



COURT OF MAGISTRATES (MALTA)

**MAGISTRATE DR.
GABRIELLA VELLA**

Sitting of the 18 th March, 2013

Avviz Number. 69/2011

Silvio Debono

Vs

**Willem Houtzaager and by Decree dated 26th May
2011 Adrianus P Houtzaager and Geerthe MJ
Houtzaager have been joined in the suit**

The Court,

After having taken cognisance of the application filed by Silvio Debono on the 7th March 2011 by means of which he requests the Court to condemn Willem Houtzaager: (a) to make good for structural damages caused to the well of the premises “Silverstars” 269, Triq iz-Zebbug, Mellieha, owned by plaintiff, including cracks in the walls of the said well which resulted in infiltration of water, as certified by Architect Robert Musumeci, by paying such sum as duly liquidated by the Court following a declaration that said damages have been caused by trees which have been

planted in the defendant's property at a lesser distance than that stipulated by law; and (ii) to carry out, within a peremptory period set by the Court, such works as are necessary in order to stop further damages from being caused;

After having taken cognisance of the report by Architect Robert Musumeci submitted by the plaintiff together with his application at folio 2 to 16 of the records of the proceedings;

After having taken cognisance of the Reply filed by Willem Houtzaager on the 29th March 2011 by means of which he contests the plaintiff's claims and asks for the same to be rejected on the grounds that: (i) he is not the legitimate respondent vis-à-vis the plaintiff; and (ii) without prejudice to the first plea, the claims put forth by the plaintiff are unfounded in fact and at law;

After having taken cognisance of the Decree dated 26th May 2011 by means of which Adrianus P Houtzaager and Geerthe MJ Houtzaager have been joined in this suit;

After having taken cognisance of the documents submitted by the defendant by means of Note filed on the 26th May 2011 at folio 31 to 33 of the records of the proceedings;

After having taken cognisance of the Reply filed by Adrianus P Houtzaager and Geerthe Houtzaager (hereinafter referred to as spouses Houtzaager) on the 4th July 2011 by means of which they contest the plaintiff's claims and ask for the same to be rejected on the grounds that: (i) this Court is not competent *rationae materiae* to determine whether the trees planted in their property have been so planted at a lesser distance than that stipulated by Law; (ii) the plaintiff must prove his title over the tenement "Silverstars" 269, Triq iz-Zebbug, Mellieha; (iii) the plaintiff's claims are unfounded in fact and at law since they did not cause any damages to him; (iv) the plaintiff must prove the damages he has allegedly suffered; (v) in any case they are not responsible for any damages

allegedly suffered by the plaintiff; and (vi) this action is a further vexatious attempt by the plaintiff to obtain the removal of the trees from their property;

After having taken cognisance of the fact that during the sitting held on the 7th July 2011, spouses Houtzaager declared that they are the owners of premises No.270, The Long House, Triq iz-Zebbug, Mellieha;

After having taken cognisance of: (i) the Note of Submissions filed by the plaintiff on the 20th February 2012¹ and of the judgment in the names “Saviour Brincat et v. Salina Estates Limited et” Civil Appeal No. 510/99 delivered by the Court of Appeal in its Inferior Jurisdiction on the 25th February 2005 attached together with the plaintiff's Note of Submissions; (ii) the Note of Submissions filed by the defendant on the 17th April 2012²; and (iii) the Note of Submissions filed by spouses Houtzaager on the 23rd April 2012³;

After having taken cognisance of all the records of the proceedings;

Considers:

By virtue of these proceedings the plaintiff requests the Court to condemn the defendant and, following their joinder in the suit, spouses Houtzaager: (a) to make good for structural damages caused to the well of the premises “Silverstars” 269, Triq iz-Zebbug, Mellieha, owned by him, including cracks in the walls of the said well which resulted in infiltration of water, by paying such sum as duly liquidated by the Court following a declaration that said damages have been caused by trees which have been planted in the defendant's property at a lesser distance than that stipulated by law; and (ii) to carry out, within a peremptory period set by the Court, such works as are necessary in order to stop further damages from being caused.

¹ Folio 42 to 47 of the records of the proceedings.

² Folio 60 of the records of the proceedings.

³ Folio 62 to 64 of the records of the proceedings.

Both the defendant and spouses Houtzaager contest the plaintiff's claims and spouses Houtzaager specifically contest his claims on the preliminary ground that this Court is not competent *rationae materiae* to determine whether the trees planted in their property have been planted at a lesser distance than that stipulated by law. It is this particular preliminary plea which is being dealt with and determined by virtue of this judgment.

Spouses Houtzaager found their preliminary plea on the ground that by requesting the Court to determine whether the trees planted in their property have been planted at a lesser distance than that stipulated by law, the plaintiff is effectively asking this Court to determine an issue relating to easements, which in terms of Section 47(3) of Chapter 12 of the Laws of Malta does not fall within its competence.

The plaintiff contrasts the preliminary plea raised by spouses Houtzaager by arguing that the suit against them and the defendant is aimed at the liquidation and consequent payment of damages caused by them and not at a declaration concerning the distance at which the trees in their property have so planted and consequent order regarding the same. He further argues that suits for the liquidation and consequent payment of damages are regularly filed before the Court of Magistrates in its civil jurisdiction and therefore this Court is competent to hear and determine his claims against them and the defendant even though in so doing it will need to determine if the legal distance for planting of trees stipulated by law has been observed or otherwise.

In support of his argument the plaintiff makes reference to a judgment delivered by the Court of Appeal in its Inferior Jurisdiction in the names "Saviour Brincat et v. Salina Estates Limited et" Civil Appeal No. 510/99 delivered on the 25th February 2004, where that Court, faced with a similar plea to that raised by spouses Houtzaager in this case, observed that *tajjeb li jigi ccarat qabel xejn illi l-materja de quo ma tittrattax minn wahda ta' invazjoni ta'*

*proprietà izda minn kwestjoni ta' rizarciment ta' danni necessitata minhabba li, kif allegat mill-appellati, fil-kors tat-tqattiegh tal-blat fil-plot adjacenti tqatta' wkoll parti mill-blat sottostanti l-plot taghhom Numru 23 and effectively proceeded to determine whether or not the failure by the defendant company and party joined in the suit to observe the legal distance set out in Section 439 of Chapter 16 of the Laws of Malta (the section pertinent to those proceedings) caused damages to the plaintiffs, and to that effect observed that *l-inosservanza ta' din in-norma tal-ligi ggib b'konsegwenza r-responsabilità ghad-danni sofferti mill-gar, u ggib ukoll l-obbligu ta' min ikkawzhom biex jirrimedja ghall-hsara*. The Court of Appeal further noted that *dwar l-ahhar aggravju dan hu ghal kollox insostenibbli. Issa, apparti mill-fatti illi skond in-natura tal-meritu l-ewwel Qorti kienet hekk kompetenti li tiehu gharfien tal-kaz quddiemha u tiddeciedi dwaru, anke kieku stess dan ma kienx hemm il-kaz mhux lecitu li s-socjetà appellanti tissollewa materja – dik ta' l-inkompetenza – quddiem din il-Qorti ta' revizjoni meta hi tkun naqset li taghmel dan quddiem il-Qorti inferjuri*.*

Had the plaintiff's suit against the defendant and spouses Houtzaager really been aimed **solely** at the liquidation and consequent payment of damages allegedly caused to his property by them, this Court would have been in complete agreement with his arguments in support of his decision to file his suit before the Court of Magistrates in its civil jurisdiction and it would have followed the observations made by the Court of Appeal In the above-mentioned judgement "Brincat et v. Salina Estates Limited et". However, from a closer examination of the application filed by the plaintiff it clearly results that the aim of his suit goes beyond the mere liquidation and consequent payment of damages.

As already pointed out above, by means of these proceedings the plaintiff is asking the Court: (i) to liquidate the damages caused to his property and, after finding the defendant and spouses Houtzaager responsible for said damages in view of the fact that the trees planted in the property owned by spouses Houtzaager have been

planted at a lesser distance than that stipulated by law, condemn them to pay the sum liquidated by the Court; **and** (ii) to order the defendant and spouses Houtzaager to carry out, within a peremptory period set by the Court, such works as are necessary in order to stop further damages from being caused to his property.

In terms of Section 437(3) and (4) of Chapter 16 of the Laws of Malta *the neighbour may, unless the period required for prescription has elapsed, demand that trees planted at a lesser distance, or which, notwithstanding the observance of the aforesaid distance, are causing him damage, be uprooted at the expense of the owner. The court, however, may grant to the owner of such trees the option either to uproot them, or to cause ditches or other works to be made at his expense sufficient to prevent all damage to the tenement of his neighbour.* In the light of the said provisions of the Law it is very clear that the plaintiff's claims are perfectly legitimate however for this Court to determine the same it must necessarily enter into an issue pertaining to easements, which issue does not fall within its jurisdiction.

Section 47(3) of Chapter 12 of the Laws of Malta in fact clearly provides that *causes involving questions of ownership of immovable property, or relating to easements⁴, burdens or other rights annexed to such property, including any claim for the ejectment or eviction from immovable property, whether urban or rural, tenanted or occupied by persons residing or having their ordinary abode within the limits of the jurisdiction of such court, shall not fall within the jurisdiction of the Court of Magistrates (Malta) independently of the value of the claim⁵.*

From the said provision of the law it clearly results that this Court is definitely not competent *rationae materiae* to deal with and determine the claims as put forth by the plaintiff in his suit against the defendant and spouses Houtzaager.

⁴ Underlining by the Court.

⁵ *Ibid.*

Informal Copy of Judgement

For these reasons the Court decides and determines to uphold the preliminary plea raised by spouses Houtzaager and declares that it is not competent *rationae materiae* to deal with and determine the suit put forth by the plaintiff against the defendant and spouses Houtzaager.

Costs pertinent to these proceedings are to be borne by the plaintiff.

< Final Judgement >

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