

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 95 of 2017**

**BETWEEN** : **FIJI ROADS AUTHORITY** a body corporate constituted by the Fiji Roads Authority Act having its head office at Level 4 Development Bank Centre, 360 Victoria Parade, Suva.

**PLAINTIFF**

**AND** : **MARY NAGAMMA DASS, HAROLD SURYA KANT PANNIKER, IVAN SUNDAR PANNIKER and GERALD NEELAM KANT PANNIKER** as Registered Lessees of Crown Lease 2408, being Lot 72 Wainibuku and containing an area of 2 roods and 9 perches

**DEFENDANTS**

**BEFORE** : **Hon. Justice Kamal Kumar**

**COUNSEL** : **Ms N. Choo for the Plaintiff**

: **Secondnamed Defendant in Person**

**DATE OF HEARING** : **1 June 2017**

**DATE OF JUDGMENT** : **31 October 2017**

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**JUDGMENT**

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## **Introduction**

1. On 5 April 2017, Plaintiff filed Originating Summons (Expedited Form) seeking the following Orders:-

- “1. A Declaration that the Defendants, being the registered Lessees of the land known as Lot 72, Wainibuku being the land in Crown Lease 2408 have deliberately and knowingly encroached on the adjacent land known as the Road Reserve and vested in the Plaintiff pursuant to the Fiji Road Authority Decree 2012 by building a structure over a portion of the Plaintiff’s vested land without the consent of the Plaintiff.*
- 2. An Order that the 2<sup>nd</sup> Defendant namely Harold Surya Kant Panniker within 7 days remove the encroaching structures that he has erected on the Road Reserve area.*
- 3. An Order that in the event that if the Defendants and in particular the 2<sup>nd</sup> Defendant fails to remove the encroachments within the time specified then the Plaintiff and its agents are to be at liberty to forcefully enter the Plaintiff’s land and remove the encroachment.*
- 4. An Order that the 2<sup>nd</sup> Defendant, namely Harold Surya Kant Panniker be ordered to pay penalty to the Plaintiff in the sum of \$10,000.00 for each day the encroachment accrues from the date of this Summons together with all associated costs on an indemnity basis.*
- 5. Such further or other relief as seems just and equitable to this Honourable Court.”*

### **(“the Originating Summons”)**

2. The Originating Summons was returnable on 25 April 2017, at 9.30 am and was served on Secondnamed Defendant only because the other Defendants are residing overseas.
3. On 25 April 2017, Secondnamed Defendant appeared in person and informed Court that Defendants have removed the encroachment when Counsel for the

Plaintiff sought three (3) weeks to inspect the property and the Originating Summons was adjourned to 5 May 2017, for review.

4. On 5 May 2017, Counsel for Plaintiff informed Court that Plaintiff engaged Opus International Consultants (Fiji) Ltd (“**Opus**”) to carry out inspection and Opus stated that structures have not been removed and in response Secondnamed Defendant informed Court that structures have been removed and Plaintiff wants to acquire part of his land.
5. The parties were directed to file Affidavits and the Originating Summons was adjourned to 1 June 2017 at 9.30 am, for hearing and the Secondnamed Defendant was informed that he could consult a lawyer.
6. On 1 June 2017, the Originating Summons was heard and Plaintiff by its Counsel and Secondnamed Defendant made Oral Submissions.
7. Following Affidavits were filed by the parties:-

**For Plaintiff**

- (i) Affidavit of John McGregor Jefferies sworn on 4 April 2017 and filed on 5 April 2017 (hereafter referred to as “**Jeffries 1<sup>st</sup> Affidavit**”);
- (ii) Affidavit of John McGregor Jefferies sworn on 30 May 2017 and filed on 30 May 2017 (hereafter referred to as “**Jeffries 2<sup>nd</sup> Affidavit**”);

**For Secondnamed Defendant**

Affidavit of Secondnamed Defendant sworn and filed on 19 May 2017 (hereafter referred to as “**Secondnamed Defendant’s Affidavit**”).

**Background/Undisputed Facts**

8. The Plaintiff is a corporate body established pursuant to section 4 of the Fiji Roads Authority Act 2012 (“**FRAA**”) whose functions and powers are provided for in the FRAA.

9. The Plaintiff is in the process of carrying out widening of Kings Road between Suva and Nausori which is along Wainibuku Settlement.
10. Defendants including Secondnamed Defendant are registered lessees of property known as Lot 72 Wainibuku Tikina of Suva Province of Rewa containing eight roods and nine perches comprised and described in Crown Lease No. 2408 which is situated at the junction of Sasawira Street and Kings Road (hereinafter referred to as **“the property”**).
11. Constructed on the property are certain structures from where Secondnamed Defendant is or has been running a shop.
12. It is alleged by Plaintiff that certain structures on the property has and still is encroaching onto the road reserve, Kings Road and Sasawira Road.

### **Issues of Determination**

13. Issues for determination are:-
  - (i) Whether structure on the property is still encroaching the road reserve along Kings Road and Sasawira Road, Kings Road and Sasawira Road;
  - (ii) Whether Plaintiff is entitled to cost of this proceeding.

### **Whether Structure on the Property is encroaching on Road Reserve, Kings Road and Sasawira Road**

14. The Orders in the Originating Summons are sought pursuant to section 109 of Property Law Act 1971 (**“PLA”**) which provides as follows:-

**“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 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.*

*(3) Where the court makes any order under the provisions of this section, the court may, in the order, declare any estate or interest so vested to be free from any mortgage or other encumbrance affecting the piece of land encroached upon, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease or contract affecting or relating to that piece of land.*

*(4) Any order under the provisions of this section, may be made upon and subject to such terms and conditions as the court thinks fit, whether as to the payment by the encroaching owner or any other person of any sum or sums of money, or the execution by the encroaching owner or any other*

*person of any mortgage, lease, easement, contract or other instrument, or otherwise.*

*(5) Every person having any estate or interest in the piece of land encroached upon or in the adjoining land of the encroaching owner, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, contract or easement affecting or relating to any such land, shall be entitled to apply for an order under the provisions of this section, or to be heard in relation to any application for or proposal to make any such order. For the purposes of this subsection the court may, if in its opinion notice of the application or proposal should be given to any such person, direct that such notice as it thinks fit shall be given to that person by the encroaching owner or any other person.*

*(6) Every order vesting any estate or interest in any person under the provisions of this section shall for the purposes of the Stamp Duties Act be deemed to be a transfer on sale and shall be liable to stamp duty accordingly. (Cap 205)”*

15. The Secondnamed Defendant does not dispute part of the structures including his containers are encroaching on Sasawira Road and Kings Road including road reserve.
16. It is also not disputed that Secondnamed Defendant has removed most of the encroachment and claims that he could not remove the structure fully because of barricades erected by Plaintiff's contractor.
17. Plaintiff by its Counsel handed in Submissions and made Oral Submissions mostly highlighting the evidence in Jefferies 1<sup>st</sup> and 2<sup>nd</sup> Affidavits.
18. Plaintiff's evidence in summary is as follows:-
  - (i) Plaintiff “is carrying out construction work on Kings Road between Nakasi and Davuilevu. The road is being upgraded from 2 lane carriageway to 4 lane carriageway over a length of 3.7 kilometers with

footpaths along both sides of the carriageway (Annexure “E” of Jeffries 1<sup>st</sup> Affidavit - 1<sup>st</sup> paragraph);

- (ii) During the course of the construction, it was revealed that Secondnamed Defendant has constructed structure on the property which are encroaching on road reserve along Sasawira Road and Kings Road and both roads;
- (iii) Nausori Town Council had given notice to Secondnamed Defendant to remove the structure and has filed charges against Secondnamed Defendant in Nausori Magistrates Court in 2016;
- (iv) Plaintiff's Officers, Officers from Opus and Secondnamed Defendant met on 14 March 2017 (“**the meeting**”);
- (v) At the meeting Secondnamed Defendant acknowledged that the structures have encroached on road reserve and sought twenty-one (21) days to dismantle the structure;
- (vi) Plaintiff refused to grant Secondnamed Defendant twenty-one (21) days but instead granted him five (5) days to remove the encroaching structure;
- (vii) On 15 March 2017, Plaintiff wrote to Secondnamed Defendant confirming the discussion held during the meeting and giving notice for him to remove the structures and his assets from the road reserve;
- (viii) Secondnamed Defendant has removed part of the encroaching structure but has not done so fully;

19. Secondnamed Defendant's evidence in summary is that:-

- (i) Encroachment was not intentional and an unforeseen human error;
- (ii) Secondnamed Defendant's request to remove this encroachment within twenty-one (21) days was refused;

- (iii) Plaintiff agreed to assist in removal of structures;
  - (iv) Plaintiff through its contractors erected barricades which effected him to demolish the structures;
  - (v) Plaintiff is intending to acquire part of his property for which he needs to be compensated;
20. After analysing the Affidavit evidence and hearing submissions from Plaintiff's Counsel and Secondnamed Defendant this Court makes following finding:-
- (i) Secondnamed Defendant has constructed structures encroaching on road reserves along Sasawira Road and Kings Road intentionally and not due to a human error;
  - (ii) Secondnamed Defendant was made aware of the illegal structures on or about 11 May 2016, as appears from Annexure "JM/J1" of Jefferies 2<sup>nd</sup> Affidavit (notices issued by Nausori Town Council);
  - (iii) Secondnamed Defendant deliberately delayed the removal of the encroachments;
  - (iv) In fact on 5 May 2017, Secondnamed Defendant informed Court that encroaches have been removed and Plaintiff wants to acquire part of his land but when he filed the Affidavit as directed by Court he raised the issue of barricades because of which he could not get crane to remove the containers;
  - (v) Secondnamed Defendant mentioned the barricade when the Originating Summons was called on 25 April 2017, but did not say anything about it when the Originating Summons was called on 5 May 2017.
  - (vi) On 5 May 2017, Secondnamed Defendant informed Court that he removed the encroachment and that Plaintiff wants to acquire his land.
  - (vii) This clearly shows that Secondnamed Defendant to some extent attempted to mislead this Court on 5 May 2017.



21. Secondnamed Defendant claims that Plaintiff is intending to acquire his land and that if his shop will be removed twenty-six (26) employees will lose job is not relevant to the issue in this proceedings and those facts does not justify construction of illegal structure.
22. If Secondnamed Defendant is aggrieved with Plaintiff acquiring part of his land then he should seek legal advise on the issue and deal with appropriate authorities.
23. After analysing the evidence given and the fact that Secondnamed Defendant has not denied that he constructed structure that encroached on the road reserves along Sasawira Road and Kings Road this Court sees no reason as to why Order for removal of the encroachment and Defendants assets should not be made.

### **Costs**

24. Secondnamed Defendant had ample time to fully remove the structures encroaching the road reserves along Sasawira and Kings Road and assets placed there but has failed and/or neglected to do so.
25. It is therefore just and fair that Plaintiff be awarded costs of this proceedings.
26. Secondnamed Defendant has been occupying and conducting business from the encroached structure for a long time and such the appropriate authorities should have taken action sometime ago.
27. This Court does not think that this matter calls for indemnity costs.

### **Orders**

28. This Court makes following Orders:-
  - (i) Plaintiff cause the barricade placed along Kings Road and Sasawira Road to be removed by 3 November 2017;

- (ii) Secondnamed Defendant within three (3) days of the barricade being removed dismantle and remove all structures constructed on road reserve along Sasawira Road and Kings Road including both Roads together Defendants assets and materials from the road reserves along Sasawira Road and Kings Road and both Roads;
- (iii) If Secondnamed Defendant fails to dismantle and/or remove the structures and assets from the road reserves and the roads as ordered in paragraph 28(ii) of this Judgment then Plaintiff whether by itself or its contractors shall be at liberty to dismantle and remove the structure and assets from road reserves along the Sasawira Road, Kings Road and both Roads [at Secondnamed Defendant's cost] without being liable for any damages caused to any other structure constructed on Defendants property comprised and described in Crown Lease No. 2408 whilst dismantling and removing the structures and assets on the said road reserve and the roads;
- (iv) Secondnamed Defendant do pay Plaintiff's cost of this action assessed in the sum of \$2,000.00 within thirty (30) days from date of this Judgment.



**K. Kumar**

**JUDGE**

At Suva

31 October 2017

**R. PATEL LAWYERS FOR THE PLAINTIFF  
SECONDNAMED DEFENDANT IN PERSON**