

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBA 27 of 2013

BETWEEN : **AMRIT PRAKASH** f/n Ram Bhagat and **ANIL PRAKASH** f/n
Ram Bhagat both of Ragg Street, Namosau, Ba.

Appellants

AND : **KARUNA PRASAD** f/n Ram Narayan and **JANARDAN**
PRASAD f/n Gangan Prasad both of Ragg Street, Namosau, Ba.

Respondents

Appearances : Samuel K. Ram for the Appellant

R U L I N G

BACKGROUND

1. On 06 September 2013, the Appellant (Plaintiff in the Magistrates Court Civil Action 9 of 2003) filed Grounds of Appeal in the High Court in Lautoka. He had filed his Notice of Intention to Appeal earlier on 12 August 2013 at the Ba Magistrates Court. His Grounds of Appeal are as follows:
 1. That the learned Magistrate erred in fact by holding that there is no evidence to support the Plaintiff's claim when sufficient evidence was provided to establish it.
 2. That the learned Magistrate erred in fact by not considering the evidence of the Plaintiff which establishes the Defendants were trespassing on the Plaintiffs property.
 3. That the learned Magistrate erred in fact by incorrectly inferring that the cause of the damage was done by Ba Town Council and not considering the evidence of the Plaintiff.
 4. Such further grounds of appeal as may be added upon receipt of the record of the Court.
2. The matter was first called in this Court on 10 April 2014. Mr. Dayal appeared for the Appellant but there was no appearance by or for the Respondents. The Grounds of Appeal had not been served as the plaintiff was unaware of the whereabouts of the Respondents. On 30 April 2014, the

Appellant filed an *ex-parte* Summons seeking leave to serve the Notice and the Grounds of Appeal to the Defendant by way of substituted service (by advertisement in a local daily newspaper). Order in Terms was granted on 09 May 2014 and the Order was sealed on 09 May 2014. Mr. Dayal appeared in Court on 10 June 2014 and sought time to advertise. On 26 June 2014, an affidavit of Advertisement sworn by one Shoma Shivani Rekha was filed annexing the advertisement in the Fiji Sun issue of 25 June 2014.

3. Thereafter, the matter was called in Court on 30 June 2014, 23 July 2014, 01 December 2014, 02 February 2015, 23 February 2015, and finally on 22 July 2015.
4. On 01 December 2014, the matter was set for hearing before me. Mr. Dayal appeared and informed the Court that certain exhibits that were tendered at the trial in the Magistrates Court are not in the Copy Records. However, over the two next call over dates of 02 and 23 February 2015, this was all sorted out and the exhibits retrieved from Ba Magistrates Court. The appeal was then set for hearing on 22 July 2015 at 2.30 p.m.

THE HEARING

5. Mr. Dayal appeared for the Appellant. There was no appearance for or by the Respondents.
6. Mr. Dayal proceeded to outline the background of the case. I observe that the Learned Magistrates' outline of the same in her Ruling does not differ in any material aspect from that which Mr. Dayal gave.
7. The matter had proceeded by formal proof because the defendants had not appeared after their former counsel had withdrawn.

8. The plaintiffs were owners in possession of land known as Lomolomo (part of) shown as Lot 9 on Plan 1801 and contained in Lease No. 131892. The defendants resided on an adjoining piece of land. The claim is that on 02 May 2001, the defendants carried out certain earthmoving work on their land. At some point, the defendants wrongfully entered the plaintiffs' land and defaced the boundary pegs, damaged crops and dug a drain and caused to accumulate a large quantity of debris that would be washed onto the drains and blocking the drainage system.
9. The plaintiffs were seeking:
- (i) A declaration that the defendants were not entitled to cross the plaintiff's land.
 - (ii) An injunction to restrain the defendant whether by himself or by his servants or agents or otherwise howsoever from entering or crossing Lot 9 on Plan 1801 contained in Lease No. 131892.
 - (iii) Special damages in the sum of \$4,850.
 - (iv) General and Aggravated Damages.
 - (v) Costs
10. The \$4,850-00 in special damages that the Plaintiffs were seeking is broken down as follows:
- | | |
|---|-------------------|
| Cost of repegging | \$ 400.00 |
| Damage to cassava and dalo | \$ 350.00 |
| Cost of cleaning debris dust | \$ 200.00 |
| <u>Loss of use of land for crops at \$50 per week for 8 weeks</u> | <u>\$3,900.00</u> |
| | <u>\$4,850.00</u> |
11. The Learned Magistrate was satisfied that the Plaintiffs were the registered proprietors of Lease No. 131892. She raised no issue with the Demand Notice that the Plaintiffs had issued to the Defendants. However, she would go on to strike out the Statement of Claim. From my reading of her reasoning, the Learned Magistrate was not satisfied with the evidence that the Plaintiffs adduced.

Boundary Issue

12. The bedrock of the Plaintiff's case in the Magistrates Court is that the Defendants had trespassed onto their land. Trespass happens when a person directly enters upon another's land without permission. Entry onto another's land happens when one has crossed a boundary line. In this case, I note from the Learned Magistrate's Ruling (paragraph 21) that there is a disputed area of about 60 square meters.
13. The Plaintiff had produced two Valuation Reports. It seems that these two reports were intended *inter alia* to prove the Defendants' alleged trespass. However, the Learned Magistrate clearly was not so satisfied.
14. I totally agree with the Learned Magistrate. I reproduce below paragraphs 12 to 23 of the Learned Magistrate's Ruling which outline her findings and her rejection of the two Valuation Reports.
 12. The plaintiff had carried out valuation of his property by Westate Consultants. A report dated 31 October 2001 was tendered into court and marked exhibit number 4.
 13. As per the report the valuation was carried out on 29 October 2001 "***for the purpose of ascertaining the current market value of the leasehold interest for mortgage lending purposes***" – page 1 of the report. Emphasis is mine.
 14. On page 4 on the first paragraph it states that:

"We are unable to carry out an accurate inspection of the surveyed boundaries and have of necessity, assumed all standing structural improvements are erected with the title boundaries." [emphasis mine]
 15. The said report outlines the physical description of the property as follows:

***"The subject property forms an irregular shaped block forming a frontage of 28.69 meters to Ragg Street by an average depth of 73.13 meters and a rear boundary of 29.51 meters.
The certified land area is 2,074 square meters (2 rods and 02 perches).
The site is slightly raised above the road level and offers an even contour Throughout."***
 16. The plaintiff in his evidence in chief stated that Westate Consultants had calculated amount for the portion of the arrear utilized by the defendant and encroachment on his boundary. However, after careful perusal of exhibit numbered 4 no such comments were found in the valuation report.

17. He again hired another surveyor to redefine the pegs. Letter dated 13 December 2002 was tendered into court as exhibit numbered 5.
18. According to the said letter, a P.K. Bamola a registered surveyor had in September 2000 redefined and reinstated the road boundary for Lot 9 DP 1801.
19. The property subject to the proceeding was redefined some 8 months prior the alleged earthwork carried out by the defendants.
20. A second report by Northern Property Valuation & Consultant was tendered into Court and marked as exhibit numbered 5.
21. Said report is dated 29 December 2009 and was prepared to re-value the report on the disputed portion (60 square meters) on the land situated on lease number 131892 Lot 9 DP 1801, at Namosau, Ba.
22. On page 2 of the report paragraph B, the valuer states that:
"We have not had the opportunity to inspect the property but we have based our assumptions on Westate Valuation Report"
23. As per the drawing attached to the said report there is a report stating that on the boundary adjoining Lot 9 and 8 *"there was earth drain dug by council"* and on the front boundary of the land a concrete drain was dug extending to Lot 10.

Other Allegations (Damaging Crops, Digging of Drain, Piling Earth/Debris on Plaintiffs' Land, Damaging Crops)

15. Firstly, if there was no evidence of trespass onto the land, it would be very hard for the Plaintiffs to prove these other allegations. Secondly, I note that the Learned Magistrate had picked on some glaring inconsistencies in the Plaintiff's evidence in Court (see paragraphs 16, 25, 27 and 28). Clearly, the Learned Magistrate had found the Plaintiff's credibility wanting. I would not want to disturb that finding.
16. The court records for 21 May 2012 records the Plaintiff as having informed the Court that **"slope which has eroded due to excavation of land by lessee later BTC depth of 1 m depth"** and Mr. Dayal also informing the Court that **"there is another case against BTC – they dug drain and repeg Case for Hearing this year in this Court"** and that **"Agriculture Office didn't do valuation of the damage to crops – dalo, cassava, etc"**.

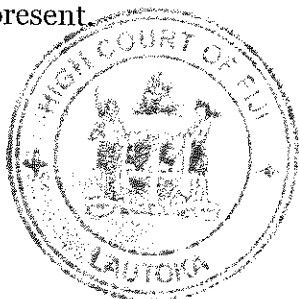
COMMENTS

17. In Langsam v Beachcroft LLP [2012] EWCA Civ 1230, the Court said:

It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach. In other cases, where the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court must in general make up its own mind as to the correctness of the judge's finding (see Datoc Electronic Holdings v United Parcels Service [2007] UKHL 23, [2007] 4 All ER 765, [2007] 1 WLR 1325 at 46 per Lord Mance).

18. The grounds raised in this appeal all have to do with the Learned Magistrate's findings of fact and also her choosing not to accept some aspects of the Plaintiff's oral evidence. There is no allegation of an error of law. I am of the view that the Learned Magistrate was correct to have rejected the two Valuation Reports before her as evidence of trespass. The Reports themselves have shortcomings as the Valuers themselves acknowledge. These shortcomings are noted by the Learned Magistrate in paragraphs 13, 14, 15, 16, 20, 21, 22 and 23 (see above).

19. Mr. Dayal, as of to date, has not filed any written submissions.
20. Appeal dismissed. No Order as to costs as the defendants have not been present.



Anare Tuilevuka
JUDGE

20 March 2018.