



**CIVIL COURT  
FIRST HALL  
THE HON. MADAM JUSTICE ANNA FELICE**

**Today 14<sup>th</sup> December, 2022**

**Sworn Application No: 979/2019 AF**

**Timothy Marshall Clark and his wife Laura Clark**

**VS**

**Salem I.S. Alhenshiri in his capacity of Counsellor  
attached to the Libyan Embassy duly authorised by  
the said Libyan Embassy, in the name, in the interest  
and in representation of the State of Libya, diplomatic  
identity card #01720**

The Court,

Having seen the sworn application filed by the plaintiffs in the Maltese language which reads as follows:

L-esponenti akkwistaw permezz ta' Att tan-Nutar Jean Paul Farrugia tat-tnax (12) ta' Awwissu tas-sena elfejn u tlethax (2013), u dan mill-poter ta' Samuel u Emmy Gauci, il-fond ossia il-porzjon diviz ta' art tal-kejl superficjali ta' tlett elef mija u hamsin metru kwadru (3150 m.k.), maghrufa bhala 'Tas-Sellum' fil-vicinanze maghrufa bhala 'Tas-Salib', fil-limiti tar-Rabat, Malta, u li hija accessibbli minn passagg bir-rigel u bil-vettura u li jisbokka fi Triq is-Salib gewwa l-limiti tar-Rabat, Malta (Dok. TMC1).

L-esponenti, permezz ta' Att iehor tan-Nutar Jean Paul Farrugia, tas-sittax (16) ta' Lulju tas-sena elfejn u erbatax (2014) akkwistaw mill-poter ta' Carmelo u Catherine Fenech, il-fond ossia porzjon ohra diviza ta' art u li hija wkoll formanti parti mill-artijiet maghrufa 'Tas-Salib', fil-limiti tar-Rabat, tal-kejl superficjali ta' tlett mija u sebgha u sittin punt ghaxra metri kwadri (367.10 m.k.), accessibbli mill-passagg suindikat. (Dok. TMC 2).

Sa minn meta l-esponenti akkwistaw l-imsemmija fondi, huma dejjem accedew ghall-imsemmija porzjonijiet ta' artijiet, millimsemmi passagg.

Madwar sentejn (2) ilu, il-konvenut arbitrarjament, abuzivament, u llegalment qabad u ghalaq l-imsemmi passagg, billi bena hajt adjacenti ghal mat-triq, fil-bokka ta' l-imsemmi passagg ghal mat-triq, kif ukoll, pogga fl-imsemmi passagg, blokk tal-konkos, u terrapien, u dan sabiex l-esponenti, u sidien ohra li ghandhom il-proprjeta' fl-inhawi, jigu mcahhda milli jaccedu ghall-proprjeta' taghhom mill-imsemmi passagg. (ritratti esebiti u mmarkati Dok. TMC 3).

Recentement u cioè nhar l-4 ta' Settembru tas-sena elfejn u tmintax (2018) l-esponenti qabad u fetah l-access ghall-imsemmi passagg, billi nehha l-hajt, u wahhal xatba u nehha it-

terrapien, u l-blokki tal-konkos, bil-konsegwenza illi l-konvenut ha passi kontra l-attur permezz ta' kawza ipprezentata fl-ismijiet 'Salem I.S. Alhenshiri vs Timothy Marshall Clark', (Rikors Guramentat numru 1098/2018 LSO), u li tinsab pendenti quddiem il-Prim'Awla tal-Qorti Civili, u differita ghad-29 ta' Ottubru, 2019. (Dok. TMC 4).

Permezz ta' ittra gudizzjarja datata is-7 ta' Jannar, 2019, l-esponenti kienu irrizervaw id-dritt taghhom kontra l-konvenuti, ghar-rigward il-passagg li tgawdi il-proprjeta' taghhom. (Dok. TMC 5).

Hija l-pretensjoni tal-esponenti illi l-proprjeta' taghhom suindikata, tgawdi minn dritt ta' passagg u access kif indikat.

Ghalhekk kellha ssir din il-kawza.

Intalbet din il-Qorti sabiex:

1. Tiddikjara u tiddeciedi illi l-fond ossia iz-zewg (2) porzjonijiet ta' artijiet suindikati, wahda tal-kejl superficjali ta' tlett elef mija u hamsin metru kwadru (3150 m.k.), maghrufa bhala 'Tas-Sellum', fil-vicinanze maghrufa bhala 'Tas-Salib', fil-Limiti tar-Rabat, Malta, u l-ohra tal-kejl superficjali ta' tlett mija u sebgha u sittin punt ghaxra metri kwadri (367.10 m.k.), maghrufa bhala 'Tas-Sellum', filvicinanze maghrufa bhala 'Tas-Salib', fil-limiti tar-Rabat, Malta, it-tnejn proprjeta' tal-esponenti, jgawdu servitu' ta' passagg bir-rigel u bil-vettura, kif ukoll ta' access, millimsemmi passagg, indikat bl-ahmar, u mmarkati ittri 'A' u 'B' fuq l-annessa Pjanta mmarkata Dok. TMC 6, liema passagg jizbokka fi Triq is-Salib gewwa l-limiti tar-Rabat, Malta.
2. Tiddikjara illi bl-agir tieghu, l-intimat cahhad lill-esponenti mit-tgawdija ta' dan il-passagg, hekk kif indikat.
3. Konsegwentement tordna lill-intimat jirripristina, dan is-servitu', jekk ikun mehtieg, bil-hatra ta' perit nominat mill-Qorti.

4. Fin-nuqqas, tordna illi dawn ix-xogholijiet jigu esegwiti mir-rikorrenti ghas-spejjez ta' l-intimat.

Bl-ispejjez, inkluzi dawk tal-ittra gudizzjarja datata s-7 ta' Jannar, 2019, (Numru 59/2019), kontra l-intimat, minn issa ngunt ghas-subizzjoni.

Having seen the documents annexed to the sworn application.

Having seen the sworn reply filed by the defendant nomine in the Maltese language which reads as follows:

L-esponent nomine jiddikjara ghall-finijiet u effetti kollha tal-Ligi li qed jintervieni f'dawn il-proceduri gudizzjarji esklussivament u limitatament biex jinvoka l-immunitajiet aktar 'l isfel riferiti stante li la hu u lanqas l-Istat Libjan m'huma ser jirrinunzjaw ghal tali mmunitajiet u ghalhekk mhumiex ser jissottomettu ghall-gurisdizzjoni ta' din l-Onorabbli Qorti b'mod li f'dan irrigward l-esponent nomine, in vista tal-improponibilita' tal-azzjoni odjerna qed jissollewa s-segwenti eccezzjonijiet prettament ta' natura interlokutorju lkoll relatati mat-tema tal-immunita' u konsegwentement jeccepixxi bir-rispett.

Fl-ewwel lok, l-immunita' tieghu fil-kwalita' diplomatika premissa mill-gurisdizzjoni civili ta' din l-Onorabbli Qorti u dan skond innormi perentorji tad-Dritt Internazzjonali konswetudinarju li in effetti ghandhom l-istatus gerarkiku ta' normi ta' Jus Cogens kif ukoll u senjatament ai termini tal-Artikolu 31 tal-Konvenzjoni ta' Vienna dwar ir-Relazzjonijiet Diplomatici rez applikabbli fil-gurisdizzjoni Maltija permezz tad-disposizzjonijiet rilevanti tal-Att dwar l-Immunitajiet u Privileggi Diplomatici (Kapitolu 191 tal-Ligijiet ta' Malta), tenut kont li ebda wahda mill-eccezzjonijiet previsti mid-disposizzjoni riferita m'huma applikabbli ghall-kaz odjern b'mod li l-esponent ghandu jigi liberat mill-osservanza tal-gudizzju.

Fit-tieni lok u minghajr pregudizzju ghall-ewwel eccezzjoni, minnu sollevata, in kwantu li l-azzjoni odjerna hi diretta lejn l-iStat Libjan qed tigi eccepita l-immunita' gurisdizzjonali tal-iStat

Libjan minn din l-Onorabbli Qorti u dan ai termini tal-Artikolu 8 tal-Konvenzjoni tal-Gnus Maghquda dwar l-Immunitajiet Gurisdizzjonali tal-iStati u tal-Proprietà Taghhom (2004) kif ukoll fuq l-iskorta tan-normi perentorji tad-Dritt Internazzjonali konswetudinarju li effettivament ghandhom l-istatus gerarkiku ta' normi ta' Jus Cogens inkluz il-gurisprudenza kostanti ta' fora evoluti u d-duttrina stabbilita u konsegwentement l-iStat Libjan ghandu jigi liberat mill-osservanza tal-gudizzju.

Minghajr pregudizzju ghall-eccezzjonijiet precedenti, stante li l-pussess u z-zamma tal-Ambaxxata Libjana f'Malta mill-iStat Libjan ut sic jikkostitwixxi "acta jure imperii" ossija att sovran ta' natura statali intiz biex ikattar l-interessi ta' tali stat sovran fit-territorju Malta bi skop purament ta' natura publika ma jista' jsir xejn gudizzjalment li b'xi mod jinvolvi lill-Ambaxxata Libjana la de proprio u lanqas fl-interess ta' terzi inkluz l-iStat Libjan molto più meta jitqiesu d-disposizzjonijiet tal-Artikolu 3 (1)a tal-Konvenzjoni surriferita tal-Gnus Maghquda li jirreferi ghall-privileggi u l-immunitajiet li tgawdi inter alia Ambaxxata, f'dan il-kaz l-Ambaxxata Libjana. Dan jimplika li dawna l-privileggi u immunitajiet ma jistghu bl-ebda mod jigu disturbati. Il-fatt li rrikorrenti ccitaw fil-gudizzju lill-Ambaxxata Libjana tramite l-esponent nomine, anke jekk dan sar in rappresentanza tal-iStat Libjanm l-integrità tal-gudizzju safà ivvizzat fis-sens li gew intralcjati l-privileggi ul-immunitajiet li tgawdi l-Ambaxxata Libjana oggettivament bi ksur tal-Konvenzjoni aktar 'il fuq imsemmija u tan-normi tad-Dritt Internazzjonali konswetudinarju. Ghalhekk l-iStat Libjan ghandu jigi liberat mill-osservanza tal-gudizzju.

Salv eccezzjonijiet ulterjuri jekk ikun il-kaz, wara li jigu indirizzati l-eccezzjonijiet ta' natura interlokutorju aktar 'il fuq sollevati.

Having seen that during the sitting of the 3rd March 2020, the Court ordered that the proceedings were to be conducted in the English language.

Having seen the note of submissions filed by the plaintiffs relating to the preliminary pleas raised by the defendant nomine.

Having seen that in virtue of a judgment delivered on the 28<sup>th</sup> April 2021, this Court rejected the preliminary pleas raised by the defendant nomine and ordered the continuation of the hearing of the case.

Having heard the final submissions made by plaintiffs.

Having seen that the case was adjourned for judgment.

Having seen the acts of the proceedings.

Having considered that this action is known as the *actio confessoria servitutis* whereby the plaintiffs are demanding a declaration affirming the existence of a servitude, in this case a right of passage, in favour of their property.

The defendant nomine raised only three preliminary pleas and no pleas as to the merits of the case. In actual fact the defendant nomine took a very passive role in these proceedings and did not submit any evidence for the consideration of this Court. Neither did he make any final submissions before the case adjourned for judgment.

The Court notes that in virtue of a deed dated 12<sup>th</sup> August 2013 in the records of Notary Jean Paul Farrugia, plaintiffs acquired a divided portion of land measuring 3150 metres squared, which land is known as 'Tas-Sellum' in the area known as 'Tas-Salib' limits of Rabat Malta which land is described on the said act as being "*accessible from a passage which is marked on the said plan which passage by means of foot and vehicle abuts into Triq Tas-Salib, in the limits of Rabat, Malta.*"

By a subsequent deed dated 16<sup>th</sup> July 2014 also in the acts of Notary Jean Paul Farrugia, the plaintiffs acquired another divided portion of land measuring 367.10 metres squared, also forming part of the area known as 'Tas-Salib' limits of Rabat Malta which land is described on the said act as being "*bounded... on the south by a private common passageway from which it has its right of access ...*"

The plaintiffs testified that ever since they acquired the land they have always accessed it through the said passage both by foot and by car. This passage is also used by other owners who have property along this passageway.

Problems arose when in 2017 the defendant nominee barricaded the said passage by building a wall adjacent to the street precisely at the very beginning of the passage where it intersects with the main road. Plaintiffs testified that on that same occasion the defendant nomine had also placed blocks of concrete and rubble in the passage with a view of blocking access.

On the 4<sup>th</sup> September 2018 plaintiff opened access by removing all the building material that was blocking the passage. He also installed a gate. As a consequence, the defendant nomine took legal action against the plaintiff which proceedings, bearing sworn application number 1098/2018 LSO in the name Salem I.S. Alhenshiri noe vs Timothy Marshall Clark, were declared deserted in virtue of a decree dated 4<sup>th</sup> May 2021. Defendant nomine also reported the incident to the police and criminal proceedings are still pending against petitioner and the workmen he engaged to help him with the removal of the wall blocking the passage.

In virtue of a judicial letter dated 7<sup>th</sup> January 2019 the plaintiffs requested the defendant nomine to re-open the passage and in the meantime they reserved the right to re-open the passage themselves should the defendant nomine fail to do so.

In the case of Emanuel Farrugia et vs Nicola Farrugia et, decided on the 9<sup>th</sup> January 2009, the Court of Appeal stated that:

*"...din il-Qorti ser tghaddi l-ewwel biex tezamina n-natura u l-ghan ewlieni ta' l-actio confessoria servitutis, u ghal dan l-iskop issir referenza ghal dak li nghad fis-sentenza fl-ismijiet Josephine Darmanin v. Joseph Camilleri, Citaz. Nru. 1932/99 deciza mill-Prim Awla tal-Qorti Civili fit-3 ta' Gunju 2004.*

*Fl-imsemmija sentenza nghad illi l-ghan ewlieni ta' l-azzjoni konfessorja huwa dak li permezz taghha s-sid ta' fond li jgawdi servitù fuq fond iehor jitlob dikjarazzjoni mill-Qorti li l-gid tieghu jgawdi dik is-servitù li s-sid tal-post l-iehor, b'ghemil jew b'fatt iehor, ikun qieghed ixekklu jew inehhah mit-tgawdija taghha. Din l-azzjoni - bhall-azzjoni negatoria - tmiss lil sid il-fond u trid issir biss kontra s-sid tal-fond serventi bhala l-persuna li ghandha interess legittimu li timpunja l-ezistenza tas-servitù pretiza. Illi ghall-kuntrarju ta' dak li hu mistenni fl-azzjoni negatoria, l-attur fl-azzjoni konfessorja jrid ghalhekk juri mhux biss li huwa s-sid tal-fond dominanti, imma wkoll li tassew dak il-fond igawdi s-servitù pretiza fuq il-fond serventi.*

*Minn dak appena citat jirrizulta ferm car u inekwivoku li z-zewg elementi li l-attur fl-actio confessoria servitutis irid jirnexxielu jipprova biex l-azzjoni minnu istitwita tirnexxi huma: (a) illi hu huwa s-sid tal-fond dominanti li jippretendi li jgawdi dritt ta' servitù fuq il-fond servjenti proprjetà tal-konvenut; u (b) li l-fond proprjetà tieghu effettivament igawdi s-servitù minnu pretiza."*

In terms of Article 455(3) of Chapter 16 of the Laws of Malta, an easement of right of way is a discontinuous easement and hence, in terms of Article 469:

*"(1) Continuous non-apparent easements, and discontinuous easements, whether apparent or non-apparent, can only be created by a title; they cannot be created by prescription or by the disposition of the owner of two tenements.*

*(2) Nevertheless, the easement of right of way for the use of a tenement may be acquired by the prescription of thirty years, if such tenement has no other outlet to the public road; and any other easement which, on the 11th February, 1870, was already acquired under previous laws, may not be impeached."*



In the present case the plaintiffs have proved successfully that they are the rightful owners of the land described above which land was acquired by said plaintiffs in virtue of two distinct and separate public deeds. Both deeds mention in very specific and clear terms that the land acquired by the plaintiffs is accessible from the same passage with which it is bounded. Hence in this particular case the right of way has been created in virtue of a public deed the contents and veracity of which have not been questioned or contended by the defendant nomine.

For these reasons the Court:

1. Declares and decides that the two portions of land described above, namely the divided portion of land measuring 3150 metres squared, which land is known as 'Tas-Sellum' in the area known as 'Tas-Salib' limits of Rabat Malta and which land was acquired in virtue of a deed dated 12<sup>th</sup> August 2013 in the acts of Notary Jean Paul Farrugia, and the divided portion of land acquired measuring 367.10 metres squared, also forming part of the area known as 'Tas-Salib' limits of Rabat Malta which land was acquired in virtue of a deed dated 16<sup>th</sup> July 2014 also in the acts of Notary Jean Paul Farrugia, both enjoy a right of way by way of foot and by vehicle from the passage that is clearly indicated in red and marked with the letters 'A' and 'B' on the plans respectively attached to each deed, which passage abuts onto Triq is-Salib in the limits of Rabat, Malta.
2. Declares that by his actions, the defendant nomine has denied plaintiffs the enjoyment of said passage.
3. The Court accedes also to third and fourth pleas and consequently orders the defendant nomine to reintegrate the easement. In default, the Court is hereby authorising the plaintiffs to carry out any necessary works to reintegrate the right of way.

The costs of the proceedings are to be borne by the defendant nomine.

JUDGE

DEP/REG