COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] (18 December 2023)
SCA 08/2023
(Arising in CS 63/2019)

Cerf & Surf Properties Limited Appellant
(rep. by Mr. Bernard Georges)

And

Jean Paul Calais 1st Respondent

Catherine Calais 2nd Respondent

Deborah Bechard nee Calais 3rd Respondent

(represented by Mr. Frank Elizabeth)

Neutral Citation: *Cerf & Surf Properties Limited v Calais & Others* (SCA 08/2023) [2023] (Arising in CS 63/2019) (18 December 2023)
Before: Twomey-Woods, Robinson, Gunesh-Balaghee, JJA
Heard: 7 December 2023
Summary: **Encroachment – test to be applied to determine whether encroachment should be removed**
Delivered: 18 December 2023

ORDER

1. I quash the award made for loss of opportunity of development or sale as a result of the encroachment.
2. I quash the award in the sum of SCR 300,000 for loss of use and enjoyment of property and substitute therefor an award in the sum of SCR 100,000.
3. The appeal is otherwise set aside with costs.

JUDGMENT

GUNESH-BALAGHEE JA (Dr. M. Twomey-Woods, Robinson JJA concurring)

1. This is an appeal against a judgment of the Supreme Court ordering the appellant (then defendant) to, inter alia, remove encroachments from the respondents' property and to pay of SCR1,182,404.30 as damages to the respondents (then plaintiffs).

2. The respondents are the co-owners of parcel CA 103 and the appellant is the owner of parcels CA 20 and CA 102 at Cerf Island. The appellant originally only owned parcel CA 20 on which it had a small hotel comprising some chalets. It wanted to increase the size of the hotel and purchased the adjacent parcel, parcel CA 102, from the respondents' late father. Parcels CA 103 and CA 102 share a common boundary.

3. The present case arose following encroachments on the respondents' property by constructions effected by the appellant on parcel CA 102. It is undisputed that the appellant encroached on parcel CA103 in four places over a total area of 175 square metres as follows:
    (a) 145 square metres by part of a block wall, a concrete buggy drive a concrete footpath and a concrete tank;
    (b) 27 square metres by a tennis court;
    (c) 2 square metres by the roof overhang of one chalet; and
    (d) 1 square metre by the roof overhang of another chalet.

4. By the time the case was heard, all the encroachments except for the two roof overhangs had been removed and there were still some debris on the respondents' property.

5. The case for the respondents was that the appellant had unlawfully encroached on their property. Since 17 April 2018, the appellant had been put on notice to remove the encroachments within 14 days, but only part of the encroachment had been removed by February 2022. It was the respondents' contention that the encroachments constitute a "faute" in respect of which they have suffered loss and damages for which the appellant was liable. They accordingly sought damages in the sum of SCR 7,974,063 made up as follows from the appellant:
    (a) moral damages in the sum of SCR 50,000 for each of the respondents;

(b) loss of opportunity of development or sale as a result of the encroachments for the period 28 January 2015 to 31 December 2018 at the rate of SCR 5, 111 per day making a total of SCR 7,324,063; and

(c) loss of use and enjoyment of property in the sum of SCR 500,000.

In addition, they also sought an order that the appellant remove the encroachments.

6. The case for the appellant was that it encroached onto parcel CA 103 by mistake or inadvertence. The encroachments are *de minimis* and caused little or no inconvenience to the respondents or in their enjoyment of their property. It was willing to purchase any part of the property for a reasonable price. It further contended that the claim is exaggerated and disproportionate and that the respondents' action amounts to a delict of abuse of right if they "*refuse any reasonable accommodation*" with the appellant and insist with their claim.

7. The learned Judge found that the encroachments which still remain on the respondents' property are over a total area of 3 square metres and cannot be considered as substantial. However, he was of the view that the question was not whether the encroachments were substantial or *de minimis* but rather whether they could be removed. He found that the evidence on record tilts in favour of the respondents and that there was a lack of good faith on the part of the appellant. He also found that the encroachments did not arise through inadvertence, mistake or negligence.

8. Regarding the question of hardship, the learned Judge found that no unbearable hardship would be caused to the appellant if it were to be ordered to remove the encroachments. He also found that the respondents' demand to have the encroachments removed was not unreasonable and accordingly ordered that the encroachments be removed.

9. The learned Judge further awarded SCR 50,000 as moral damages to each of the respondents. He also made an award to the respondents of 10% of the sum claimed for loss of opportunity of development or sale as a result of the encroachment (SCR 732,406.30) and of SCR 300,000 for loss of use and enjoyment of property after taking into account the size of the encroachments.

10. The appellant is appealing against the judgment of the Supreme Court on 3 grounds of appeal as follows:

> "*1. The Learned Trial judge erred in not accepting that the encroachment was de minimis and that demolition of chalets which have encroached to the extent of 1 sqm and 2sqm respectively over an unoccupied and unused property of 14, 363 sqm was unjustified in all the circumstances.*
>
> *2. The damages awarded in all the circumstances are manifestly excessive given the extent of the encroachment, the removal of most of it and the fact that the property encroached upon was at all material times unoccupied and unused.*
>
> *3. The calculation of damages for the encroachment on the basis of a percentage of the claim, and the percentage calculated at 10% where the encroachment was of the order of 1.2% of the whole property are respectively a wrong method of calculation and a wrong assessment of the method applied.*"

11. The appellant is seeking the following order from this Court-

> "*An order allowing the appeal and:*
>
> *4. Replacing the order to demolish the encroachment with one ordering the Respondents to sell the encroached areas to the appellant at a fair valuation;*
>
> 5. *Either annulling the awards of damages or reducing the sums awarded to the Respondents.*"

12. I have duly considered both the oral and written submissions made on behalf of the parties. Before turning to the grounds of appeal, it is important to point out that the plaint was lodged on 6 May 2019 and the respondent's claim arose as a result of encroachments which must have existed prior to 17 April 2018 when the respondents brought same to the appellant's attention through a letter sent by their attorney.

13. However, it is apparent from the court record that, during their respective submissions before the trial court, learned Counsel for both parties relied on Article 556 of the Civil

Code of the Seychelles (hereinafter referred to as "the current Civil Code") which only came into effect on 1 July 2021. Further, although there is a passing remark made by the trial Judge to "*the argument that the Court should apply the law as it was before* (sic) *coming into force of the Civil Code of Seychelles 2020 and consider the principle of de minimis as set out in case law*", it is clear that he relied on Article 556 of the current Civil Code. In addition, learned Counsel for the appellant has made reference to Article 556 of the current Civil Code in the Heads of Argument of the appellant.

14. The Civil Code of the Seychelles which was in force prior to 1 July 2021 (hereinafter referred to as "the old Civil Code) with the coming into force of the current Civil Code. It is also apposite to note that section 3A of the current Civil Code (which was inserted in the said Code by Act 25 of 2021) provides as follows:

> "*3A. (1) The repeal of the Civil Code of Seychelles Act (Cap 33) does not —*
>
> *(a) affect the previous operation of the repealed Civil Code of Seychelles Act or anything duly done or suffered under it;*
>
> *(b)* ***affect any right, interest, privilege, obligation or liability acquired or accrued under the repealed Civil Code of Seychelles Act****, unless affected under any law;*
>
> *(c)* ***affect any legal proceedings or remedy in respect of any right, interest, privilege, obligation or liability referred to in paragraph (b).***
>
> *(2) No loss of right, interest, privilege or obligation occurring prior to the date of commencement of the Civil Code of Seychelles Act, 2020 (Act 1 of 2021) shall be deemed revived by the Civil Code of Seychelles Act, 2020 (Act 1 of 2021)."*[emphasis added]

15. It is clear from section 3A that the repeal of the old Civil Code does not affect any right acquired or liability accrued under the old Civil Code nor any legal proceedings brought in respect thereof under the old Civil Code. It follows from the above that this case had to be

determined by reference to the old Civil Code and that any reference to Article 556 of the current Civil Code or to any other Articles of the current Civil Code is wrong.

16. This having been said, I must point out that, in arriving at the findings made by him, the learned Judge did not solely rely on Article 556 of the current Civil Code; he also found support on the case law prior to the enactment of the current Civil Code which seems to have largely inspired the drafting of Article 556 of the current Civil Code. In the circumstances, I shall therefore turn to the grounds of appeal to consider whether the conclusion arrived at was warranted on the basis of the law as it stood at the time the plaint was lodged.

Ground 1

17. Under ground 1, the appellant is in effect challenging the learned Judge's Judge's finding that the encroachments should be removed.

18. Learned Counsel for the appellant argued that the learned Judge should have applied the test set out in **Mancienne & Anor v Ah-Time & Anor SCA 9 of 2010**, namely, that "*where the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, account taken of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher, the court should as an exception mitigate the consequences by an award of damages instead of a demolition.*'

19. I agree that the test to be applied should have been the one set out in **Mancienne**. However, the above paragraph quoted by learned Counsel for the appellant cannot be read in isolation and it is relevant to refer to the following extract from **Mancienne** which places the paragraph referred to above in its proper context–

> "*12. The adoption of a rule awarding damages in place of ordering demolition for boundary encroachments would at once be contrary to the provision of art 545 of the Civil Code and violate the constitutional principle of private ownership of property in a democratic society. It would also set in motion a*

law of unintended consequences. Article 545 would become a charter of mischief in the hands of persons who may be tempted to make an abuse of it. For then, an adjoining land owner by design would be able to force his unwilling next-door neighbour to part with a strip of land along the boundary line against the payment of mere damages. The only limitation to the right of private ownership of property is that it can be compulsorily acquired by a specific law, through a specific procedure and for a public purpose. That is the rationale behind a rule that demolition should be the order of the day. Not even good faith or mistake on the correctness of the boundary would constitute a bar to the law's diktat to require demolition in boundary encroachments and the Court's duty to order same.

13. *However, if pushed to the extreme, there may be cases where for a small area of land encroached upon, part of a high rise would have to be demolished with consequences out of proportion to the value of the land encroached upon,* ***if such an encroachment has come about in good faith and the encroacher is otherwise compliant with the law****. It was to mitigate the rigours of an indiscriminate application of the rule that a number of foreign jurisdictions have developed the concept of abus de droit, Some have done it by judicial creation and some by legislative intervention.*

14. *...*

15. *...*

16. *...*

17. *Post-Nanon, the exception to the rule that demolition should be ordered in all neighbour boundary encroachments may be stated to be as follows:*

> ***where the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, account taken of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher****, the Court should, as an exception mitigate the*

> *consequences by an award of damages instead of a demolition. Nothing short of that would suffice. For the encroacher to escape the guillotine of article 545, he should show that, in refusing a compensation for the negligible encroachment and insisting on a demolition order in all the circumstances of the case, the owner is making an abus de droit."* [emphasis added]

20. It is clear from the above extract that the rule remains that, where there is an encroachment, the encroacher must be ordered to remove same. However, where –

    (a) the encroacher is of good faith;

    (b) the encroacher is otherwise compliant with the law; and

    (c) the demolition order would result in a grave injustice in view of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher, the Court may, in lieu of an order for demolition, make an order for damages against the encroacher.

21. In the case at hand, the learned trial Judge rightly noted that the crucial question was not whether the encroachment was *de minimis* but rather whether the encroacher was of good faith. He then stated that the appellant had to prove bad faith on the part of the respondents and that the appellant had to satisfy that there was good faith. Basing himself on the facts of the case, he found that there was a lack of good faith on the part of the appellant.

22. The owner of the property on whose land there is an encroachment cannot bear the onus to prove that the encroacher was of bad faith; it should be for the encroacher who has infringed the constitutional right to property of the owner to establish that the encroachment was made in good faith. I therefore find that the learned Judge erred when he stated that it was for the respondents to prove that the appellant was of bad faith. However, I find that the above error was of no consequence in the present case since the learned Judge also stated that it was for the appellant to establish its good faith and, in any event, he found that the appellant was not of good faith.

23. In the Heads of Argument of Appellant, learned Counsel for the appellant submitted that the learned Judge fell short of making a finding that the appellant was of bad faith. I do not agree. The learned Judge stated –

> *"Balancing the evidence of the Plaintiff's witnesses and the Defendant, and considering that the Defendant is one experienced in the construction industry together with the several attempts by the Defendant to purchase additional parts of the whole of the Plaintiffs' land favours the Plaintiffs' argument that there was a lack of good faith on the part of the Defendant. I am not convinced that the encroachments occurred "through inadvertence, mistake as to ownership of the land or as to boundary line, or simple negligence.*"

24. It makes no doubt from the above extract that the learned Judge in fact made a finding that the appellant (then plaintiff) was of bad faith as he lacked good faith. I do not find any ground for interfering with the learned Judge's finding that the appellant was of bad faith. I do not consider that this finding is perverse, unreasonable or unwarranted on the basis of the evidence on record. Further, I was not directed to any contrary evidence on which the learned Judge should have arrived at a different conclusion in this regard.

25. I must emphasise that, as explained above, being of good faith is only one of the conditions that has to be met "*for the encroacher to escape the guillotine of article 545".* Another important criterion in determining whether to grant a demolition order is whether the order would result in a grave injustice to the encroacher in view of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher. It stands to reason that it would be for the encroacher to establish that grave injustice would be caused to him if he were to be ordered to remove the encroachment.

26. It is apparent from the court record that no evidence was adduced by the appellant with regard to any grave hardship which would be caused to it by a demolition order. In fact, the evidence of Mr Patel, the director of the appellant company, was to the effect that the overhang cannot be removed without affecting the chalet and that the appellant would have to modify the villa structure because the structure supporting the roof would be affected. He explained that to remove the encroaching overhang, the work involved would entail

removing one column and cutting out the projected part. The foundation of the timber column would then have to be rebuilt.

27. The appellant can surely not complain that it will have to modify its chalets as the current situation was brought about by its own doings. In addition, it is evident that Mr Patel did not testify to any grave injustice or unbearable hardship that would be caused to the appellant by the removal of the encroachment. It is amply clear from the evidence on record that the work which would be involved in removing the encroachment cannot be qualified as being one which would cause great hardship to the encroacher .

28. Learned Counsel for the appellant argued that the trial court had failed to give due weight to the fact that there was only an encroachment of the airspace of parcel CA 103 over an extent of 3sqm of CA103 which is of a total area of 14,363sqm. However, the above clearly overlooks the fact that, pursuant to the Civil Code, ownership of land carries with it the ownership of what is above and what is below it. (*vide* Article 552)

29. In the light of the evidence on record, the learned Judge was perfectly entitled to find that no grave hardship would be caused to the appellant by the demolition order. Taking all the above into consideration, I find that, although the learned Judge was wrong to have relied on Article 556, he was nonetheless right in making the demolition order after having found that the appellant was of bad faith and that the demolition order would not cause any grave hardship to the appellant.

30. For all the reasons given above, I find that there is no merit in ground 1 which is accordingly set aside.

Grounds 2 and 3

31. It is important to recall that the respondents' claim for damages was based on "faute". In this regard, it is of interest to refer to the following extract from paragraph 32 of **JurisClasseur Notarial Répertoire > V° Responsabilité civile Fasc. 120-10 : DROIT À**

RÉPARATION. – Responsabilité fondée sur la faute. – Notion de faute : contenu commun à toutes les fautes :

> "*...Mais les personnes dont les droits sont bafoués conservent toujours la possibilité d'engager la responsabilité civile de l'auteur de l'atteinte sur la base de l'article 1240 du Code Civil. Or ces droits impliquent, pour les tiers, des devoirs (devoirs de respecter les droits d'autrui), dont la violation réalise une faute. C'est ainsi que, par exemple, l'empiétement sur le terrain d'autrui, qui représente une atteinte au droit de propriété, suffit seul à caractériser la faute (Cass. 3e civ., 10 nov. 1992 : Bull. civ., III, n° 292 ; RTD civ. 1993, p. 360 , obs. P. Jourdain. – Cass. 3e civ., 16 déc. 1999 : Bull. civ., III, n° 252 ; Resp. civ. et assur. 1999, comm. 31 ; RTD civ. 1999, p. 638 , obs. P. Jourdain. – Cass. 3e civ., 29 mars 1999 : Resp. civ. et assur. 1999, comm. 165 . – Cass. 3e civ., 9 juill. 2020, n° 19-11.157 : JurisData n° 2020-010468 ; Resp. civ. et assur. 2020, comm. 179)...*"

32. It can be gathered from the above extract that under French law a person who breaches another's right engages his liability on the basis of Article 1240 of the French Civil Code and that an encroachment which constitutes a breach of the property right of a person suffices to establish that the encroacher has committed a "*faute*".

33. It is interesting to note that Article 1240 of the French Civil Code and Article 1382 paragraph 1 of the old Civil Code of the Seychelles (which are reproduced below) are exactly in the same terms.

Article 1240 of the French Code Civil stipulates:

> "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*."

Article 1382 paragraph (1) of the old Civil Code provides:

> *"Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it."*

34. It follows from the above that an encroacher commits a "faute" by the mere fact of encroaching on another person's property. Thus, basing himself on the fact that the appellant had encroached on the respondents' property, the learned Judge was entitled to find that the appellant had committed a fault vis à vis the respondents and, pursuant to Article 1382 paragraph 1 of the old Civil Code, the appellant was liable for any damage caused to them as a result of its fault. I note in this regard that learned Counsel for the appellant admitted that there was a faute.

35. The learned Judge awarded damages against the appellant under three heads. In so far as the moral damages awarded are concerned, in his judgment he stated that respondent No. 3 testified that the other respondents and herself faced stress and anxiety on learning of the encroachment. She also testified that, due to the encroachments, the respondents who do not live in the Seychelles had to travel there on a number of occasions to have surveys conducted and to attend court.

36. It is also clear from the evidence on record that although the respondents had put the appellant on notice to remove the encroachments since 18 April 2018, none of the encroachments had been removed by the appellant even after the case had been lodged. In addition, although two of the larger encroachments had been removed by 4 February 2022 when Mr Leong, the respondent's land surveyor made his second report, the encroachments of 2 square metres by the roof overhang of one chalet and 1 square metre by the roof overhang of another chalet as well as debris still subsisted on the respondents' property up to the time of the hearing.

37. The testimony of respondent No. 3 regarding the stress, emotional distress and inconvenience which the respondents had to endure as a result of the encroachments remained unchallenged. In the circumstances, I do not consider that the sum of SCR 50,000 awarded as moral damages to each of the respondents can be said to be unwarranted or excessive.

38. In so far as the question of loss of opportunity of development or sale of the respondents' property is concerned, the evidence on record at best showed that the respondents were unable to sell the property because of its size. Respondent No. 3 did not expatiate on this limb of the claim.

39. The learned Judge noted that the respondents did not adduce any evidence regarding to any development plan, except that there was interest by a developer who backed off in view of the legal dispute regarding the encroachments. They did not testify that there was in existence any investment plan which would have brought them the equivalent of the amount being claimed and that the land had not been developed at all and remained covered in vegetation up to the date of the hearing. However, he awarded 10% of the sum claimed under this head on the basis that it was not reasonable for the respondents to claim loss for the whole of parcel CA 103 when the encroachment was only on 175 square metres.

40. Given that the respondents had failed to establish that there was any loss of opportunity of development or sale of their plot as a result of the encroachment, the learned Judge was wrong to have awarded the sum claimed. I therefore quash the award of damages made under this head.

41. The sum of SCR 300,000 was awarded by the learned Judge under the head "loss of use and enjoyment of property". It is undisputed that the total area encroached was 175 square metres; the four encroachments over an area of 175 square metres were there at least from April 2018 up to the year 2022 and that 3 square metres still remained encroached when the case was heard.

42. Whatever may be the term used by the respondents in their plaint, it cannot be gainsaid that the parts of the respondents' property which were encroached were used by the appellant without their consent and without any payment having been made in return therefor. Furthermore, it is amply clear from the evidence led by the respondents that they were in fact claiming for an indemnity from the appellant for having used their land. Although, it is unclear from the evidence on record when the encroachments really started,

I note that learned Counsel for the appellant admitted that the encroachments subsisted for some 4 years.

43. However, learned Counsel for the appellant submitted that the land was neither being used nor enjoyed by the respondents at the material time and that they never showed that the encroachments prevented them from using or enjoying their property and that therefore no damages should be paid to them under the head "loss of use". I do not agree; if I were to follow his submissions this would mean that, for example, if a person owned a disused shed, a squatter would be able to move in and stay there for years on a small part of the shed and claim that no payment was due by him to the owner for his occupation as the shed was not being used by the owner and that his occupation did not prevent the owner from using the shed. This cannot be correct. The respondents must be compensated for the use of their land and they should have been awarded a payment akin to an "indemnité d'occupation" by way of damages in this respect.

44. The learned Judge awarded the sum of SCR 300,000 to the respondents under this head. However, he does not explain in his judgment how he arrives at the said sum. There is in fact scanty evidence on record with regard to the basis which could be used to calculate the damages. In the circumstances, given the findings above, I have to make an assessment of the damages that have to be awarded under this head. Unfortunately, this calls for some guesswork but I believe that one may use the sale price of lot CA 102 by the respondents' father to the appellant as a starting point in arriving at the quantum of damages. I note that CA 102 which is of an extent of 10,000 square metres was sold for CSR 1,000,000. It can be inferred that the market value of the respondents' property, which is adjacent to that property would also have the same market value per square metre. The rental or "indemnité d'occupation" in respect of the property would obviously have to be less that the value of the land.

45. Learned Counsel for the appellant argued that the sum awarded under this head of claim was excessive and that a sum in the range of SCR 100,000 to SCR 150,000 would be more reasonable having regard to the facts and circumstances of the case. In the absence of any better alternative means of assessing what should be the damages payable to the

respondents under this head and after taking into consideration the area of the land that was encroached and the time during which the encroachment subsisted, I consider that an award of SCR 100,000 under this head would meet the ends of justice.

46. In the light of all the above, I quash the judgment of the learned Judge in so far as the sum awarded under this head is concerned and substitute therefor the sum of SCR 100,000.

47. The appeal is otherwise set aside with costs.

K. Gunesh-Balaghee JA

I concur:-

Dr. M. Twomey-Woods JA

I concur:-

F. Robinson JA

Signed, dated and delivered at Ile du Port on 18 December 2023.