

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No C.V. 2011 - 01163

JUDY BHOLA

Claimant

AND

NAZIR ALI

1st Defendant

LILAWATEE RAJARAM

2nd Defendant

STEFFANIE RESHMA ALI

3rd Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: MR. RANESH DEENA

For the Defendants: MR. RAMESH LAWRENCE MAHARAJ instructed by MR.
ASAF HOSEIN

Date of Delivery: Tuesday 19th November, 2019

JUDGMENT

THE CLAIM

- [1] The Claimant sought a declaration that she is entitled to a Right of Way (the said way) measuring twelve feet in width and approximately seventy feet in length extending from the Eastern boundary of Lots Numbers 6e and 6i and now known and assessed as No. 6i Mucurapo Street San Fernando containing 4, 848 square feet and bounded on the North by a road, on the South by a Cemetery on the East by lands of MC Parson and on the West by lands of Parsons (the Claimant's lands) to Monsegue Lane, San Fernando across the Defendants' lands for the purpose of the Claimant, her servants and/or agents/and or licensees passing and re-passing on foot and with horses, carriages and other conveyances at all times and for all purposes to and from the Claimant's lands.
- [2] The Claimant also sought an injunction against the Defendants preventing her use of the said Right of Way and an injunction directing the Defendants to remove a galvanize fence and gate erected along the Eastern boundary of the Claimant's land. Damages for breach of the quiet enjoyment of her lands were also sought.
- [3] The Claimant pleaded that her predecessor in title, one Gertrude Jameson sold her the said lands in 1986. The Second Defendant became registered owner of Numbers 5 and 7 Monsegue Lane in 1991 and 1994 respectively. The First and Second Defendants became owners of lot 4 in 2002. Lots 4, 5 and 7 abut the Eastern boundary of the Claimant's lands.

- [4] The Claimant pleaded further, that she and her predecessors in title have, in excess of sixteen years enjoyed the use of the said Right of Way for the purpose of passing and re-passing by themselves, their servants, agents and licensees on foot and with horses, carriages and other conveyances as of right and without interruption. She therefore claimed a Legal Easement of Way pursuant to Section 3 of the Prescription Ordinance Chapter 5 No. 8.
- [5] The Claimant had lived with Ms. Jameson since 1983, between 1983 to 1988 when Ms. Jameson died. They both used the said Right of Way. However, on the 20th September 2009 the Defendants erected a galvanized fence and gate on the Eastern boundary of the Claimant's lands. The Defendants now use the Right of way as a parking lot for vehicles.
- [6] The Claimant averred, in the alternative, that by his and her predecessors continuous and uninterrupted use of the said way in excess of sixteen years, she has acquired a Right of Way by prescription over the said way.

THE DEFENCE

- [7] The Defendant pleaded that the Claimant's claim should be struck out as an abuse of process of the Court on the ground that the issues raised by her in this case should have been raised in earlier proceedings brought by her against the First Defendant.

[8] The First Defendant pleaded that in the earlier claim CV 2009-03562, (earlier claim) against the First Defendant, the Claimant asserted that the said Right of Way was a public road. When the Defendant in the earlier claim pleaded that since those proceedings were to abate a public nuisance, the Claimant ought not to have brought the action in her own name, but as a relator in the name of the Attorney General who is the nominal Claimant for relators in public nuisance claims, the Claimant withdrew the earlier claim. He also pointed out in the earlier claim that his wife Lilawatee Rajaram Ali was the owner of Nos. 5 and 7 Monsegue Lane and ought to have been made a party to the claim. The First Defendant's daughter jointly owned Lot 4 Monsegue Lane - the First Defendant pleaded that she was not made a party to the earlier claim.

[9] The Defendants averred that in the earlier claim, the Claimant's claim to the said Right of Way under the Prescription Ordinance was answered. They contended that the Claimant ought to have amended her earlier claim to add the Second and Third Defendants as parties and to amend her claim instead of filing the instant claim, thereby unjustly harassing and oppressing them and putting them to the expense of defending a new claim.

[10] The Defendant pleaded that the roadway to the North of the Claimant's land is Monsegue Lane which provides access to and egress from the Claimant's property and other properties adjoining and opposite hers since that road was reserved as such by Deed of Partition No. 1663 of

1928 (the 1928 Deed); in the circumstances the Claimant is estopped from contending that she does not have proper access and egress to and from her home to Lord Street San Fernando via Monsegue Lane aforesaid.

[11] The Defendants averred that Ms. Jameson enjoyed a bare licence/permission for herself only to use the Right of Way and this licence was incapable of being passed to the Claimant or any successor in title; further, no such Right of Way was passed to the Claimant by deed.

[12] The Defendants asserted that the Claimant's property was always known as No. 6 Monsegue Lane and was so described in earlier proceedings. The Second Defendant's parents Bissoon Rajaram Mungal and Rosy Mungal owned Lots 5 and 7 from 1962 when they began living there. In 1975 Bissoon started a tailor shop on the premises Lots on by Deeds Numbers 2225 of 1991 and 10752 of 1994 the Second Defendant became owner of these lots. The First Defendant from 1975 began working with the Second Defendant's father in his tailor shop. They married in 1981 and have lived there ever since. The Third Defendant was born in 1987 and resided on Lots 5 and 7 from birth.

[13] The Defendants pleaded that they gave Ms. Jameson permission to park her car on the Right of Way between the 1960's to 1982. She lived alone and was a good neighbor. The licence was limited to her.

- [14] Monsegue Lane is a public roadway twelve feet wide and leads from the front of the Claimant's property to Lord Street. At all material times there has been a gate from the north of the Claimant's property to onto Monsegue Lane. There is also a garage/driveway on the North West portion of the Claimant's property. Additionally, this roadway runs for a distance of one or two feet from the front of the Claimant's house to Lord Street.
- [15] The San Fernando City Corporation maintained and has continued to maintain Monsegue Lane. This lane was paved by the Corporation and Mr. Omardeen. In 1992, the Corporation repaired the roadway which is used by the Claimant and students of Omardeen School of Accounting situate immediately west of the Claimant's house.
- [16] In 2006 the Claimant attempted, through the San Fernando Corporation, to pave the Right of Way for her use but they were prevented from so doing by the Defendants. In earlier proceedings the Claimant pleaded in her Statement of Case that four years prior to 2009 (2005) the Defendants prevented the Corporation's workers from paving. The Defendants therefore pleaded that the Claimant has not used the Right of Way for sixteen years as prescribed by the Prescription Ordinance Chapter 5:8. The Claimant acquiesced in this interruption of her use of the Right of Way for more than one year from the time of her having notice of said interruption. Accordingly by Sections 2, 4 and 5 of the Prescription Ordinance her right to use the Right of Way was extinguished.

REPLY

[17] The Claimant pleaded that *res judicata* is not applicable since no determination of fact or law was made in the earlier proceedings.

EVIDENCE FOR THE CLAIMANT

[18] In support of the Claimant, the following persons gave witness statements and were cross-examined; Judy Bhola, Ernest Gosine, Daniel Nagessar and Diane Seukeran.

Judy Bhola

[19] She denied that trucks used Monsegue Lane to access the construction site when Omardeen School of Accounting was being built. Ms. Bhola testified that the roadway was formerly grassy but is now paved. The Claimant insisted that the northern boundary was wrongly described in her deed of conveyance since her property's northern boundary is a track and not a road. She also acknowledged that her deed does not provide for a Right of Way in her favour over the Defendant's land. The Claimant however denied that at the time of purchase of her lands, there was a road twelve feet wide in front of her house. Confronted with her predecessor's deed, the Claimant agreed that the North boundary of her property was described as a road not a track.

[20] Ms. Bhola reiterated that her case is that the Right of Way is a public road, she assumed that it was a public road. Ms. Bhola stated that after she withdrew the earlier claim she began using Monsegue Lane.

[21] The Claimant testified that she did not have a vehicle and never had one. She has tenants who live on her property. The Claimant insisted that her house front was a Road Reserve five feet wide not Monsegue Lane. She later asserted that Monsegue Lane is a road reserve. Surprisingly, Ms. Bhola also said that there is a road passing in front of her house leading to Lord Street which was paved in 2009. She however denied that this road was Monsegue Road. In a sketch produced by her the roadway in front of her house was described as Monsegue Lane but the Claimant denied that that sketch was accurate.

[22] When shown the 1928 deed, the Claimant admitted that her lot is along Monsegue Lane. She contradicted this evidence soon after. Ms. Bhola also admitted that the road reserve described in the deed is twelve feet wide; she however denied that the road in front of her house was twelve feet wide.

[23] She revealed that she has a parking spot at the back of her property for her tenants. Ms. Bhola stated that she had a driveway and garage at the back of the house. The Claimant also admitted that she was seeking the same relief in this claim as in the earlier proceedings.

Ernest Gosine

[24] He testified that between 1952 to 1972 he lived with his family in a wooden house East of the Claimant's house now on the lands of the Defendant. He stated that they used the Right of Way to enter and egress their house and that Ms. Jameson drove along the Right of Way

and parked her car under her house. He supported the Claimant's testimony that there was a grassy track in front of her house at that time; he also testified that members of the public used the Right of Way freely without let or hindrance.

[25] In cross-examination, he asserted that he did not know where Omardeen's building was located.

David Nagessar

[26] From 1972 to 1982 he lived at 19B Monsegue Lane San Fernando. He supported the Claimant's and Mr. Gosine's evidence that the Right of Way was Monsegue Lane and used by persons in the area freely. Ms. Jameson's visitors also used the Right of Way,

[27] In cross-examination, Mr. Nagessar stated that there is no road in front of the Claimant's house. However, he described Monsegue Lane as being a street off Lord Street. He explained that he could not read or see very well; as well he did not know the cardinal points. However 'north' and 'south' were used in his witness statement. He then denied ever having said this to the lawyer who drafted his witness statement or having used any cardinal points. He denied other portions of his witness statement.

Diane Seukeran

[28] Mrs. Seukeran, a former Member of Parliament for the San Fernando West Constituency, testified that she was familiar with the Monsegue Lane area because her aunt and uncle lived there and she visited them

regularly during her childhood from 1945 to 1968 when she went abroad to study. Her evidence was that Monsegue Lane was a properly paved road which ran from Lord Street up to Ms. Jameson's garage. The latter drove along Monsegue Lane to her house; the section of the road leading to Ms. Jameson's was made of gravel. She too asserted that everyone use the Right of Way as a public road without objection from anyone.

[29] In the 1990's she continued to use Monsegue Lane while visiting the Claimant. She also knew the First Defendant since the mid 1990's when he became her tailor.

[30] In cross-examination Mrs. Seukeran denied that Monsegue Lane was accurately depicted in the sketch annexed to the Statement of Case. She stated that the road to the north of the Claimant's house was not Monsegue Lane; Monsegue Lane was that road to the East which ran along the manhole then turned left to the Claimant's house. She described the road to the North as an extension of Monsegue Lane but insisted that it is not a paved roadway and never has been – it is in fact a dirt track up to today. She was unsure whether that road was twelve feet wide but asserted that she could drive onto the dirt track. This witness claimed that Monsegue Lane to the East of the Claimant's property is a public Right of Way maintained by the City Corporation.

THE ISSUE

[31] The issue that falls to be determined is whether the Claimant's claim is maintainable in law having regard to her evidence given in cross

examination (which was inconsistent with her pleaded claim) that she was claiming a public right of way and not a private right of way.

[32] I agree with the Defendants' submission that the claim fails in limine because notwithstanding the fact that the Claimant claimed a private Right of Way, she asserted in cross-examination that her claim was for a public Right of Way over a public road. In cross examination the Claimant gave the following answers:

*“Question: Madam, I’ll come back to the question that I asked you just now, **but are you saying that your case today is that this is a public right – of –way?***

Answer: Yes, sir.

Question: Yes. And you are saying it’s a public right-of-way because, as far as you’re concerned, any member of the public, every member of the public acquired this right?

Answer: Yes

Question: Yes.

Answer: Yes.

Question: So if you’re saying this was a public right-of-way, right - - I’m going to ask you two questions, right? If you’re saying this was a public right-of-way, when you were buying this land and you read your deed -- and you read the deed, right, and you saw on the deed, you saw nothing that this land that you were buying had the benefit of a public right-of-way. Do you agree that when you bought this land, and the deed which you got, it had nothing to say that this land was being bought by you with the benefit of a public right-of-way or any right-of way?

Answer: Sir, when I purchased the land, when I went there to live, that was the only road and that was the only road I used so I assumed that that, even though it wasn’t in the deed, it was a public road.

Question:

Answer:

Question: So, in your evidence you gave today, you said it was a public road?

Answer: Yes.

Question: Yes. And you are not asking for the Court to declare it a public road?

Answer: Yes.

Question: Yes?

Answer Yes. Yes sir.”¹

[33] The Claimant’s witness, Diane Seukeran, also supported the Claimant’s evidence that the present claim is for a public Right of Way over a public road, contrary to the case pleaded on behalf of the Claimant.

“Question: Secondly, Ms Bhola said to this Court that this Monsegue Lane and where you said you parked your vehicle

--

Answer: Uh-huh.

Question: -- is a public right-of-way. Do you know whether this a public right-of-way or not?

Answer: Well, I would think that if you looked --

Question: I’m just asking you a simple question.

Answer: Yes, I would, but I'd like to give you my rational too. One is that I have known this since 1945 to be a place that all persons could traverse, and therefore it's is a public domain. Secondly, is that as a representative of San Fernando West, I know it to be numbered in the city and serviced in the city. Therefore, it is to me -- it's named Monsegue Lane by the records of the Corporation.”²

¹ (Appendix A pages 23 – 24)

² (Appendix A pages 123-124)

[34] The evidence of both Mr. Nagessar and Mr. Gosine, on behalf of the Claimant, is that while they lived at No. 4 Monsegue Lane, they used the alleged Right of Way as did other members of the public.

[35] The Claimant's case fails because all civil proceedings brought in respect of a public road such as a public nuisance or a public right of way must be brought with the sanction and in the name of the Attorney General as the representative of the public. The Attorney General has a duty in an appropriate case to bring proceedings to enforce a public right of way if that exists. A Court does not have the jurisdiction to enforce an alleged public right of way in a claim brought by a private individual and especially where the claim was brought to enforce a private right of way but during the case the Claimant stated that her case is to enforce a public right of way.

“In **Halsbury's Laws Volume 34 at paragraph 63, 4th edition** the authors opine:

All civil proceedings brought in respect of public nuisance other than a private action by an individual who, or a public or local authority which, has suffered particular damage or an action brought by a local authority in its own name to protect the inhabitants of its area must be brought with the sanction and in the name of the Attorney General. This rule applies whether it is an individual or a local or other public authority who seeks to proceed.”

[36] The Privy Council also affirmed the Court of Appeal reasoning at paragraph 55 in **John A. Gumbs v Attorney General of Anguilla, Privy Council Appeal No 35 of 2008** their Lordships stated:

“No one has a proprietary right or interest in a public right of way. The right of each member of the public is a right of passage but it is a public right enforceable in public law, not a private right. An unlawful obstruction of the way is an interference with a public right, not a private right. That is why a claim for an injunction has to be brought by, or in the name of, the Attorney General.”

- [37] The Court in **Gouriet v Attorney General [1978] AC 435**³ established that public rights can only be asserted by the Attorney General representing the public. Just as the Attorney General has no power to interfere with the assertion of private rights, no private person has the right of representing the public in the assertion of public rights.

*“A relator action - a type of action which has existed from the earliest times - is one in which the Attorney-General, on the relation of individuals (who may include local authorities or companies) brings an action to assert a public right. It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that **public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown, and just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.**”*

- [38] The Claimant’s claim for a public Right of Way over a public road must fail on the ground that her claim was not brought in the name of the

³ at page 477

Attorney General or with his sanction, given the fact that public rights can only be asserted by the Attorney General as representative of the public.

[39] The Claimant asserted at trial that she was pursuing the same relief that she had claimed in her earlier claim which had been withdrawn; in the circumstances this claim amounts to an abuse of process, the issue having been raised in the earlier claim and withdrawn on the basis that the Claimant could not pursue a claim to abate a public nuisance in her name but must do so as a relator in the name of the Attorney General who is the nominal Claimant for relators in public nuisance claims. The Claimant had in those earlier proceedings asserted that Monsegue Lane was a public road over which she had claimed a public Right of Way.

[40] I also hold that the Claimant's case is unreliable by reason of the fact of her fundamental departure from her pleaded case. During the course of her testimony the Claimant changed her relief from that of a claim for a private Right of Way to that of a claim for a public Right of Way; she also changed the location of Monsegue Lane, even disputing the accuracy of her own sketch of the area. The result is that the Defendants were taken unawares, having prepared their case on the basis of the Claimant's claim for a private Right of Way over a private road. The effect of this departure from her pleaded case was that both the Defendants and the Court were faced with an entirely different claim to that pleaded at trial. If this is permitted, it would serve to undermine the basic principles upon which civil litigation is conducted. As the Judicial Committee of the Privy Council stated in *Charmaine Bernard v Ramesh Seebalack* [2010] UKPC 2015:

“15. In the view of the Board, an amendment of the statement of case was required. Part 8.6, which is headed “Claimant’s duty to set out his case”, provides that the claimant must include on the

claim form or in his statement of case a short statement of all the facts on which he relies. This provision is similar to Part 16.4(1) of the England and Wales Civil Procedure Rules, which provides that “Particulars of claim must include—(a) a concise statement of the facts on which the claimant relies”. In *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at p 792J, Lord Woolf MR said:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. **Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.** This is true both under the old rules and the new rules. The Practice Direction to r 16, para 9.3 (Practice Direction – Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.”

- [41] In determining the inherent plausibility of the parties’ cases, I must take into account any departure from the respective cases as pleaded. I consider that the Claimant’s departure to be so fundamental that I hold that her evidence and case are unreliable.

[42] In the circumstances I make the following Order:

- a. The Claimant's claim is dismissed.
- b. The Claimant to pay to the Defendant budgeted costs in the sum of \$263,440.00 as Ordered on the 6th December 2011.

JOAN CHARLES

JUDGE