

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CIVIL APPEAL NO. ABU 0053 of 2018**  
**[Lautoka Civil Action No: HBC 60 of 2006]**

**BETWEEN** : **MAHENDRA SHARMA** *1<sup>st</sup> Appellant*

**AND** : **MAHENDRA SHARMA** as the Administrator in the **ESTATE OF RAJENDRA SHARMA** *2<sup>nd</sup> Appellant*

**AND** : **NATIVE LAND TRUST BOARD** *Respondent*

**Coram** : **Dr. Almeida Guneratne, P**  
**Jitoko, VP**  
**Basnayake, JA**

**Counsel** : **Mr M Kumar for the Appellants**  
**Mr J Cati for the Respondent**

**Date of Hearing** : **3<sup>rd</sup> May, 2023**

**Date of Judgment** : **26<sup>th</sup> May, 2023**

**JUDGMENT**

**Almeida Guneratne, P**

[1] This is an appeal against the High Court judgment dated 11<sup>th</sup> May, 2018. By that judgment the learned judge dismissed the plaintiffs-appellants (hereinafter referred to as the Appellants) claim seeking the issuance of registered leases from the Respondent.

- [2] The Respondent had refused the issuance of the leases on the basis that the Appellants had encroached on the area occupied by a third party.
- [3] The Appellants relied on a survey carried on by one Ami Chand and had contended that therefore the Respondent was estopped from denying the survey.
- [4] The Appellants Statement of Claim is at pages 43 – 49 of the Copy Record and the Respondent’s Statement of Defence is at pages 50 – 53 thereof. Subsequently there was an Amended Statement of Claim (at pages 79 – 84), an Amended Statement of Defence (at pages 85 – 89), a Reply to the Amended Statement of Defence (pages 90 – 92 of the Copy Record) followed by an Amended Reply to the Defence (pages 135 – 137) Copy of the Survey Plan relied on by the Appellants is referred to by the High Court in its Judgment which will be revealed in the ensuing reference to it at paragraph [7] of this judgment.

**The Judgment of the High Court (pages 5 – 39 of the Copy Record)**

- [5] The learned Judge recorded the factual background of the case (pages 6 – 14 of the Copy Record) (including the protracted pleadings) and reproduced in verbatim (the disputed facts and the issues to be determined) (pages 15 – 16 of the Copy Record). Thereafter, the learned judge made a tabulated summary of the documentary evidence (pages 16 – 18) as well as a summary of the oral evidence led at the trial followed by his initial analysis of the same (pages 18 – 27 of the Copy Record).
- [6] At this point, I wish to say that, that meticulous exercise (which I adopt without having to repeat the same) on the part of the learned Judge made this Court’s task that much easier in this Court’s appellate function which was to see whether the analysis the judge made on the evidence bears scrutiny and if not prompting this Court to interfere with the Judgment.

[7] Having said that, I turn now to the decisive findings of fact the learned Judge made in his Judgment.

“(8) *On the instructions of Ami Chand, the survey was done in the year 2005 by Sela Macanawai (PE-20) and a plan made. The plan had been signed by Ami Chand. The Plan had been given a reference number SO-5364 (PE-22). The Plan depicts two allotments as Lot 01 and 02 with extents of 1142 square meters and 1145 square meters respectively. The obligation to conduct the survey in accordance with the NLTB survey instructions was with the Plaintiffs surveyor. **The survey plan prepared by the Plaintiffs surveyor consisted of larger area than what was requested to be surveyed by the Defendant.** As I said earlier, according to the survey instructions given by the Defendant (PE-17), the estimated areas to be surveyed were 582 square meters (23 perches) and 455 square meters (18 perches). It is to be noted that accordingly to the ‘Notices of Approval to lease’ (PE-5 and PE-6) the extents of the two allotments leased to the Plaintiffs are 582 square meters (23 perches) and 455 square meters (18 perches).*

(9) *In my view, therefore, it is clear on the evidence that the survey was not done in accordance with the NLTB survey instructions that were provided. The Plaintiffs contended that the survey was conducted by their surveyor in accordance with the survey instructions. I am not prepared to accept this. Clearly, the supposition is untenable.”*

(10) *The Defendant’s “Internal Memorandum” dated 27<sup>th</sup> October 2005” (PE-23) from Acting/EO to Manager North-Western states that the Plaintiffs survey plan no. SO-5364 has been approved.*

(11) *On 28<sup>th</sup> October 2005, the Plaintiffs were offered in writing two leases of land for residential purposes by the Defendant (PE-24 and PE-25). These leases are in respect of the two allotments depicted in plan no: SO-5364, as Lot 01 and 02 with extents of 0.1142 and 0.1145 HA (1142 and 1145 square meters). In the offer letters the Plaintiffs were invited to execute contracts upon settlement of \$3,805.98. In order to facilitate the issue of the new leases, the Plaintiffs had surrendered the remaining term of the former two leases and had paid \$1800.00 as surrender fees (PE-26). The surrender was registered with the Register of Titles (PE-27).*

(12) *Thereafter, in pursuance of the agreement, one of the two lease documents was executed by both parties and required to be sent for registration. The other document was executed by the Plaintiffs in the office of the Defendant (PE-28) and PE-29).*

(13) *In my opinion, the two letters written by the Defendant on 28.10.2005 (PE-24 and PE-25) to the Plaintiffs constitutes a **contractual offer** by the Defendant*

to lease-out the two pieces of native land to the Plaintiffs for their residential purposes which is capable of being converted into a legally enforceable contract for the lease of the land. The correspondence contained the very significant passage following: "Thank you for your application to lease the . . . land for residential purposes. The Board is pleased to offer you a lease contract for the said land under the Native Land Trust (Leases and Licences) Regulations. The relevant terms and conditions of your lease are specified in the contract document that will be made available for your perusal in any of our offices." The Plaintiffs accepted the Defendant's offer by surrendering the remaining terms of the existing leases. What is more, the Plaintiffs paid \$1800.00 as surrender fees and the surrender was registered with the Registrar of Titles. In the offer letters the Plaintiffs were invited to execute contracts upon settlement of \$3,705.98. The consideration had passed. **Therefore, all three conditions are satisfied, the fundamentals to the formation of a contract for the lease of the land. In the light of this history of events, I can find a contract here.**

- (14) The Defendant declined to issue and register leases to each of the Plaintiffs on the ground that the surveyed boundary of each of Lot 1 and 2 was not such as had been represented to it in the Plaintiffs survey plan No.SO-5364. The Defendant complained that the surveyed boundary of each of Lot 1 and 2 crossed through a house on adjoining lots. The Defendant drew my attention to the affidavit (PE-20) of the Plaintiffs registered surveyor 'Sela Macanawai'. Moreover, the Defendant referred me to the 'investigation survey' (PE-39) carried out by 'Indra Deo Sharma' on the instructions of the Surveyor General's Office. The Defendant specifically pleaded that it is impossible for it to lease-out Lot 1 and 2 encompassing O.1142 and O.1145 hectares (1142 and 1145 square meters respectively) as such extents were crossing the adjoining lots. This was detected much later in the date by an investigation survey of the land conducted by the Defendant (PE-39). The Defendant admits to having approved Plan SO-5364. However, the Defendant complains that the approval was given on a misrepresentation by the Plaintiffs. The Plan SO-5364 contains a representation that the boundaries of Lot 1 and 2 do not form part of any land.
- (15) The evidence establishes to my satisfaction that the surveyed boundary of each of lot 1 and 2 in the Plaintiffs survey plan no. SO-5364 encompassing O.1142 and O.1145 hectares (1142 and 1145 square meters respectively) crossed through the houses on adjoining lots. In the affidavit of the Plaintiffs surveyor 'Sela Macanawai' (PE-20), he deposes the following:

Para.18 - **That there were three houses on the northern boundary which I did not show on the plan.**

**Para.19 - That in the survey plan I am required to show any existing structure on the surveyed lot and any other structures that are very close or encroaching onto the surveyed lots.**

(16) *The crucial paragraphs in the affidavit of the Plaintiffs surveyor 'Sela Macanawai' are paragraphs 18 and 19.*

*What is more, there is sufficient **corroborative evidence** to satisfy the court. The **investigation survey**, (PE-39) corroborates that the surveyed boundary of each of lot 1 and 2 in the Plaintiffs survey plan no. SO-5364 encompassing 0.1142 and 0.1145 hectares (1142 and 1145 square meters respectively) crossed through the houses on adjoining lots. There are two written communications touching this matter. On 6<sup>th</sup> June 2007, the Acting Assistant Director of Lands and Surveyor General wrote to the Defendant; (PE-32)"*

### **The Grounds of Appeal**

[8] As many as 11 grounds have been urged by the Appellants in their Notice of Appeal (pages 1 to 4 of the Copy Record).

### **What transpired at the hearing of the Appeal**

[9] At the hearing of the appeal, I called upon respective Counsel to address Court taking the grounds of appeal cumulatively to which call both Counsel graciously responded.

[10] Mr Kumar for the Appellant's in his brief address submitted which I reproduce in summary as follows:-

- (i) The leases approved and given to his clients by the Defendant, (being a statutory authority), was estopped from refusing the same.
- (ii) The survey plan "*the depicted two pegs*" shown on it, taken with the boundary line, was in fact an encroachment by "a third party" and not by his clients.

[11] Mr Cati for the Respondent submitted in counter that:

- (i) The “*two pegs*” put forward by the Appellants had in fact were “*iron rods*” and therefore totally in breach of the “*survey instructions*” contained in the Surveyors Regulations 1980, interalia, on instructions as to the boundaries to be marked and fixed.
- (ii) Computation of areas following therefrom and the validity (acceptability of the Survey Plan) also did not bear scrutiny apart from the fact the surveyor in any event was not a qualified surveyor.

### **Relative Assessment of the said submissions of Counsel**

[12] Although the appeal record has run into three volumes, the ultimate issue for determination stood within a narrow compass as I have discerned above.

### **Discussion and Determination**

[13] The learned Judge addressed, analysed and concluded in his judgment absorbing into his thinking the three basic requirements of evidence *viz*: (a) the reception of evidence  
(b) the assimilation of evidence  
(c) the application of evidence

[14] That is what I have adopted in this judgment at paragraph [7] above without the need to add anything thereto.

[15] For the aforesaid reasons, I could not find a reason to interfere with the impugned judgment of the High Court for any misdirection or non direction on any fact or law (leave alone anything perverse in the Judgment).

[16] Sufficing therefore the aforesaid exposition I did not feel the need to go into the qualifications of Ami Chand as “*a Surveyor*” and the allegations of “*deception/misrepresentation*” that appear to have gone along with it, which had led the learned Judge to use strong language as “*trickery etc*” (*vide*: paragraph 8 of the grounds

of appeal at page 3 of the Copy Record), which the learned Judge has employed at paragraph [17] of his judgment and page 37 thereof.

[17] I am of the considered view that, the learned Judge ought not to have indulged in such language for, upto that point, the learned Judge had come to the stage in deciding to dismiss the Appellants claim.

[18] I say that bearing in mind the basic function of law and the role of the Courts in executing that function. And what is that function?

**It is to regulate human conduct in society and resolving conflicting interests**

[19] Thus, when the learned Judge in regulating that conduct and resolved the conflicting interests in dismissing the appellants claim on the basis of the documentary and the oral evidence led (very particularly on the interpretation of the survey plan concerned), the learned Judge need not have gone further.

[20] Respectfully, I say that, such language in my view is not judicial language and I have no hesitation in directing the Registrar to expunge from the record the reference in the High Court Judgment to such language contained at paragraph [17] of the High Court judgment reflected at page 37 thereof.

**One other matter that needed to be addressed**

[21] That matter was occasioned by an interjection my brother Justice Basnayake made during the hearing and that was, as His Lordship put to the Appellants' Counsel thus:

*“should this Court at the end of this hearing were to find in your favour, wouldn't that “third party” be affected? If so, should you have not joined that party in the High Court action and now in this Appeal?”*

[22] Mr Kumar, for the Appellants' conceded that it was a lapse on the Appellants' part.

[23] However, this Court did not feel it necessary to go into that, if only for the reason that, the Respondent did not raise the same.

### **Conclusion**

[24] Consequently, by passing that matter, on an analysis of the case on the merits I propose the orders for this Court as follows.

### **Jitoko, VP**

[25] I entirely concur with Guneratne P's observations, reasoning and conclusions and with the Orders proposed in this appeal.

### **Basnayake, JA**

[26] I agree with the reasoning and conclusions arrived at by Guneratne, P.

### **Orders of Court:**

1) *The Appeal is dismissed.*

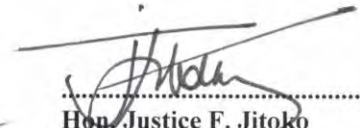
2) *The Appellants shall pay to the Respondent costs in a sum of \$5,000.00 within 28 days of notice of this Judgment.*



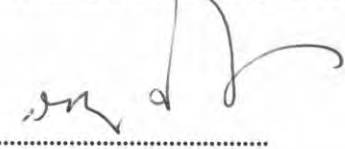
3) *The Registrar of this Court is directed to have the passages contained in paragraph [17] of the High Court Judgment culminating at page 37 of the Copy Record of its Judgment expunged.*



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**Hon. Justice Almeida Guneratne**  
**PRESIDENT, COURT OF APPEAL**



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**Hon. Justice F. Jitoko**  
**VICE PRESIDENT, COURT OF APPEAL**



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**Hon. Justice E. Basnayake**  
**JUSTICE OF APPEAL**

**Solicitors:**

Fazilat Shah Legal for the Appellants

iLTB Lawyers for the Respondent