Umbricht v Lesperance
(2007) SLR 221

Philippe BOULLE for the plaintiff
Karen DOMINGUE for the defendant

Judgment delivered on 6 August 2007 by:

KARUNAKARAN J: The plaintiff in this action prays this Court for a judgment against the defendant in essence, seeking the following remedies -

(i) An order directing the defendant to unblock the access road, and remove all constructions and the gate he has put up blocking the plaintiff's right of way on the defendant's land Parcel PR661, in order to have access from the public road to the plaintiff's land Parcel PR624.

(ii) A declaration that the plaintiff has a right of way over the defendant's land Parcel PR661 along the existing access road; and

(iii) An award of R20,000 - for the plaintiff against the defendant towards moral damages the plaintiff suffered

Beginning from the main road the access way passes over several parcels of land situated between the main road and the plaintiff's property. They are namely,(1) PR1287, (2) PR829, (3) PR1344, and (4) PR 1988 (belonging to the plaintiff herself), (5) an unsurveyed parcel of land belonging to one Mrs. Western Fred, (6) PR661 belonging to the defendant, and (7) PR625 belonging to one Ms Wilhem Figaro and then it ends up on the plaintiff's property. After the purchase, the plaintiff lived in that house for about six years. Thereafter, she had been renting it out to several tenants. Undisputedly, the first tenant was one Mr Louis D'offay - PW2 - who had been occupying the house from 1991 to 1994. The second tenant was a company "Casino Des Iles", represented by its General Manager Mr Philip Saunders - PW3 - who had been renting the house from 1995 to 1998. The third tenant was also a company, Masons Travel (Pty) Ltd, represented by one Mr Paul Allisop - PW5 - who had been occupying the house from 1999 to August 2001. Be that as it may.

The defendant's parcel PR661 is situated not only adjacent to that of the plaintiff but also it is the penultimate parcel of land, through which passes the said access road. The defendant purchased his land in 1989 from his aunty Davinia Lesperance - vide exhibit P3 - and then built his house thereon. Incidentally, the defendant's parcel PR661 is now subdivided into two parcels namely, PR3878 and PR3875.

The plaintiff testified that as far as she knew the said access road had been in existence for the past 35 years serving different houses in that area, wherein the families of her father and other siblings had been living. The plaintiff further stated that her father was

the one first started building the said access road beginning from the main road for the benefit of his children. A stretch of the said access road, which now passes through the defendant's land, hereinafter called the "access in dispute" according to the plaintiff, has been in use as a motorable access to reach her parcel PR624 ever since she purchased the property. The plaintiff testified that in 1988 she carried out some repair works and resurfaced the access in dispute with concrete strips to enhance its utility.

The plaintiff categorically testified that the access in dispute is the only shortest route possible, convenient, and available from the public road to the plaintiff's property as well as to the adjacent property PR625. Further, the plaintiff testified that her property is an enclave and no other access is available apart from the access in dispute. The plaintiff also produced a detailed plan - exhibit P6 - in respect of the said access in dispute that passes through the defendant's land leading to parcel PR624 via PR625. This plan drawn by G & Surveys Pty Ltd in 2000 clearly indicates that there had been an existing access road beginning from the public road to the plaintiff's property stretching across the defendant's land. She also produced an Aerial Photographic Map - exhibit P7 - in respect of her land and its surroundings. This map indeed, shows the continuation of the said access road over PR625, PR661 and PR1988 and then shows it leading to the adjoining properties situated down towards the seaside. In addition, the plaintiff produced a number of photographs - exhibits P11 to P25 - from which one can easily observe the existence of a motorable access road with old concrete strips starting from the public road, passing over different properties, crossing the defendant's land and then leading to the plaintiff's property. Furthermore, the plaintiff testified that Ms Wilhem Figaro, the owner of PR625, had already granted her permission - vide exhibit P8 - in 1990 for the construction of a motorable access road leading to her property. Moreover, she produced in evidence copies of the "title deeds" in respect of PR 1988 and PR 1288, exhibit P9 and P1O respectively, showing that she is the owner of these two parcels of land over which passes the said access road. The plaintiff further testified that she also built a retaining wall along the stretch of the access in dispute on the defendant's property at her own expense and that too with the defendant's consent in order to protect the said access in dispute from being damaged by landslides. Moreover, the plaintiff testified that the defendant had also been using the said access road since he purchased the property and even transported all the building materials for the' construction of his house using the same the access road in dispute.

In November 1999, the plaintiff was away from the country for some time. The third tenant Mr Paul Allisop - PW5 - of Masons Travel Pty Ltd was occupying the house at that time. Upon her return in December 1999, the plaintiff noticed that the defendant had put up a gate - made of galvanised pipes -- across the access in dispute and had completely blocked the motorable access to plaintiff's house. The tenant also complained about it to the plaintiff. When the plaintiff asked the defendant why he had done so, the defendant stated that the said access road was on his property and he had the right to block it. Moreover, the defendant told the plaintiff to advise her tenant to move out of the house. The plaintiff sought police assistance to get the obstructions removed but to no avail. Then she sent a personal letter to the defendant dated 1 December 1999 - exhibit P26 - which reads thus:

Dear David,

On my return from my holidays I was surprised to see you have erected a gate across my road leading to the house I rent to Masons Travel.

Obviously, this is not acceptable to me because you are prohibiting access by car or any vehicle to the house. Access to the property has been available for some twenty years, long before you lived near the land. I funded the construction of the road personally at great expense. No objections were raised by the previous owners of the land. Only now after all these years you have decided to block the road without consultation with me.

....David please, contact me... so we sort this matter out.

Yours sincerely,
(Sd) Plaintiff

The defendant made no response to this letter. In the meantime, because of non-access, the tenant "Masons Travel" vacated the house before the expiry of the contracted tenure. As a result of the defendant's unlawful act, according to the plaintiff, she suffered mental stress, which affected her health condition and she had to undergo four surgical operations. She estimated the moral damage, which she suffered in this respect at R20,000 for which she claimed that the defendant is liable to make good.

The first tenant Mr Louis D'offay - PW2 - testified that he was living in the plaintiffs house as a tenant from 1991 to 1994. During that period he had a car. He used to drive on the said access in dispute to reach the entrance of the veranda of the house and park his car there. According to him, the plaintiff in the early 1990s resurfaced the access in dispute with concrete. The second tenant, Mr Philip Sanders - PW3 - who was then the General Manager of Casino Des Iles also testified that his company had been renting the house from the plaintiff from 1995 to 1998. During that period the said motorable access road was in existence with a concrete surface and was in use by the tenant. The third tenant Masons Travel (Pty) Ltd, represented by one Mr Paul Allisop - PW5 - who had been occupying the house from 1999 to August 2001 testified that the tenant had to terminate the tenancy prematurely and vacate the house since the defendant had put up an obstruction across the access road.

The land surveyor Mr Michel Leong - PW4 - testified in essence that in July 2000 upon the plaintiff's request, he surveyed her property. On the defendant's property, he noticed a gate made of galvanised pipe erected across the access in dispute. This gate was completely blocking the motorable access to the plaintiffs house. Although the gate was mostly located on defendant's property, part of it had encroached onto PR624. Further, in cross-examination he stated that he did not see any other footpath on any other property, which could lead to the plaintiff's house.

In view of all the above, the plaintiff has now come before this Court seeking the remedies first-above mentioned.

On the other hand, the defendant denied all the allegations and the claims made by the plaintiff in this matter. According to the defendant, the plaintiff has no right of way over his property, as it has not been demarcated in the registered title deed burdening PR661. Therefore, the defendant seems to justify that he has the right to block the access road in dispute. The previous co-owner, Mr Laporte - DW2 - who sold the property to the plaintiff testified that when he sold it to the plaintiff in 1988, there was only a footpath along the access in dispute. According to him, the plaintiff built the motorable access along the access in dispute only in 1990 or 1991. It is the contention of the defendant that the plaintiff's property is not enclosed. The plaintiff has other alternative access without having to go through the access in dispute. Moreover, it is the case of the defendant that the Government has built a road on the western side at a distance of 7 minutes walk from the plaintiff's property. There was a proposal by the Government for the extension of that road. This project can easily provide an alternative access to the plaintiff's property through adjacent parcels lying on the western side of the plaintiff's land. In support of this contention as to the alternative access the defendant called DW3, Mr Brian Felix - a private land surveyor - to testify as to the possibility of getting an alternative access road to the plaintiff's property. According to this witness there is already a footpath - vide blue broken line in exhibit P3 - from parcel PR625 leading to parcel PR3854, which has been earmarked by the Government for the construction of a sub road. This proposed road would pass over adjacent parcels of land on the western side of the defendant's property. According to Mr Felix, the plaintiff can have a right of way over PR625 to reach the said footpath and then reach the road yet to be built by the Government. He also testified that the existing access road reduces the area of the defendant's property, which has already been subdivided into two parcels and its area of utility is minimised. According to the defendant, the right of way proposed by him is more convenient than the existing one. In the circumstances, the defendant seeks dismissal of the suit.

I meticulously perused the entire evidence including the documents adduced by the parties. I gave diligent thought to the arguments advanced by both counsel in their written submissions. Obviously, the plaintiff in this matter claims right of way over the defendant's land relying on two grounds.

Ground (i): Since the plaintiff's land is enclosed on all sides, in law she is entitled in terms article 682 and 683 of the Civil Code to obtain a right of way over the defendant's property. These two articles read thus:

> Article 682
> 1. The owner whose property is enclosed on all sides, and has no access or inadequate access on to the public highway, either for the private or for the 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 adequate compensation for any damage that he may cause.

2. However, where the owner has been deprived of access to a public road, street or path in pursuance of an order converting a public road into private property, the person who has been granted such property shall be required to provide a right of way to the owner without demanding any compensation.

Article 683
A passage shall generally be obtained from the side of the property from which the access to the public highway is nearest. However, account shall also be taken of the need to reduce any damage to the neighbouring property as far as possible.

Ground (ii): L'assiette de passage over the access in dispute has been used for a period in excess of 20 years and the plaintiff has prescribed the said assiette de passage, which is the shortest route to the main road.

For the sake of convenience, let us first take ground (ii) above for examination. It is trite law that a right of way is a discontinuous easement in terms of article 688 of the Civil Code of Seychelles. This right cannot be created except by a document of title. Even possession, use and enjoyment from time immemorial is not sufficient for its creation in terms of article 691 of the Civil Code of Seychelles (see *Payet v Labrosse* (1978) SLR 122 and *Delorie v Alcindor* (1978-1982) SCAR 28)**.** Hence, as I see it, the right of way cannot be created by acquisitive prescription, even if the claimant had been in use and enjoyment for 20 years or more or even from time immemorial. However, it is interesting to note here that in cases of non-access (enclave) “assiette de passage et mode de servitude de passage" is subject to prescription by twenty years of continuous use in terms of article 685 of our Civil Code, which reads thus:

1. The position and the form of the right of way on the ground of non-access are determined by twenty years' continuous use. If at any time before that period the dominant tenement obtains access in some other way, the owner of the servient tenement shall be entitled to reclaim the right of way on condition that he is prepared to return such a proportion of any compensation received under paragraph 1 of article 682 as is reasonable in the circumstances.

2. The action for compensation as provided in paragraph 1 of article 682 may be batted by prescription; but the right of way shall continue in spite of the loss of such action.

Indeed, article 685 of our Civil Code (supra) is simply the replica of article 685 of the French Civil Code, except for the number of years pertaining to the continuous use. Article 685 of the French Civil Code, which was in force until 1975, reads thus:

> L’assiette et le mode de servitude de passage pour cause d'enclave sont determines par trente ans d’usage continu.
>
> L'action en indemnité, dans le cas prévu par l’article 682, est prescriptible et le passage peut-être continue, quoique l’action d’indemnité ne soit plus recevable

Therefore, it is evident that article 685 of our Civil Code simply specifies that only the position and the form of the right of way are to be determined by twenty years' continuous use. This obviously, does not refer to the right itself or create any right of way (the abstract entity); but rather determines only the position and form of the access (the physical attributes) and thus protects their continuance and longevity by prescription of 20 years. To my understanding of the case law, the right of way is a distinct discontinuous easement attached to an immovable property. It is a real right as opposed to personal. It is perpetually attached to the property, not to the owner/s of the property. Therefore, it requires a document of title or a declaration of the Court for its creation. In this respect, I would like to restate herein the *Sinon* Principle, which I first formulated and applied in the case of *Georges Sinon v Maxim Dine* (unreported) CS 177/1999 and later fine-tuned it in the case of *Pat Pascal v J J Leveille* (unreported) CS 177/2000. This principle states that in the absence of any document of title or a declaration by a competent court of law, no owner of land is entitled to have any right of way over another's land. This is the general rule of principle, which I applied in *Sinon* (supra). When the occasion arose in a subsequent case of *Pat Pascal* (supra) I had to rethink and fine-tune the said principle and appended two exceptions to the rule. Thus, in *Pat Pascal* I held that although the creation of the said right of way is governed by that principle, there are two exceptions to it by virtue of articles 693 and 694 respectively of the Civil Code of Seychelles, which I termed as "statutory exceptions". Obviously, these two articles relate to the category of contiguous plots of land, which were once owned by the same owner but subsequently subdivided and transferred to different owners. If the non-access had arisen from exchange or a division of land or from other contract, the passage may only be demanded from such land as has been the subject of such transaction. In such cases, requirement as to the existence of any document of title or a declaration by Court under article 682 becomes irrelevant and thus constitute an exception to the *Sinon* principle quoted supra. However, the case on hand does not fall under this category of statutory exceptions to the *Sinon* principle. Hence, the plaintiff, who admittedly, having no "document' of title" or a "declaration by Court" for the right of way, has now come before this Court seeking a declaration that she has a right of way over defendant's land parcel PR661 along the existing access road, invoking article 682 of the Civil Code.

Coming back to the facts of the case, the plaintiff purchased the property only in 1988. Obviously, she could not have been in continuous use in excess of 20 years whether it relates to the right of way as such or the position and form of the right of way as she was admittedly interrupted of her use by the defendant in November/December 1999. In any event, the previous owner, Mr Laporte - DW2 - unequivocally testified that when he

sold the property to the plaintiff, the access was only in the form or mode of a footpath along the access in dispute, not in the form of any motorable road. Therefore, the plaintiff cannot invoke article 685 of the Civil Code to establish l' assiette et le mode de servitude de passage namely, the position and the form of the right of way, as the condition as to number years required under article 685 of the Code is not satisfied.

I will now move on to examine the merits of ground (i) supra, pertaining to the issue of enclave. From my observations of all the relevant documents admitted in evidence, namely the detailed plan (exhibit P6), Aerial Photographic Maps (exhibits P7 and D4) and photographs (exhibit P11 to P25) I find more than on a balance of probabilities that the plaintiff's property is enclosed on all sides in the present condition and nature of the surrounding terrain. The plaintiff has no other convenient and practicable access on to the public highway for the private use of her property apart from the access in dispute. The alternative access proposed by the surveyor Mr. Felix (DW3) in this respect is not only speculative but also being a footpath, it cannot provide a sufficient right of way to ensure the full use of her property. Besides, the proposed alternative (see, blue broken line in exhibit P3) is not obviously the nearest to the public highway compared to the access in dispute. Therefore, the plaintiff is entitled to claim from her neighbor, namely the defendant, the existing right of way - the access in dispute - to ensure the full use of her property in terms of article 682 of the Civil Code. A passage shall generally be obtained from the side of the property from which the access to the public highway is nearest: vide article 683 (supra). Undoubtedly, the existing access road over the defendant's property is not only the shortest route to the public highway but also more practicable and more convenient in the circumstances. Hence, I find the existing right of way along the access in dispute on the defendant's property is the plaintiff's entitlement in law by virtue of article 683 of the Civil Code and so I find.

In passing, I would like to observe that by granting a landowner "right of way" on another's property, the Court in effect, interferes with the former's constitutional "right to property and peaceful enjoyment", which is one of the fundamental rights, a sacrosanct right guaranteed by the Constitution. In so doing the Court indeed sets limitations to the constitutional right of that person in order to accommodate a statutory right granted in favour of his enclosed neighbour under article 682 of the Civil Code. At this juncture, I should mention that the list of such limitations which may be prescribed by law as contemplated under article 26 (2)(a) to (i) of the Constitution does not include or provide for the contingency of non-access due to enclosed lands, which is a common phenomenon in the Seychelles given the nature and form of its terrain and topography. The constitutional reflection in this respect indeed, originates from the noble thought of Mr PJR Boulle, counsel for the plaintiff, expressed in his address before the Constitutional Court in the case of *Alf Barbier v Government of Seychelles* (unreported) CC 1/2003. Be that as it may. When an enclosed neighbour requires access over another's property, the Court should determine such requirement with utmost judicious mind and diligence striking a balance between the constitutional right of the landowner and the statutory right of his neighbour. In this process, the Court obviously ought to take into account all the relevant circumstances of the case. These circumstances in my view should include the fact as to how the non-access arose, the balance of

convenience and hardship, the availability, practicability and cost of construction of the alternative access road on neighbouring properties, the peaceful enjoyment of one's property with least interference from others and the need to reduce as far as possible any damage to neighbouring properties and the like.

In fact, the plaintiff in this matter has now come before this Court seeking a declaration, injunction and damages against the defendant. On the other hand, the defendant suggests that his neighbour, the plaintiff, may build an alternative access road over the neighbouring properties belonging to others like Freddy and Ginette and that too based on a speculation that the government will be extending an existing road situated several parcels away from that of the plaintiff. With due respect to the defence suggestion as to the alternative access, I would state that the extended application of the religious principle - the Golden Rule - "Do unto others what you expect from others to do for you" - see Matthew 7:12 and Luke 6:31 - embodied in article 682 of the Civil Code should not be restricted only to Freddy and Ginette. The defendant himself should first observe this rule by extending his generosity and kindness to his neighbour before he suggests it to be enforced by law on others. Having said that, it is pertinent to note what the Court held in *Azemia v Ciseau* (1965) SLR 199, which runs thus -

> (i) The land owner whose property is enclave and who has no access whatever to the public road can claim a right of way over the property of his neighbour for the exploitation of his property, conditioned on giving an indemnity proportionate to the damage he may cause.
>
> (ii) A property may be deemed to be "enclave" not only from the fact that it has no access to the public road but also in the case where such road is impracticable.
>
> (iii) If the accessibility is the result of the property having been divided by sale, exchange, partition or any other contract, a right of way can only be asked for over the properties affected by such contract.

Bearing the above principles in mind, on the strength of the evidence and pleadings on record, I hold that the plaintiff is entitled to claim/maintain/possess the right of way over the defendant's property. In the circumstances, I conclude that the plaintiff's claim for a right of way over the defendant's land based on enclave is maintainable in law and on facts.

As I see it, the defendant's suggestion for the alternative access is based more on speculation than on facts. In any event, the alternative access canvassed by the defendant in my judgment is impracticable, inconvenient and above all such an access road will have to pass over more than two parcels of land in the adjacent area, causing more inconvenience and damage to the neighbouring properties. In the final analysis, I conclude that the plaintiff is entitled to the remedies first above mentioned. Upon evidence, I find that the defendant did put up a gate or obstruction on the existing motorable access road taking the law into his own hands and thereby prevented the

plaintiff from using the access road over which she had a legitimate expectation of having a right of way. As a result, the plaintiff should have obviously suffered a certain degree of hardship and inconvenience. However, the amount claimed by the Plaintiff for moral damages in the sum of R20,000 appears to be highly exaggerated and unreasonable in the given circumstances and nature of the case. Furthermore, I find that the defendant's unlawful act in this respect, could not have been the sole or proximate cause for the four surgical operations the plaintiff claimed to have undergone, which all appear to be of gynaecological origin. Considering all the relevant circumstances, I award a global sum R3,000 in favour of the plaintiff for moral damages, which sum, in my view would be reasonable, appropriate and meet the ends of justice in this matter.

In view of all the above, I enter judgment for the plaintiff as follows:

(i) I hereby declare that the plaintiff has a right of way in favour of her enclosed property parcel PR624, over the defendant's land parcel PR661 along the existing motorable access road leading to the public main road at Baie St Anne, Praslin;

(ii) Consequently, I order the defendant to remove permanently the obstructions, namely the galvanised gate or any other object or structure or construction, which he has put up blocking the plaintiffs right of way over his land parcel PR661, in order for the plaintiff or her assignees or successors in title or agents to have access from the public road to the plaintiff's land parcel PR624;

(iii) Further, I award a sum of R 3,000 for the plaintiff against the defendant towards moral damages the plaintiff suffered because of the obstruction the defendant had put up blocking her right of way; and

(iv) I award the plaintiff the costs of this action.

Record: Civil Side No 127 of 2000