH4 correctly, using the right Control Points and the coordinates and pegged or relocated the said beacon *in AH4 in situ*;
- (iii) The defendants did encroach on the plaintiffs' property in that the defendants have constructed part of their building without consent of the plaintiff, crossing the boundary by a minimum distance of 0.41 meter and maximum of 0.45 meter inside the plaintiffs' land over a stretch of 4.5 meters along the boundary line; the total area of such encroachment is 18 square meters. I accept the expert-evidence of Mr. Leong, an experienced land surveyor, in every aspect of his testimony as to the nature of encroachment and extent.

(iv) The roof of the defendants' building admittedly, rests on plaintiffs' wall. The defendant evidently, built or rested upon it the structure without consent of the plaintiffs. In this respect, I carefully perused article 657 of the Civil Code cited by Mr. Pardiwalla in support of his contention that the defendants as owners of the adjacent property have the right to insert beams or joints in the wall in question. In fact, this article reads thus:

“Every owner may build against a party-wall, and insert beams or joints within 54 millimeters of the whole thickness of the wall,, without prejudice to the right of his neighbour to reduce, with a chisel, the length of the beam to a half-way point in the wall, in case he himself wants to insert beams in the same place, or to build a chimney against it”

Obviously, this article applies only to party-wall, which means every wall that serves two separate buildings up to the roof line reached by the lower building or between yards and gardens vide article 653 of the Civil Code. Presumably, a party-wall is jointly owned by adjacent land owners, as it runs over the boundary that divides both properties. However, the plaintiffs' wall in the present suit is not a party-wall since it has been built entirely on the plaintiffs' land, not on the boundary line between PR10 and PR11. Besides, it has been built at plaintiffs' own costs and so I find. Hence, with due respect to Mr. Pardiwalla, article 657 he relied upon, does not seem to me relevant to the instant case. In any event, even if one assumes for a moment that the wall in question is a party-wall, it is still unlawful for the defendant to rest the roof or any structure upon it, without the consent of the plaintiffs in terms of article 662 of the Civil Code. This article runs thus:

“A neighbour shall not insert into a party-wall any object nor shall he build or rest upon it any structure without the consent of the other...”

(v) Finally, the encroached structure of the defendant on the plaintiffs' property, has not only crossed the boundary line in between, not only crossed the 2-foot gap or opening the plaintiff had left in between his wall and the boundary line, not only crossed the plaintiffs' wall but also the roof of that encroached-structure has protruded beyond the wall into the plaintiffs' property. Having said that, it is interesting to note that the Planning Authority has received the defendants' application for planning permission only on the 11th November 1997 vide exhibit P8, whereas the defendants have

already built and completed the encroached construction well before 3rd September 1997 vide *exhibit P2*. Indeed, I fail to understand, how the defendants could construct a building on the plaintiffs' property even before he applied for a planning permission, let alone the fact that one should start construction only after obtaining the necessary planning permission from the Authority.

- (vi) As a result of the said encroached structure and the consequent injury to his property and its aesthetic value, plaintiffs did suffer loss and damage as particularized hereinbefore and so I find. Undoubtedly, the defendants are liable in tort to make good the said loss and damage, which the plaintiffs suffered.
- (vii) Having regard to the entire circumstances of the case and taking all relevant factors into account, I find that the plaintiffs' claim for damages in the sum of R33, 189. 71 is just, reasonable and appropriate.

In view of all the above, I dismiss the defendants' counterclaim *in toto* and enter judgment for the plaintiffs as follows:

- (i) *I hereby order the defendants to demolish all his construction on the plaintiffs' land parcel PR10;*
- (ii) *In the event of the defendants' failure to demolish the said constructions within 30 days of the date of this judgment, I hereby authorize the plaintiffs to effect all necessary demolitions, and for that purpose I direct the Registrar of the Supreme Court/the Commissioner of Police to give the assistance of a process server/police officer, if requested by the plaintiffs;*
- (iii) *Further, I order the defendants to cease all further acts of trespass or encroachment on the plaintiffs' property PR10; and*
- (iv) *Furthermore, I order the defendants to pay to the plaintiffs the sum of R33, 189. 71 with interest on the said sum at 4% per annum as from the date of the plaint plus costs of this action.*

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D. Karunakaran

Judge

Dated this 7th day of May 2009