

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 149 of 2020

BETWEEN: **PRATAP SINGH** of Lot 13 Sharma Road, Nadera, Nasinu, Fiji, Retired.

PLAINTIFF

AND: **RISHI PRASAD** of Lot 12 Sharma Road, Nadera, Nasinu, Fiji, LTA Officer.

1ST DEFENDANT

NASINU TOWN COUNCIL of Mayoral Drive, Nasinu

2ND DEFENDANT

BEFORE: **Hon. Mr Justice Vishwa Datt Sharma**

COUNSEL: **Ms Pillai M.** for the Plaintiff
Ms Prasad S. for the First Defendant
Ms Kant S. for the Second Defendant

Date of Judgment: **27th October 2022 @ 9.30 am.**

JUDGMENT

[Encroachment: Originating Summons filed pursuant to Section 109 of the Property Law Act 130]

Introduction

- [1] The Plaintiff filed the Originating Summons on 26th May 2020 and sought for the following orders:-
- "1. The 1st Defendant does forthwith stop work or and remove building from the boundary line that comprised in CT 32451.*
 - 2. The 1st Defendant be refrained from further putting pegs in the Plaintiffs property.*
 - 3. For an order that the cost of this application be paid by the 1st Defendant on an indemnity basis.*
 - 4. For such other Order or Orders this Honourable Court deems fit to make in the circumstances of the case."*
- [2] The First Defendant filed her Affidavit in Response on 16th October 2020 to the Plaintiff's Affidavit.
- [3] On 23rd March 2021, the Plaintiff filed his Reply Affidavit to the First Defendant's affidavit.

Plaintiff's Case

- [4] That he is the registered owner of freehold title bearing description CT 32451 located at Nadera, Nasinu.
- [5] The 1st Defendant is his immediate neighbour.
- [6] The 2nd Defendant is a nominal Defendant.
- [7] That the Plaintiff was present with the First Defendant and the surveyor when the 1st Defendant had started putting boundary pegs onto Plaintiff's property passing the boundary line. The Plaintiff informed them not to do so since it is Plaintiff's property which is marked with the boundary pegs.
- [8] The Plaintiff complained to the 2nd Defendant on several occasions for them to intervene and resolve the problem. However, he did not get any assistance from the 2nd Defendant.
- [9] The Plaintiff hired a surveyor who had confirmed to him that the Defendant had put the pegs outside his boundary and onto the Plaintiff's property.
- [10] The Defendant is trying to start construction work and has put pegs onto the Plaintiff's property.

1st Defendant's Case

- [11] The Plaintiff sought for the orders as enumerated in her Originating Summons and at paragraph 1 of my Judgment hereinabove at paragraph 1(1) to (4) inclusive.

- [12] The Title owner is not only the Plaintiff [Pratap Singh] but also Son Mati. Therefore, the Plaintiff cannot bring this proceeding to Court by himself, unless consent is given by the other owner, Son Mati.
- [13] The 1st Defendant is the registered proprietor of the property of Lot 12 on DP No. 7955 on Certificate of Title No. 32574.
- [14] The Defendant says the Surveyor's Report is questionable and incomplete and cannot be relied upon as it does not provide any survey plan to support his claim and is therefore denied.
- [15] The 1st Defendant was advised by the Surveyor that he needs to have the land surveyed by the surveyor General from Ministry of Lands.
- [16] The 1st Defendant then engaged the services of a registered Surveyor, Pro Surveyors Planners, Project Managers to conduct a redefinition survey of Lot 12.
- [17] Surveyor's Report was received and at paragraph 1 clearly states that the original boundary pegs found and replaced were clearly flagged on site.
- [18] At paragraph 2, the Report states that the only encroachment was a part of building (Temple) from Lot 11 on DP 7955, which is encroaching onto his land.
- [19] According to the 1st Defendant, the Surveyor's Report does not show:-
- Any of the improvements from Lot 12 on DP 7955 encroaching onto the Plaintiff's property which is Lot 13 or any other lots nearby;
 - Any of the improvements on the 1st Defendant's property, Lot 12, built outside its boundary line.

[20] The 1st Defendant sought for the Originating Summons to be dismissed with costs.

2nd Defendant's Case [Nominal Defendant]

- [21] Received a complaint through electronic mail from the Plaintiff (Pratap Singh) residing on Lot 13, who complained that the Lot owned by the 1st Defendant has carried out development which is encroaching into the Plaintiff's lot.
- [22] Inspections were carried out on 8th march 2020 and was found that 1st Defendant had constructed a sheltered terrace on the side yard without the approval of the 2nd Defendant which is encroaching onto the 1.5m near side yard within the Plaintiff's compound.
- [23] The shelter built by the 1st Defendant was an illegal one and without a plan.
- [24] The 2nd Defendant sought for an order to regularise the said illegal structure.

The Law

[25] **Section 109 of the Property Law Act provides:-**

"109(1) Where any building on any land, whether erected before or after the commencement of this Act, encroaches on any part of any adjoining land (that part being referred to in this section as the piece of land encroached upon), whether the building was erected by the owner of the first mentioned land (in this section referred to as the encroaching owner) or by any of his or her predecessors in title, either the encroaching owner or the owner of the piece of land encroached upon may apply to the court, whether in any action or proceeding then pending or in progress and relating to the piece of land encroached upon or by an originating summons, to make an order in accordance with the provisions of this section in respect of that piece of land.

(2) If it is proved to the satisfaction of the court that the encroachment was not intentional and did not arise from gross negligence, or, where the building was not erected by the encroaching owner, if in the opinion of the court it is just and equitable in the circumstances that relief should be granted to the encroaching owner or any other person, the court, without ordering the encroaching owner or any other person to give up possession of the piece of land encroached upon or to pay damages, and without granting an injunction, may in its discretion make an order:-

- (a) vesting in the encroaching owner or any other person any estate or interest in the piece of land encroached upon; or*
- (b) creating in favour of the encroaching owner or any other person any easement over the piece of land encroached upon; or*
- (c) giving the encroaching owner or any other person the right to retain possession of the piece of land encroached upon.*

Determination

[26] There are **two (2) issues** for this Court to determine:-

- (i) The substantive issue that the case hinges upon is 'whether Lot 12 in occupation and ownership by the 1st Defendant has carried out a development which in fact has encroached upon Lot 13 occupied and owned by the Plaintiff?'**
- (ii) The preliminary issue raised herein subsequently by the 1st Defendant is that 'the property in Lot 13 and/or Title owner is not only the Plaintiff [Pratap Singh] but also son Mati and therefore the Plaintiff cannot bring this proceedings to Court by himself, unless consent by son Mati is given?' The issue raised is that of 'Plaintiff's locus standi?'**

[27] The **Certificate of Title No. 32451** confirms that the Plaintiff [Pratap Singh] and Son Mati are joint Tenants and that Son Mati took demise and her death record has been entered onto the Title on 14th May 2018. Therefore the Plaintiff is the sole proprietor of the **Certificate of Title No. 32451** accordingly.

[28] However, it will be noted from the file records and the Affidavits that there are **two (2) Surveyors Report** filed into Court.

[29] **1st Redefinition Surveyors Report dated 14th July 2019** annexed as "PS2" within the Affidavit in Support of the Plaintiff, Pratap Singh, which states as follows:-

"Iron rods placed to mark the boundary pegs inside Lot 13. Encroachment area calculated on site is 38m²."

[30] **The 2nd Redefinition Survey Report dated 8th October 2020** from Pro Surveyors Planners Project Managers found **that part of building (temple) from Lot 11 on DP 7955 is encroaching onto the subject Lot 12.**

[31] **The 2nd Defendant** in its affidavit deposed by Rajneel Rohitesh Kumar **has carried out an inspection on 8th May 2020 on Lot 12, DP 7955 and noticed that an illegal development has been carried out.** It was also noted that the 1st Defendant has constructed an illegal structure on the lot with the prior approval from the Nasinu Town Council and/or Director Town and Country Planning [DTCP].

[32] **The Plaintiff commenced these proceedings by way of an Originating Summons which is a summary proceedings.**

[33] **During the hearing, it came to light that there were two (2) Redefinition Survey Reports submitted to Court** for its consideration. **One submitted within the affidavit by the Plaintiff and the second one by the 1st Defendant.**

[34] **The 2nd Defendant** filed an affidavit on 4th September 2020 and at paragraph 6 states "That on or about 8th March 2020, I had carried out inspection whereby it was found that Mr Rishi Prasad [1st Defendant] has constructed a sheltered terrace on the side yard without the approval of the 2nd Defendant which is encroaching unto the 1.5 m rear side yard within his compound."

[35] **Upon the perusal of the two (2) Redefinition Survey Reports, it reveals that:**

- **The boundary pegs are placed inside Lot 13**
- **Encroachment calculated at 38m²**

[36] **However, 2nd Defendant's Survey Report revealed that part of the building (temple) on Lot 11 is encroaching onto Lot 12.**

[37] **The Final Inspection Report [Annexure 'C'] deposed by Rajneel Rohitesh Kumar on behalf of Nasinu Town Court (2nd Defendant) reveals an illegal development on Lot 12 and that is it.**

[38] **It can be ascertained from the Annexure 'RRP3' of 1st Defendant's affidavit filed in Court on 16th October 2020 that the encroachment is from Lot 11 onto Lot 12 occupied by the 1st Defendant and not Lot 13 which is the Plaintiff's lot.**

[39] **Further, the Surveyor's Report annexed as 'PS2' within the Plaintiff's affidavit filed on 28th may 2020 reports an encroachment area on site of 38m² but is too ambiguous and unclear and does not mention as to which Lot it has been encroached upon.**

[40] **The Surveyor further reports in the last paragraph of his Redefinition Survey that the Surveyor**

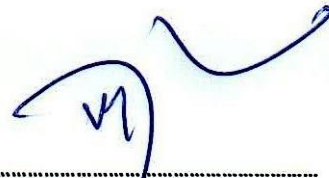
must produce a survey plan to be lodged with Director of Lands for examination and approval by the Surveyor General.

- [41] Whether the survey plan was lodged or not is best known by the Plaintiff.
- [42] Although the 2nd Defendant deposed at paragraph 6 that 'he carried out inspection which revealed that the 1st Defendant had constructed a sheltered terrace on the side yard which is encroaching unto the 1.5 m rear side yard within his compound', one report says encroaching area is 38m² whilst the second 1.5m.
- [43] It does not say on which Lot it is encroaching upon.
- [44] I find that these are triable issues in terms of the two (2) Redefinition Reports and 2nd Defendant's Final Inspection plan as well.
- [45] More clarity and explanation is needed by the Surveyors who had compiled the two (2) Reports together with 2nd Defendant's final report and subjected to cross examination in order to deal with the impending substantive and preliminary issues accordingly.
- [46] The two Surveyors and the Health Inspector from Nasinu Town Council together with the Plaintiff and the 1st Defendant needs to testify in Court and establish 'whether any encroachment has taken place from Lot 12 to Lot 13 accordingly.'
- [47] This cannot be done by an Originating Summons and submissions in a summary proceedings.
- [48] The Court heard the oral submissions of the Plaintiff and the 1st Defendant on the Originating Summons and found that there are triable issues that needs determination on evidence, both oral and documentary in nature.
- [49] Since the Hearing on the Originating Summons has been concluded, it is too late in the day for the Court to make an order that this matter to be continue as if begun by Writ in terms of **Order 28 Rule 9 of the High Court Rules 1988**. The attention of the parties to the proceedings and their Counsels attention was drawn to this fact during the hearing of the proceedings .However, they decided to proceed otherwise.
- [50] In any event, if the Court decides to make an order in terms of **Order 28 Rule 9 of the High Court Rules 1988**, then definitely it would tantamount to a duplicity of hearing, which must be avoided.
- [51] Bearing above in mind, I find that I have no other alternative but proceed to dismiss the Originating Summons due to the existing triable issues therein.

ORDERS

- i. The Originating Summons filed on 28th May 2020 is hereby dismissed.
- ii. Each party to bear their own costs.

Dated at Suva this 27th day of October 2022.



.....
VISHWA DATT SHARMA
JUDGE

cc: *Moharsh Pillai Lawyers, Suva.*
Chand & Young Lawyers, Suva
Nasinu Town Council, Nasinu.