

IN THE SUPREME COURT OF SEYCHELLES
MA290/2015 and 230/2016 arising out of CS 127/2011

[201] SCSC

Ruth Erne

Plaintiff

versus

1. Julia Brain

2. Mary Nicette

3. Anita Nicette

4. Laura Nicette

5. Jourdanne Nicette

6. Mary May Nicette

Defendants

Heard: 15 November 2016

Counsel: Mr. Serge Rouillon for the plaintiff

Mr. Divino Sabino for the 1st defendant

Mr. Francis Chang-Sam and Ms. Edith Wong for 2nd, 3rd, 4th, 5th and 6th defendants.

Delivered: 13 January 2017

RULING

M. TWOMEY, CJ

[1] The Plaintiff entered a Complaint on 30 June 2011 against the 1st Defendant in which she sought an order from the court declaring that she had a motorable right of way over the 1st Defendant's land. She also applied for other ancillary orders pertaining to the right.

- [2] The Defendant (now the 1st Defendant) duly filed her defence stating that the Plaintiff had an existing registered right of way and asked for the dismissal of the suit.
- [3] In a further amended Plaint dated 28 April 2015 the Plaintiff added Defendants 2 to 6 to the suit claiming that the existing registered right of way was “useless, hazardous and unusable” and prayed that the court make an order granting a right of way across the lands of all the Defendants.
- [4] In an amended defence dated 23 September 2015 the 2nd to 6th Defendants repeated their objection to the claimed right of way and put the Plaintiff to strict proof of his averments relating to the existing right of way.
- [5] In a further application dated 20th July 2016 the Plaintiff, who had changed lawyers several times, and whose new lawyer seemed unaware of the Amended Defence that had been filed on behalf of some of the Defendants sought further orders of the court to set aside the previous motion to amend the Plaint and to be allowed to file a new Amended Plaint.
- [6] It is this application that is now being resisted by all the Defendants. Their objections to the Amended Plaint are on several grounds: The 1st Defendant objects to annexures to the Amended Plaint which seeks to introduce a survey report. In this regard she submits that the annexure is not a document permitted to be appended to a Plaint under Section 74 of the Seychelles Code of Civil Procedure as it is not one on which the Plaintiff can rely on for the prosecution of her suit.
- [7] The 1st Defendant also submits that the amendment sought would convert the Plaint from a suit of one character to another. In this regard Counsel for the 1st Defendant, Mr. Sabino, has submitted that in the Original Plaint the Plaintiff had sought to enforce a legal servitude over two parcels of land whereas in the proposed Amended Plaint she seeks to create a new right of way over three parcels of land as shown in a survey plan the Plaintiff has appended to the Amended Plaint. It is also his submission that the Amended Plaint is equivocal as it seeks to state both that there is an existing right of way but yet claims that a right of way should be granted.

- [8] In their objections to the Amended Plaintiff, the 2nd to 6th Defendants have submitted that the Amendment is not properly before the Court as the amendment, an incidental demand, has to be accompanied by an affidavit. It is also the submission of Counsel for the Defendants, Ms. Wong that the affidavit is defective in that it contains statements which are not personally known to the deponent. She has relied on the case of *Union Estate Management (Proprietary) Limited v Herbert Mittermeyer* (1979) SLR 140.
- [9] I agree with the submissions of the Defendants. First the rules of disclosure in civil matters are contained in section 77 of the Seychelles Code of Civil Procedure which provides:
- If the defendant intends to produce any documentary evidence, he shall annex a list thereof to his statement of defence and shall state where the same may be seen a reasonable time before the hearing.*
- [10] Mr. Sabino for the 2nd to 6th Defendants has rightly pointed out that it is the list and not the document itself that has to be tendered with the pleadings. The document is tendered to the court as per section 78 of the Seychelles Code of Civil Procedure only when it has been admitted as evidence. Section 74 of the Code specifies that documents are to be appended to the pleadings when they are being sued upon. This would normally apply in cases of contract when it is the written contractual agreement that is being relied on. It is not the case in the present suit.
- [11] It is therefore inappropriate that the pleadings filed have appended to them the survey report. This should not happen as it may lead to the perception that the judge at trial might be influenced by the document whether or not it is admitted in evidence.
- [12] This transgression of the procedural provisions of the Code however is not fatal to the pleadings. The report would normally be expunged from the case file until admitted formally as evidence of the Plaintiff. Two other matters raised in the Defendants' submissions however give rise to concern.
- [13] The Plaintiff in his incidental demand has supported his application by affidavit. Section 170 of the Seychelles Code of Civil Procedure provides that:

“Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof may be admitted.

- [14] In *Union Estate Management (Proprietary) Limited v Herbert Mittermeyer* (supra) Sauzier J in explaining what constituted a proper affidavit stated:

“...an affidavit which is based on information and belief must disclose the source of the information and the grounds of belief. It is therefore necessary for the validity of an affidavit that the affidavit should distinguish what part of the statement is based on information and belief and that the source of the information and grounds of belief should be disclosed.

- [15] When the present affidavit is measured against the procedural provision and the authority of *Union Estate* it is clear that it is not valid. It is sworn by one Evans Morel acting as Power of Attorney for the Plaintiff. He avers that the Plaintiff’s land is enclaved, that a suit has been filed against the proprietors of land titles J2475 and J1921, that after further research it has come to the attention of the Plaintiff that the most convenient right of way will be through the Defendants’ properties.

- [16] The Court has on countless occasions laboured the point that affidavits are evidence and are therefore subject to the same rules of admissibility as other evidence. In the present affidavit it may well be that the Deponent may have been told by the Plaintiff what her wishes are but that is hearsay evidence and is inadmissible. The Deponent may however have personal knowledge of some of the facts but that it is not stated in his affidavit. That distinction is essential and will validate or invalidate an affidavit. In this case it is the latter that applies.

- [17] Further, as has been pointed out by Mr. Sabino the pleadings that are sought to be amended are ambiguous and equivocal. While the Plaintiff states that title J2415 is enclaved, she also states in Paragraph 3 of the Complaint that she has a right of way.

- [18] As the Complaint currently stands it does not disclose a cause of action and is struck out under section 92 of the Seychelles Code of Civil Procedure. Pleadings must be clear and

unequivocal. They must permit parties and the court to identify what the issues to be decided are. For these reasons both the incidental demand and the suit are struck out with costs.

Signed, dated and delivered at Ile du Port on

M. TWOMEY
Chief Justice