

In the High Court of Fiji at Suva
Civil Jurisdiction
HBC Action No.110 of 2015
Between
Housing Authority
Plaintiff
And
Bernard William Newton
Defendant

COUNSEL: Ms M. Vasiti for the plaintiff
Mr J. Savou for the defendant

Date of hearing: 1st December,2015

Date of Ruling : 27thSeptember, 2016

JUDGMENT

1. In these proceedings filed by way of originating summons the plaintiff, the Housing Authority states that the defendant, the registered lessee of a lot of land at Chadwick Road, Naulu, has encroached deliberately onto part of the adjacent land and erected a lean-to-dwelling on the driveway, without the consent or knowledge of the plaintiff. The plaintiff seeks a declaration to that effect and an order that the defendant remove the encroaching structure. The defendant states that he was a "*sitting tenant*", prior to the sub-division and sale of the land to him.
2. Sisilia Rakesa, a Litigation Officer of the Housing Authority, in her affidavit of support of the summons, states as follows:
 - (a) The plaintiff was issued a special lease by the Director of Lands over Crown Lease No. 257041 of an area of 8.2808 hectares for a term of 99 years. The lease is attached.
 - (b) The plaintiff subdivided the land and made an offer of sale on 27thNovember,2007, to the defendant, a "*sitting tenant*", which he accepted.
 - (c) The plaintiff issued a sublease to the defendant. The defendant is the registered owner of Lot 7 on DP 7759.

- (d) The defendant has erected a lean-to-dwelling on the driveway “*deliberately encroaching*” onto part of the adjacent Lot 8 on DP No. 7759, without the prior consent or knowledge of the plaintiff. The dimension of the encroached area is 8m². A copy of the site plan highlighting the dimension of the encroached area is annexed .
 - (e) Sainivalati Degei, the tenant of the adjacent affected Lot 8 on DP No. 7759 cannot build his residential dwelling, due to the encroachment.
 - (f) An encroachment notice has been sent to the defendant.
 - (g) The plaintiff requires the defendant to remove the dwelling from the driveway and any other additional structures erected on the adjacent Lot 8.
3. The defendant, in his affidavit in opposition states:
- i. The only extension that he has done is a shed he built 20 years ago. He was unaware that the house was encroaching onto the other Lot, as the house has been there for more than 62 years, before the subdivision of the land was done.
 - ii. He does “*not have the means to remove the said property from the driveway or reallocate his house*”.

The determination

4. At the hearing, Ms Vasiti, counsel for the plaintiff submitted that the encroachment was intentional. The defendant admits in his affidavit in opposition that he encroached on the adjacent lot and built the shed on the driveway.
5. Mr Savou, counsel for the defendant in reply submitted that the extension to the dwelling house of the defendant was built 20 years ago, before the sub-division was approved.
6. Ms Vasiti’s riposte was that the defendant ought to have been aware of the boundaries of the property, since he has resided on the property for a long period of time and the encroachment constitutes a large area of 8m². The affidavit in opposition has not pleaded that the boundaries of the land have changed nor has the defendant produced any plan to challenge the plan filed by the plaintiff.

7. Ms Vasiti relies on section 109 of the Property Law Act and the case of *Housing Authority v Ilisapeci Jiuta*, (Civil Action No. HBC 4 of 2013).
8. Sub-section(1) of section 109 titled “*Power of court to grant special relief in cases of encroachment*” provides that where any building encroaches on any part of any adjoining land, the owner of the piece of land encroached upon may apply to the court, to make an appropriate order.
9. Sub-section (2) states that:

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. (emphasis added)
10. In *Housing Authority v Ilisapeci Jiuta*, (*supra*) the Court stated as follows:

*In this instant case, the Defendant was in possession of the properly demarcated survey plans and titles received from the Housing Authority. She knew or ought to have known boundaries of her Lot. She deposed that she has no knowledge or construction industry and gave a contract to a construction company to erect the house. Obviously, she needs to provide the approved or authorized plans to any contractors to commence a construction. She has not submitted or annexed any approved plan received from a relevant authority. **The failure of the Defendants to submit approved plans to demonstrate to court that construction was done unintentionally would necessarily draw an adverse inference against the Defendant. In my view, the approved plan for a construction is a material document.*** (emphasis added)

11. I am satisfied that the encroachment by the defendant onto the adjacent Lot 8 has been “*intentional*” and does not arise from “*gross negligence*” within the meaning of section 109 (2). The defendant has not produced a plan to support his contention that the boundaries of the site plan was changed, when the sub-division was effected.
12. In my judgment, the plaintiff is entitled to the relief sought.
13. In the circumstance of this case, I make no order as to costs.
14. **Orders**
- (a) I grant the plaintiff a declaration that the defendant, the registered lessee of Lot 7 on DP No. 7759 comprised in Housing Authority Lease No. 735924 has erected a lean-to-dwelling on the driveway, not within his boundary line and encroached deliberately onto part of the adjacent land known as Lot 8 on DP No. 7759, without the consent or knowledge of the plaintiff.
- (b) The defendant shall within a period of 3 months of this judgment remove the encroaching structure from Lot 8 .
- (c) In the event that the defendant fails to remove the encroached lean-to-dwelling structure from the driveway within the time specified, the plaintiff and its agents are entitled to remove same.
- (h) I make no order as to costs.

A.L.B. Brito Mutunayagam

A.L.B. Brito Mutunayagam

JUDGE

27th September, 2016

