THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES AT VICTORIA

Civil Appeal No. 16 of 2012

[On appeal from the Magistrates Court of Victoria Civil Side No. 229 of 2011]

Cable and Wireless (Seychelles) Ltd==========Appellant

Versus

Beryl Laurence==========Respondent No.1
Nilsen Laurence==========Respondent No.2

Ms Micock for the Appellants

Clifford Andre for the Respondents

JUDGMENT

Egonda-Ntende, CJ

1 The appellant in this matter was sued in the Magistrates Court by the respondents. The respondents are the owners of land on parcel V5521 on which they have a home and reside. Towards the end of the year 2008 they agreed with the appellant for the appellant to erect a pole on the edge of their property at no fee. However, not only did the appellant place a pole on the property as agreed but it constructed a manhole in front of the entrance to the respondents' property making such entrance unusable.

2 The respondents notified the appellants that for the encroachment that had not been authorised the appellant must pay the respondents a rental of R5,000.00 per month to which the appellants made no response. It was further contended for the respondents that the appellant create a nuisance to the respondents when they undertake maintenance work. The respondents therefore claimed from the appellant rent at the rate of R5,000.00 from 13 November 2009 to 11 February 2010 a sum of R100,000.00; continuing rent at the rate of R5,000.00 up to date of judgment; inconvenience to the plaintiffs in the sum R35,000.00; and moral damages for distress of R60,000.00 totalling to 195,000.00. Interest and costs were also claimed.

3 In answer to this claim the appellants contended that there was an oral agreement between the respondents and appellant for the appellant to place a pole and manhole to service that pole on the respondents' property rent free. Secondly that the respondents are not denied use of their entrance as the manhole is far from the main entrance to the property. Furthermore it was contended that the respondents were not prevented from using the area where the manhole was located as an entrance for both pedestrians and motor vehicles.

4 The appellant denied that it had done any maintenance work on the manhole or that any nuisance was produced. The appellant has investigated the possibility of removing the man hole from the respondents' property and the respondents have objected to it being moved. The appellant denied the respondents' claim in total and prayed that the suit be dismissed with costs.

5 The case was heard before the magistrates court at Victoria and judgment given in favour of the respondents hence this appeal. The appellant set forth 4 grounds of appeal and prayed that the decision of the Magistrates Court be set aside and that this court dismisses the respondents' claim with costs here and below. The four grounds are;

> '[1] the learned judge erred in failing to consider the evidence showing that the respondent had orally agreed to allow the appellant build the manhole on the respondents' property.
> [2] The learned Judge erred in concluding that the respondent cannot build a fence on top of the manhole when the appellant witness testified that nothing prevents the respondent from building across the manhole, as the respondent testified that he wished to do so.
> [3] The learned Judge was wrong in law to award moral damages in a claim for breach of contract.
> [4] The learned Judge was wrong in law to create a tenancy agreement between the respondents and the appellant as the appellant is subject to the Immovable Property (Transfer Restriction) Act, Cap 95.'

6 The respondents contend that this court should affirm the decision of the trial court.

7 The case for the respondents was presented with the testimony of one witness. It is short and I can set it out in full.

> '**Plaintiff case start.**
> **Examination in chief by C. Andre**

PW1:- Mr. Nilsen Laurence of Mt. Buxton, Mahe, sworn and state as follows: the 1st plaintiff is my wife.

I am leaving at Mt. Buxton, Mahe. My land is plot No.VS521 in 2008, some representative of Cable & Wireless come to my place.

They told me they want to make renovation on the main road just in front of my home. I told them if it's on the public road could not affect me I have nothing to say.

One of the representatives says that they're going to put one iron sheet so that he can reach at his home. They worked there for 2-3 weeks. They were digging and the soil was on my property, after they completed is when I noted they worked on my compound and not on the public road. I ask my wife to come and see, my wife say it's not on the public road but it's on my property, I approached the lawyer Mr. Andre and told me before I proceed with a case, I should write a letter to C&W. I wrote 3 letters but got no reply. The type of structure is like the main [man] hole with iron covers, there was a pole for C&W both the pole and hole it's on my land at the district of Mont Buxton. It's about 10 minutes walking and 2 minutes by car to Victoria.

I was writing to C&W asking to reach agreement as since they have put there hole in my property so they can pay rent to me. I asked them to pay SR5000 per month. No any offers made to C&W. if I want to put a gate in front I won't be able to put. I produce this map to court and show where the main hole is situated.

They use to come at any time to do renovation. It cause obstruction to me because I want to put a gate so that we can reach into agreement to rent them. I am asking the court to consider the reasonable amount for rent. After the hole has fixed one representative of C&W come and prove that the land is on my side.

Court: Admitted the map as Exhibit P1.

<u>Cross examination by Micock</u>

In 2008 C&W come to fix the main hole. Their is no drainage system at that area. There was a work done by the government to fix the pole. The government asked me for that, but C&W come to fix another main [man] hole.

The pole was fixed before they fix the main [man] hole, there were separated.

They only tell me that there going to do something but I didn't know what. They informed me it would be done on main road and not on my land. They talk to me because as I am the one using the road to come in and out of my house. The main hole is on the 2nd entrance of my house. Both of entrance comes from the main road and I would use both entrance. They took 2-3 weeks to build the hole. When they finished and clean is when I noticed that the hole done to my land. They were supposed to dig on the main road so it's not my business to check

before. I checked after when they finished the work. I saw iron sheet on my land. I approached Mr. Andre to write to C&W in 2009. I don't remember the date of letter which wrote to C&W.

Because it's my land I would write at them at any time. There were no any meeting with C&W, they only come on the road and tell me there doing something near my house. Yes this is my house, and this is the hole which is on my land.

Court: The picture admitted as item D1.

That is my land I did not measured it on what length. I do know the price of renting the house in Mt. Buxton.

They didn't answer my letter I could even agree to make less price.

I remember I went to C&W I do know when, but they didn't tell me that there going to remove the hole. I do know when was the last time to come, but they have stopped for sometimes ago. It's true that the entrance is unusable especially when there working.

The letter was addressed to 2nd defendant who is managing director.

Re-examination

From town that is the 1st entrance. The iron sheet is under the lanb with long of 2 meters (proximate).

Mr. Andre

That is the case of plaintiff I wish to close.'

8 The appellant case below was put to the court by 2 witnesses. DW2, Didon, testified that he had first talked to the respondent no.2 at the court house seeking his permission for the appellants to construct a man hole on his property. The respondent no.2 verbally agreed. The work went ahead. The appellant could not have constructed a man hole on his land without his consent. The man hole could not be placed on the road as there was a sewer line beneath the road.

9 The issue before the trial court and now this court is to determine the outcome of the relationship of the parties. It is clear that in the beginning the parties did talk to each other though there are disagreements as to what was agreed. The respondents deny granting oral permission for the appellant to cite their man hole on the respondents' land. The appellant contend that it did so with the respondent no.2's permission. If the appellant entered the land without the owner's permission this is trespass. If they entered the land with the respondents' permission, it had at least a licence to locate the manhole.

10 The respondents want a new agreement with the appellant under which the appellant would rent the land it has located its man hole. The respondents have not accepted those terms whether they are viewed as a new agreement [which would be the appellant's view] or an amended agreement which in effect would be the respondents' view. In absence of an agreement, can a court impose an agreement on the parties as the trial court did? I think not. An agreement is consensual. It cannot be imposed by the court. The trial court erred in law to create a tenancy agreement for the parties when in fact the parties had not agreed upon it.

11 This is clear in light of the provisions of Article 1108 of the Civil Code of Seychelles, hereinafter referred to as CCS, which state,

> 'Four conditions are essential for the validity of an agreement—
> the consent of the party who binds himself,
> his capacity to enter into a contract,
> a definite subject matter which forms the subject-matter of the undertaking,
> [and] that it should not be against the law or against public policy.'

12 In the case now before this court and in the court below, the first condition or element was clearly lacking, and the testimony of all parties point to the absence of a tenancy agreement. Without determining which testimony is truthful, neither testimony supports the existence of a tenancy agreement. The court can not create one, where none existed before.

13 In cases of this nature where one party builds a structure on the land belonging to another and that other objects to the structure built, without an agreement by the parties on the way forward, article 555 of the CCS would be applicable. It states in part,

> '1. When plants are planted, structures erected, and works carried out by a third party with materials belonging to the third party, the owner of the land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them.
> 2. If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of the land.
> 3. If the owner of the land elects to preserve the structures, plants and works, he must reimburse the third party in a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of such reimbursement, after taking into account the present conditions of such structures, plants and works.'

14 In taking this view I take comfort in the decision of the Court of Appeal of Seychelles in Nanon v Thyroomooldy (SCA No. 41 of 2009) [unreported]in which Hodoul, JA, stated in part,

> '**[10]** The instant case is complex and raises a number of issues which require careful consideration. Besides "construction on the land of another", the issues raised pertain to encroachment; the applicability of any article of the CCS and the rights and liabilities of the parties. The Bar Association of Seychelles was well inspired to ask SAUZIER J., (former Judge of Appeal and of the Supreme Court) to state the law relevant to all the said issues and provisions. The learned scholar complied and we are grateful to him for having stated the law succinctly and with clarity in a document we reproduced in extenso. We confirm that the law stated therein was and is still good law.
> **[11] Consequences of encroaching on the neighbour's land by Andre SAUZIER:**
> *1. "If one builds on someone else's property a structure which **entirely** stands within the boundaries of that property, it will be Article 555 of the Civil Code of Seychelles under which the fate of the structure and the indemnity, if any, to be paid will depend.*
> *2. However if one builds **partly** on one's property and the structure goes over the neighbour's boundary encroaching on his land, Article 555 finds no application.*
> *3. In such a case the neighbour can **insist** on. **demolition** of that part of the construction which goes over the boundary and the Court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment.*
> 4. *The legal basis for such a stand is Article 545 which provides:- "No one may be forced to part with his property except for a public purpose and in return for fair compensation. "*
> *5. If damages and compensation were allowed to be given instead of demolition, the principle of Article 545 would be breached as the neighbour would be forced to part with the strip of land encroached upon for a private and not for a public purpose.'*

15 The law applicable in the instant case is therefore article 555 of the CCS given that the structure, the man hole, stands wholly on the property of the respondents.

16 It was open to the respondents, especially since they claimed that they did not consent to the construction of the man hole on their land, to require the appellant to remove the structures as well as claim for damages for the encroachment in accordance with article 555 (2) of CCS upon proof of damages suffered by the respondents. However in this case the respondents have not sought damages [save for moral damages] but have sought the court to impose a tenancy agreement. This the court cannot do. It is not authorised to do so. Secondly in light of the provisions of article 555(2) of CCS the claim for damages arises only if the owner of the land (the respondents) have asked the appellant to remove its structure on their land. As the respondents had not done so the claim for moral damages did not lie and ought not to have been awarded.

17 As the respondents did not seek any remedy in the court below available to them in law this court cannot unilaterally fashion a remedy for them. See Therese Sophola v Antoine Desaubin SCA 13 of 1987 [unreported]. In that case the plaintiff and defendant owned contiguous plots of land. The defendant was occupying part of the plaintiff's plot. The plaintiff sought an ejectment order and damages. The Supreme Court allowed the plaintiff's claim. In addition it ordered a resurvey of the land. On appeal the plaintiff contended that the resurvey was inappropriate as her title to the land was unimpeachable, and a resurvey was not requested in the defendant's pleadings. The Court of Appeal held that, allowing the appeal, the court must decide on the basis of the relief claimed.

18 For the foregoing reasons I would allow in part grounds 3and 4 of the appeal for the reasons set out above, rather than those advanced by the grounds themselves. With regard to ground 3 it is not so much that moral damages cannot be awarded in claims under contract. It is that damages under article 555 of CCS are awarded as an additional relief, '… the third party **may further be** ordered to pay damages for any damage sustained by the owner of land.' With regard to ground 4 it is not so much that the appellant was subject to the Immovable Property (transfer restriction) Act, but rather that an agreement between the parties must be consensual rather than court imposed. Clearly the parties had not agreed upon a tenancy agreement.

19 I set aside the decision of the trial Magistrate, and dismiss the respondents' action in the court below. I will, however, not grant costs to the appellant who I largely blame for not insisting on a written agreement to avoid unnecessary disputes.

Signed, dated and delivered at Victoria this 19th day of November 2012

FMS Egonda-Ntende
Chief Justice