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

CIVIL APPEAL NO. HBA 24 OF 2019

IN THE MATTER of an Appeal from the decision of the Ba Magistrate's Court, in Civil Action No. 52 of 2000.

BETWEEN : **NAZRA BIBI** of Ba, Nurse.

APPELLANT
(ORIGINAL PLAINTIFF)

A N D : **SAIYAD HUSSEIN** of Wailailai, Ba.

FIRST RESPONDENT
(ORIGINAL FIRST DEFENDANT)

A N D : **NATIVE LAND TRUST BOARD** a body corporate duly established under the provisions of the Native Land Trust Act (Cap. 134).

SECOND RESPONDENT
(ORIGINAL SECOND DEFENDANT)

Appearances : Mr N. Padarath for the appellant
Ms J. Singh (LAC) for the first respondent
Mr W. Mucunabitu for the second respondent

Date of Hearing : 24 July 2020

Date of Judgment : 28 September 2020

J U D G M E N T

Introduction

[01] This is an appeal, with leave to appeal out of time being granted by the Magistrates Court on 9 April 2018, against a decision made on 31 May 2016 by

the Magistrate's Court, Ba. The learned Magistrate held that the appellant and the second respondent were liable for breach and damages.

[02] At the appeal hearing, the appellant and the first respondent relied on their respective written submissions. The second respondent did not actively participate in these appeal proceedings.

Factual background

[03] In May 2000, Nazra Bibi, the plaintiff ("*appellant*" in these proceedings) brought proceedings in the Magistrates Court against Saiyad Hussein, first defendant ("*first respondent*" in these proceedings) and Native Land Trust Board (Now iTaukei Land Trust Board), second defendant ("*second respondent*" or "*TLTB*" in these proceedings) and sought the following relief:

a) Damages.

b) The defendants' and/or his servants and/or his agents be restrained from intimidating or threatening the plaintiff and/or her servants and/or his agents.

c) The defendants' and/or his servants and/or his agents be restrained from entering into the plaintiff's land and be restrained from trespassing on to the plaintiff's land and/or from interfering with the quite possession of the plaintiff's land.

d) The defendants' and/or his servants and/or his agents be restrained from removing any fences or structures built by the plaintiff and/or from entering the area of land occupied by the plaintiff.

e) Costs, with the total claim in this matter inclusive of (a) to (e) above not to exceeded the jurisdiction of this honourable Court.

[04] The appellant pleaded that: she had been in occupation of a piece of land subject of these proceedings since her birth (1957); the land belonged to her father and there was a lease over this piece of land, subsequently, she built a house and there was a chain link fence around her property; and that: the first respondent came onto the land next to where she (appellant) was living and stayed there as a squatter. Sometime in 2000 he tried to break the chain link fence and claimed that it was encroaching on his land. The first defendant threatened her and said that he would destroy the fence and build on part of land that fell inside the boundary of her land.

[05] In the statement of defence, the first respondent stated that: he built a house on his own lot (Lot 15) Nailovolovo Subdivision, Bulu, Ba having leased the same from NLTB. The plaintiff is claiming part of his (first defendant) land as hers. After the first defendant had caused his lease area to be surveyed to define his boundary sometime in September 1998, the plaintiff placed a fence on the land. The first respondent also counterclaimed against the appellant for damages for loss of use and enjoyment of land.

[06] On 7 April 2000, the appellant obtained injunction orders against the respondent on *ex parte* basis that:

a) The defendants and/or his servants and/or his agents be restrained from intimidating or threatening the plaintiff and/or her servants and/or his agents.

b) The defendants and/or his servants and/or his agents be restrained from entering into the plaintiff's land and be restrained from trespassing on to the plaintiff's land and/or from interfering with the quiet possession of the plaintiff's land.

c) The defendants and/or his servants and/or his agents be restrained from removing any fences or structures built by the plaintiff and/or from entering the area of land occupied by the plaintiff.

[07] Subsequently, the Magistrate ordered that the *ex parte* injunction shall continue until final determination of the suit.

[08] Both parties have got agreement leases for their respective land. The appellant has an agreement for lease-Native Lease Reference No 4/1/4982 commencing on 1 July 1996 for an area of 821m^2 and the first respondent has an Agreement for Lease Native Lease Reference No. 4/1/4983 commencing on 1 July 1996 for an area of 920m^2. Both agreements for lease are for a period of 50 years. These leases were issued subject to certain condition that they should carry out a survey to define the boundaries.

[09] The Magistrate narrowed down the issues as follows:

1. What was the basis on which NLTB agreed to grant leases in the proposed subdivision of the land known as Nailovolovo – narrowed down to the leases in question between the plaintiff and first defendant?

2. What is the entitlement of the plaintiff and the first defendant following from that first issue?

3. If there has been any breach – contractual by any of the parties then where does the liability lie.

[10] On 16 February 2015, the trial was finally concluded in the Magistrates Court. In his reserved judgment delivered on 31 May 2016, the Magistrate ordered that:

1. Given the Court's finding the interim injunction dated 7 May 2000 is dissolved forthwith.

2. An order for specific performance on the part of the second defendant in favour of the first defendant is to be executed forthwith.

3. Damages and costs will lie in favour of the plaintiff against the second defendant.

4. Damages and costs will lie in favour of the first defendant against the second defendant.

5. Damages and costs will lie in favour of the first defendant against the plaintiff.

[11] The appellant appeals the decision of the Magistrates to this court.

Reasoning in the court below

[12] The Magistrate's reasoning for the decision appears in analysis section of his judgment at paragraphs 34 to 39. For convenience's sake, I reproduce those:

"34. *It is obvious that the second defendant's witness was not promising as far as their position was concerned. He confirmed that he was not familiar with the file. The main witness that should have been made available was Etuate Mataitini whom he was assisting in their inspection. More so, when it was Mr Mataitini himself who was present on the first site visit on 16 September 2010. Effectively, the second defendant "shot itself in the foot" with this witness, so to speak in producing someone who could not help their cause. Accordingly, in the absence of any evidence in rebuttal all the plaintiff's and the first defendant's allegations against the second defendant of any shortcomings including ill-advise by the second defendant which they accepted and acted upon must be found in each of their favour.*

35. *At paragraph 12 of the plaintiff affidavit in support of her application for injunction sworn on 5 April 2000, she deposes that in 1999, she rebuilt her fence with chain-link at a cost of approximately $7,000 and before building the fence she consulted with the NLTB. She also used the pegs given in 1991. In his evidence, Iliasa Dredregasa for the second defendant confirmed that the land in question was previously an old lease that was subdivided. This would mean that the Lots would have become smaller. Hence for the plaintiff as deposed in her affidavit above to use the pegs from 1991, is somewhat mischievous to say the least since she was aware that he lease was a smaller portion of land then what her late father used to occupy. Therefore, she could not have used those pegs.*

36. *Further, that in her sworn evidence, she stated that she never knew that the land had to be surveyed. The court finds that she was ably employed as a Nurse and, therefore, adequately qualified to read and understand the conditions of her agreement to lease one of which is to engage a surveyor to survey her parcel of land for confirmation of her boundaries of the lease. As such this contention by her is not worthy of belief.*

37. *Now to attempt to answer the third and fourth issue above. When Ilaisa Dredregasa produced their third bundle dated 16 February 2015, on the final day of trial there is a letter annexed inside that bundle as dated 25 June, 1999 and addressed to SR Shankar & Company of Tavua. The following are its contents:*

"4/1/4982/JN/sv[102]

25th June, 1999

S.R. SHANKAR & COMPANY
P. O. Box 366
TAVUA

Dear Sir,

Re: Nailovolovo Subdivision Lot 16, District of Ba
NLTB Ref: 4/1/4982

Your letter dated the 18th of March, 1999 refers.

The Board do acknowledge existence of dispute in particularly your client NAZRA BIBI Father's name Abdul Mazid regarding area leased. We thought that it should have been raised earlier prior to issuance of lease, it is only appropriate for us now to have a meeting with complainant so as to resolve issue amicable (highlighting by the court)

It is also unfortunate according to our visit to subject property that lessee is currently away overseas hindering convening venue of meeting, that should be conducted in her presence.

You are therefore requested to notify us upon her return for meeting and resolving issue.

Thank you.

……………………….

[Josevata Namatasere]

Client Services Officer

FOR REGIONAL DIRECTOR [WESTERN]

38. *Obviously, this would have been after the first defendant went to see NLTB and registered his grievance over the plaintiff's conduct. Here, the NLTB acknowledge not only that a dispute exists but that the anomaly should have been raised and resolved prior to the issuance of her lease. This would seem to the court as having the effect that it was the plaintiff who was the offender*

and not the first defendant. The first defendant nowhere in his evidence including his Bundle refers to having also receiving the same letter from NLTB. Further, it is not clear as to who complained first-in-time to the second defendant. Finally, there is face to the reason of the dispute and that face is that of the second defendant obviously accordingly to the said letter.

39. *The third and fourth issues are therefore answered in the affirmative and there has been a breach and that breach was committed by the second defendant.*

Grounds of Appeal

[13] The appeal is preferred on the following 6 grounds:

1. The Learned Magistrate erred in law in the interpretation and legal effect of the Agreements for lease issued to the appellant and the first respondent. Particularly the Learned Magistrate erred in not considering or holding that:-

   1.1 Both agreements for lease were subject to survey and therefore its boundaries were yet to be confirmed.

   1.2 The existing occupation and boundaries had to be taken into account before a final lease could be issued;

   1.3 Based on her occupation, a previous lease and payment of rental to the second respondent, the appellant had a tenancy at Will over the area occupied by her and the provisions of Native Land Trust (Leases and Licenses) Regulations, required any leases issued to exclude the area occupied by her.

2. The Learned Trial Magistrate erred in fact in not holding that the parties had accepted their boundaries as occupied prior to the survey being carried out by the second respondent based on the Agreement for Lease of the first respondent. The following facts which could not be disputed supported this:

2.1 The appellant and first respondent were occupying their portions of land until a measurement was done;

2.2 The first respondent had built and completed his house based on the respective occupation.

3. The Learned Trial Magistrate erred in law in holding that the appellant was being mischievous in using the previous pegs because the land had been subdivided when:-

   3.1 The surveyors and the second respondent were legally required to take into account the occupation and boundaries existing before finalizing any subdivision plan;

   3.2 The circumstances stated under paragraph 1 of these grounds of appeal had to be taken into account.

4. The Learned Magistrate erred in holding that the plaintiff was the offender and not the first respondent based on a letter dated 25 June 1999, when the said letter was based on "Issuance of a lease" and no such lease had been issued. The second respondent had only entered into Agreements for lease on with the appellant and first respondent.

5. The Learned Trial Magistrate in ordering specific performance when a period of almost 20 years had expired since the issue of the agreements for lease and the Learned Magistrate had already ordered damages.

6. The Learned Magistrate erred in law and fact in ordering costs against the appellant.

Discussion

[14] I intend to deal with each ground of appeal individually.

Ground 1: *The Learned Magistrate erred in law in the interpretation and legal effect of the Agreements for lease issued to the appellant and the first respondent.*

[15] The complaint in ground 1 is that the Magistrate misinterpreted the legal effect of the agreement for lease.

[16] Both the appellant and the first respondent have been issued agreements for lease, subject to survey, by the second respondent. Each agreement for lease contains approximate areas covered by the agreement. The agreement for lease granted to the appellant covers an approximate area of 821m^2 while first respondent's an area of 920m^2. Both agreements for lease had been granted for 50 years commencing 1 July 1996.

[17] The dispute before the Magistrate appears to be a boundary dispute. It was not disputed that both agreements for lease had been issued subject to survey.

[18] The appellant had argued in written submission that: ... the second respondent must first serve a written notice to engage a surveyor. In this case, there is no evidence that the second respondent issued with the appellant with a notice to require her to engage a surveyor. The learned Magistrate had to first consider what is the existing occupation of both the parties.

[19] Conversely, the first respondent submits that the agreement to lease was subject to survey. However it is important to note that the first respondent had proceeded to survey his portion of land. That was one of the requirements in the agreement of lease.

[20] The agreements for lease issued were subject to survey. This has meant that the agreements for leases were issued without definite boundaries. The first respondent did survey his portion of land in 1998. According to the survey done by the first respondent, the land surveyed was 820 square metres while in his agreement to lease it states as 920 square metres. He based on that survey claimed that the appellant had encroached on his land. To date, the appellant did not make any attempts to survey her portion of the land she was occupying. The boundary dispute appears to have been there even before the issuance of the agreement for lease in July 1996.

[21] The Magistrate, having identified that both the agreements given to the parties were agreements to lease and that they were issued subject to survey, determined the issues and rights of the parties in accordance with those agreements. He rightfully found that:

> *"It was the appellant who had constructed the chain link fence. There was a dispute over the chain link fence and hence the writ action was filed. We do agree that the Agreement for lease is subject to survey. The issue is older peg that initially defined the boundary is in dispute. The first respondent states that there was wooden pegs and the plaintiff (the appellant) has put a chain link to determine the boundary. If the boundaries are yet to be confirmed then the plaintiff cannot state that the first defendant is interfering with her occupation as this point it clearly cannot be defined as to where the occupation of the land starts."*

[22] In my opinion, the Magistrate, on the evidence that was before him, was entitled to make the above findings of fact. In arriving at that finding, the Magistrate had considered the terms and conditions of the agreement to lease each party had. There is nothing on the case record to suggest that the Magistrate misinterpreted the effect of the agreements to lease issued to the parties. Therefore, Ground 1 has no merits.

Ground 2: *The Learned Trial Magistrate erred in fact in not holding that the parties had accepted their boundaries as occupied prior to the survey being carried out by the second respondent based on the Agreement for Lease of the first respondent.*

[23] The parties were issued with the agreement for lease in 1996. They were occupying their portions of land until a measurement was done. The appellant heavily relies on her father's occupation before the issuance of the agreements for lease. Before the issuance of the agreements for lease, the parties appear to be squatters. After the agreement for lease was issued, the appellant cannot and is not entitled to rely on her father's previous occupation. The agreements for lease clearly define the area each party has to be in occupation of. It was $821m^2$ for the appellant and $920m^2$ for the first respondent.

[24] The appellant had brought the encroachment claim against the first respondent without the definite boundary of her land. She did not have her land surveyed,

albeit she was granted the agreement for lease subject to survey. The appellant says that she did not survey because the NLTB did not serve a notice on her to survey the land. The appellant is not entitled to blame the NLTB for not surveying the land. She should have done the survey before bringing the action against the first respondent based on encroachment. In the absence of a survey, the appellant was unable to establish her boundary and encroachment on her land by the first respondent. However, the first respondent produced a survey report and thereby was able to prove that the appellant had been encroaching his portion of land. The appellant did not try to challenge or counter the survey plan adduced by the first respondent with another survey of her own. She did not do so because a survey of her land would not have assisted her claim against the first respondent.

[25] The Magistrate has relied on the agreements for lease issued to the parties and on the unchallenged survey plan submitted by the first respondent. He was entitled to do so considering the nature of the claim that was before him.

[26] Therefore, Ground 2 has no merits as well.

Ground 3: *The Learned Trial Magistrate erred in law in holding that the appellant was being mischievous in using the previous pegs because the land had been subdivided when the surveyors and the second respondent were legally required to take into account the occupation and boundaries existing before finalizing any subdivision plan.*

[27] As I said, the appellant had brought her boundary dispute without a surveyor report to support her claim.

[28] The Magistrate rightfully disregarded the appellant's evidence that she was unaware that she needed to survey the property. The Magistrate in his judgment states [at para 36]:

"36. Further, that in her evidence, she stated that she never knew that the land had to be surveyed. The court finds that she was ably employed as a Nurse and therefore adequately qualified to read and understand the conditions of her agreement to lease one of which is to engage a surveyor to survey her parcel of land for confirmation of her boundaries of the lease. As such this contention by her is not worthy of belief."

[29] The appellant had accepted the agreement for lease with the terms and conditions stated therein. One of the conditions therein was that the lessee (appellant) had to engage a surveyor to confirm the boundaries of the lease. To date, she did not comply with that condition. She is not permitted to say that she was unaware that there was such a condition. She should have known that there was such a condition when she accepted and signed the lease.

[30] The previous pegs had been tempered with and replaced by the chain links by the appellant. The survey report submitted by the first respondent established that the chain link encroaches on the first respondent's land.

[31] The Magistrate had the opportunity to observe the demeanours of the witness. Based on the evidence adduced before him, the Magistrate held that the appellant was mischievous in using the previous pegs. There was sufficient evidence before the Magistrate to arrive at that conclusion.

[32] Therefore, Ground 3 fails.

Ground 4: *The Learned Magistrate erred in holding that the plaintiff was the offender and not the first respondent based on a letter dated 25 June 1999, when the said letter was based on "Issuance of a lease" and no such lease had been issued. The second respondent had only entered into Agreements for lease on with the appellant and first respondent.*

[33] The appellant was unable to prove her claim against the first respondent that he was trespassing on her land. However, the evidence demonstrated otherwise. The first respondent's evidence established that the appellant was encroaching on the first respondent's land. Evidence supports the Magistrate's finding that the appellant was the offender and not the first respondent. He was entitled to arrive at that conclusion.

[34] Ground 4 fails as well.

Ground 5*: The Learned Trial Magistrate in ordering specific performance when a period of almost 20 years had expired since the issue of the agreements for lease and the Learned Magistrate had already ordered damages.*

[35] This issue appears to be an issue not raised before the Magistrate. This issue has been raised for the first time on appeal. However, the boundary dispute between the parties had continued since the issuance of the agreements for lease in 1996. The plaintiff initiated her claim based on the boundary dispute in 2000. The Magistrate delivered his judgment in 2016.

[36] The specific performance is a discretionary remedy. The court may grant such relief in appropriate cases where such performance is still available. Further, the court may also grant damages in addition to specific performance.

[37] The Magistrate has granted specific performance against the second respondent. There is no appeal by the second respondent challenging any decision made against them.

[38] Therefore, ground 5 has no merits.

Ground 6: *The Learned Magistrate erred in law and fact in ordering costs against the appellant.*

[39] As a successful party, the first respondent was entitled to costs against the appellant. The Magistrate ordered costs against the appellant in favour of the first respondent. He has correctly exercised his discretion in ordering the costs against the appellant. I do not find any fault in that order.

[40] Therefore, Ground 6 necessarily fails.

Conclusion

[41] For the reasons given, none of the grounds of appeal having succeeded, I dismiss the appeal with summarily assessed costs of $ 1,000.00 payable to the Legal Aid Commission by the appellant. The Legal Aid Commission represented the first respondent in these appeal proceedings.

Result

1. Appeal dismissed.
2. Appellant shall pay summarily assessed costs of $1,000.00 to the Legal Aid Commission.

3. Case record to be transmitted to the Magistrates Court, Ba forthwith.

28/9/20

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M. H. Mohamed Ajmeer

JUDGE

At Lautoka

28 September 2020

Solicitors:
Samuel K Ram, Barrister & Solicitor for the appellant
Legal Aid Commission for the first respondent
Legal Department, iTaukei Land Trust Board for the second respondent