

**Morin v Pool
(2002) SLR 144**

Philippe BOULLE for the Plaintiff
Jacques HODOUL for the Defendant

Ruling delivered on 13 March 2002 by:

PERERA ACJ: This ruling concerns an application for amendment of the plaint. Paragraph 2 of the original plaint reads as follows:

2. The Plaintiff has and had at all material times a right of way over the Defendant's land above mentioned."

That averment was answered by the Defendant in his statement of defence as follows:

2. Para. 2 of the plaint is strictly denied. The Defendant avers that he is the sole and absolute owner of Title C. 768; that the encumbrance Section in the Land Register reveals that his property is not burdened by a right of way as alleged and that he has not granted any easement for land comprised in C. 948 which, from time immemorial, has its own passage.

On 15 March 2001, before re-examining the Plaintiff, Mr Boule, Learned Counsel made an oral application to amend paragraph 2 of the plaint to read as –

2. The Plaintiff has and had at all material times a right of way over the Defendant's land abovementioned to the public road. by virtue of the fact that his property is enclaved". (Amendment underlined).

Mr Hodoul, learned counsel for the Defendant stated that he had no objections, as in paragraph 2 of the defence he had already averred that "from time immemorial" the Defendant's land had its own passage and that no easement has been granted over his land to serve the land of the Plaintiff. He stated that that was an adequate reply to the amendment sought. Asked by the Court whether there would be any consequential amendment to the prayer of the plaint. Mr Boule replied in the negative.

However on 4 June 2001, learned counsel for the Plaintiff filed a notice of motion seeking to amend the plaint as per the amended plaint attached therewith. That amended plaint contains the paragraph 2 as amended on 15 March 2001 and an additional prayer, which is as follows:

(a) To declare that the Plaintiff has a right of way on the Defendant's land, Title no. C. 768 exercisable by the use of a vehicular access road on the Defendant's land which has been blocked by the Defendant.

On 1 October 2001, Mr Boule moved that that prayer be added. He submitted that no additional remedy is being sought, and that what was involved in that amendment was only a "clarification".

Mr Hodoul, Learned Counsel for the Defendant, however objected to the amendment of paragraph 2, but had no objection to the amendment of the prayer of the plaint. He submitted that although he had not objected to the amendment of paragraph 2 on 15 March 2001, upon subsequent instructions, he would submit that by introducing the concept of an "enclaved property", the original cause of action based on faute has been added with another cause of action under Article 682 of the Civil Code.

In the present action therefore the Plaintiff has to establish that he was using the passage, as of right, and not out of mere tolerance and sufferance on the part of the Defendant. Article 682 of the Civil Code provides that where a person's land is enclosed on all sides, and has no access or inadequate access to the public road, he "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". An enclavement has therefore to be declared by Court, it cannot be presumed. Hence, the Plaintiff in the present proceedings does not claim such a right of way, but avers that he used that passage by virtue of the fact that his land is enclaved. The Plaintiff also avers that at all times and six years after the Defendant had acquired ownership of land Parcel C 768, he had been using that right of way. The Defendant on the other hand avers that before he purchased Parcel C 748, the Plaintiff had never claimed, enjoyed or attempted to create any passage thereon, and that after he purchased, the Plaintiff, despite strong objections, unlawfully cleared vegetation to create a vehicular passage. The co-lateral issue to be decided is limited to that dispute.

Mr Boule however contended that the cause of action is still based on faute. He referred the Court to paragraph 5 of the plaint wherein it is averred that the Defendant blocked the access road six years after he (the Defendant) had acquired land Parcel C 768. In paragraph 6 it is averred that the Plaintiff had been using that access road, *inter alia* for the purpose of transporting his produce to the market and to customers. It was therefore submitted that the facts on which the Plaintiff relies on and the remedy sought are both based on a right of way. Hence he submitted that the averment as regards the land being enclaved was added to establish "the original of the right of way".

Section 146 of the Code of Civil Procedure permits a party to amend his pleadings at any stage of the proceedings. But in the case of a plaint, it provides that no amendment which seeks to "convert a suit of one character into a suit of another and substantially different character should be allowed".

The cause of action pleaded in the plaint is unambiguous. The Plaintiff avers that he had been using a right of way over the Defendant's land and that the Defendant on 25th May 1999 blocked that access road causing him loss of earnings and moral damages.

Accordingly I rule that in these circumstances the amendment of paragraph 2 of the plaint does not have the effect of adding a separate cause of action. The amended plaint is accordingly accepted.

Record: Civil Side No 259 of 1999