

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 258 of 2016

BETWEEN : **MOHAMMED BASIR** of Lovu, Lautoka,

PLAINTIFF

AND : **THE TRUSTEES OF THE JAMIAT AHLEHADEES** a religious group of Tore Subdivision, Vitogo, Lautoka.

1st DEFENDANT

AND : **ITAUKEI LAND TRUST BOARD** a body corporate at 431 Victoria Parade, Suva

2nd DEFENDANT

Appearances : **Plaintiff in person.**
Mr. Mohammed Zoyab for the first defendant.
Mr. Salesi Mucunabitu for the second defendant.

Trial : **Wednesday, 01st July 2020**

Judgment : **Wednesday, 29th July 2020**

J U D G M E N T

- (01) The plaintiff was issued with an Agreement for Lease (NLTB No: 4/7/7063) by the second defendant to all that piece or parcel of land described as Tore Subdivision, Lot 54, Vitogo containing an area of 401 square meters from the 01st day of July, 2004 for a term of fifty (50) years. (PEX-1).
- (02) The first defendant was issued with a Native Lease (Ref. No:-50023075) by the second defendant to all that piece or parcel of land described as Tore Subdivision, Lot 28, Vitogo, Ba containing an area of 1,220 square meters from the 01st day of January, 1998 for a term of fifty years. (PEX-2).

- (03) The plaintiff and the first defendant are next door neighbours. In March 2016, the first defendant built a fence made of concrete base with corrugated iron tin fencing and chain link fencing.
- (04) The plaintiff claims that the area of land which the first defendant built its fence belongs to the plaintiff's land. The plaintiff alleges that the first defendant had encroached upon the plaintiff's land and seeks damages.
- (05) The question before the court is whether the first defendant by fencing has encroached on to the plaintiff's land.
- (06) The agreement for lease is subject to one condition. The lessee should engage the services of a Surveyor registered under the Surveyors Act to carry out a survey of the land agreed to be leased and to prepare a survey plan in accordance with the regulations made under the Act.
- (07) The plaintiff has engaged the services of "Cadastral Solutions Ltd" for demarcation of the boundaries. According to PEX-3, correspondence from Cadastral Solutions Ltd, dated 07-08-2011, the plaintiff had no legal boundary for fencing, registration or occupation of the land.
- (08) The "Cadastral Solutions Ltd" had not carried out a legal survey because the plaintiff's allotment is less than 800 square meters. A subdivision approval cannot be obtained as per the Town & Country Planning provisions due to the size of the land.
- (09) The plaintiff was unable to show by survey that there had been an encroachment upon the plaintiff's land by fencing. I have no evidence to satisfy myself that an encroachment has indeed occurred on the boundary.
- (10) On the other hand, the subdivision plan and the associated documents of the first defendant have been approved by the Director of Town and Country Planning on 13.12.2013 (DEX-7). Now, it has been lodged with the Lands Department for final approval and registration (DEX – 9).
- (11) Having heard the evidence and seen the documents which were produced, I am not satisfied on the balance of probabilities that an encroachment has occurred on the boundary.

Therefore, the plaintiff's action is dismissed.

- (12) The first defendant counter-claimed damages for private nuisance. The first defendant pleaded in paragraph eight (08) the statement of defence as follows;

The plaintiff is a continuing nuisance to the First Defendant, its members and the Orphan Children, by reason of which they have suffered loss and damages

Particulars of damages

- a) Disturbance and harassment to the members of the First Defendant and orphan children by swearing and yelling at them.*
- b) Disturbance to the peace and tranquillity of the members of the First Defendant and orphan children threatening them with words and weapon.*
- c) Making continuous false allegations and complaints to the Police and government against the members of the First Defendant and Orphan children.*
- d) Destroying the property of the Orphan children by taking their play equipment such as football and destroying it.*

(13) The plaintiff denied paragraph eight (08) of the statement of defence.

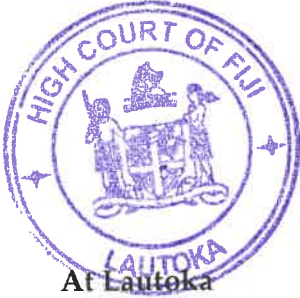
(14) The first defendant's only witness Mr. Tariq Bahadur, the President of Jamiat Ahle Hadith did not live on the affected property. He was not in a position to tell the court what the exact relationship was between the orphan children of the first defendant and the plaintiff.

The tort of private nuisance is primarily concerned with the value, use and enjoyment of real property. Only those who were living on the affected land can say whether there was any continuous activity or state of affairs causing a substantial and unreasonable interference with their land or their use or enjoyment of that land. They must show the time and duration of the interference and the conduct of the defendant. A private nuisance is normally 'continuing state of affairs', not a one-off situation. The onus of proof is on the persons who were living on the affected land.

None of them were called to give evidence in this case to establish the counter claim.


ORDERS

- (1) The Writ of Summons is struck off and the statement of claim is dismissed.
- (2) The Counter-claim of the first defendant is dismissed.
- (3) There will be no order as to costs.



At Lautoka

Wednesday, 29th July 2020


29/07/2020.
Jude Nanayakkara
[Judge]