

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 59 OF 2014**

**BETWEEN** : **MOHAMMED AZAD KHAN** of 163 Great South Road, Otahuhu,  
Auckland, New Zealand, formerly of Nasoso, Nadi.

**PLAINTIFF**

**AND** : **MANDA YOLANDE IHAKA** of Nasoso, Nadi.

**1<sup>ST</sup> DEFENDANT**

**AND** : **TOWN AND COUNTRY PLANNING** a statutory body incorporated  
under the Town Planning Act Cap 139 of Laws of Fiji.

**2<sup>ND</sup> DEFENDANT**

**AND** : **THE ATTORNEY GENERAL OF FIJI**

**3<sup>RD</sup> DEFENDANT**

**Appearances** : Mr R. Singh for the plaintiff  
No appearance for the first defendant  
**Date of Hearing** : 2 June 2020  
**Date of Decision** : 14 October 2020

# DECISION

## Introduction

[01] This decision concerns an application for damages arising out of encroachment on the land.

[02] The plaintiff by way of writ of summons dated 16 April 2014 and the amended statement of claim dated 17 July 2017 (which was filed on 18 July 2017) instituted this action against the defendants seeking the following relief:

- (i) Special damages;
- (ii) General damages for diminished value of the plaintiff's land;
- (iii) An order that the defendant rectify at her costs the trespass of her residence projecting over the plaintiff's land;
- (iv) Damages for trespass at the rate of \$200.00 per week or a sum to be determined by the Court until rectification of the trespass from 24 September 2013;
- (v) Interest on general damages;
- (vi) Cost of this action;
- (vii) Any other relief that this Court may deem fit.

[03] On 6 September 2018, the plaintiff informed the court that the plaintiff's claim is now confined to damages only as the first defendant had removed the fence that was projecting on the plaintiff's land.

[04] Thereafter, on 8 November 2018, the plaintiff withdrew the claims against the second and third defendants.

[05] Therefore, the only issue remains to be determined is whether the plaintiff is entitled to seek damages for trespass from the first defendant.

[06] In support of the claim for damages, the plaintiff has filed affidavit evidence in chief.

[07] The hearing proceeded in the absence of the first defendant. The plaintiff informed the court that he would rely on his affidavit evidence and the written submission.

### **Background**

[08] The plaintiff is the registered proprietor for the land comprised in Certificate of Title No. 20075 being Lot 7 on DP No. 5119 the land known as "*Naisosovu*" (part of) situated at Nasoso, Nadi ("*Plaintiff's Property*") whilst the first defendant

was the registered owner of the neighbouring property being the land comprised in Certificate of Title No. 20074 being Lot 6 on DP No. 5119 (“*First defendant’s property*”) and both the plaintiff and the first defendant shared a common boundary between their land.

- [09] The plaintiff sometimes in early September 2012, was advised by the consultants, Westate Consultants that the defendant’s fence and residence is built along the common boundary which projects over and trespasses on the plaintiff’s land.
- [10] After the issuance of the proceedings, the first defendant had removed the fence that was constructed along the common boundary. However, the plaintiff alleges, the defendant had failed to remove the structures from the plaintiff’s land on or about 24 October 2013, when notice to remove the same had been given; and due to the negligence of the defendant the plaintiff was unable to sell his land and the value of his land has also diminished.
- [11] The plaintiffs claim damages against the first defendant for the diminished value of his property.

### **The Law on Encroachment**

- [12] Section 109 of the Property Law Act (Cap 130) provides:

*“Power of Court to grant special relief in cases of encroachment*

*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 or her 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 of 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.”*

[13] In the case of *Patel v Narayan* [2008] FJHC 46; HBC 570.2007 (20 March 2008), Jiten Singh, J (as he then was) in respect of Section 109 of the Property Law Act [Cap 130] said that:

*“Section 109 of the Property Law Act empowers the court to grant certain relief where any building encroaches onto adjoining land. The reliefs which the court can grant, are a vesting order giving the encroaching owner an estate or interest in the land encroached upon or create an easement in favour of the encroaching owner or give the encroaching owner right to retain possession. To obtain relief the application has to show that the encroachment was –*

- 1. not intentional and*
- 2. did not arise from negligence*
- 3. that it is just equitable to grant relief.”*

[14] In *Hardip Narayan & Sons Limited v Kellapan* [2009] FJHC 137; HBC028.2008S (2 July 2009), the applicant had brought the action against the respondent under sections 108 and 109 of the Property Law Act [Cap 130] seeking for access to

adjacent property and seeking for encroachment area to be vested in it where Inoke, J (as he was then) at paragraph 34 said that:

*"[34] Subsection 2 of section 109 has two limbs in my opinion. The first is where the encroaching building was erected by the encroaching owner, i.e. the current owner of the land and building. The second is where the encroaching building was erected by a predecessor in title. It is important to distinguish the two because what the court has to decide is different for each case. For the first limb, the court need only be satisfied that the encroachment was not intentional and did not arise from gross negligence. For the second limb, the Court must be satisfied that it is just and equitable that relief should be granted. Consideration of whether there was intention and gross negligence may come into the determination of whether it is just and equitable to grant relief but not necessarily so in all cases. In this respect I differ from Justice Singh in Patel v Narayan [2008] FJHC 46; HBC 570.2007."*

[15] In the text of "Textbook on Torts 8<sup>th</sup> Edition by Michael A. Jone" the author at page 693 paragraph 15.1.14 said that in respect of damage to property that:

*"In the case of damage to property, the basic rule for the measure of damages is again that the claimant should be restored to his position before the tort was committed. Where the property has been completely destroyed the measure of the loss is the market value of the property at the time of destructions.*

*If the property was used in a business then loss of use includes loss of profit. The value of the property has to be assessed as a 'going concern' at the time of the loss. Even in the case of non-profit earning chattels the claimant is entitled to claim for loss of use."*

### **The issue**

[16] The issue in this is whether the plaintiff is entitled to damages for diminished value of the plaintiff's property as a result of encroachment by the first defendant, if so, how much.

## Discussion

- [17] The plaintiff seeks damages against the first defendant for diminished value of the property. The plaintiff alleges in the statement of claim that on 24 October 2013, his solicitor issued a letter to the first defendant requesting her to remove the building and the fence but she had either failed and/or neglected to do so, and that due to the first defendant's negligent act he (plaintiff) was unable to sell off and/or construct a building on his land and as such suffering loss and damages.
- [18] In her defence, the first defendant states that: "... the plaintiff had not objected to first defendant's predecessor in title building a wall that encroached onto his property and thereby caused or permitted the 1<sup>st</sup> defendant to believe, as in fact she did, that the wall was constructed on her property and not encroaching onto plaintiff's property and led the 1<sup>st</sup> defendant to believe that he was not going to make any claim of any encroaching wall onto his land and by prolonged, inordinate and inexcusable delay acquiesced in the matter complained of. ..."
- [19] According to the statement of defence, the first defendant purchased her lot on or about 6 June 2008 with a wall already built around it with a side adjoining plaintiff's lot.
- [20] The plaintiff only found out the wall in question was encroaching on his land when he did a survey in August 2014. He did not know the wall was encroaching on his land until then.
- [21] The wall in question had been built by the first defendant's predecessor in title. There is no evidence whatsoever to suggest that the plaintiff ever objected to the wall being built by the first defendant's predecessor in title.
- [22] The first defendant had purchased her land with the wall in dispute built by her predecessor in title in June 2008. It appears that the first defendant had no knowledge of the encroachment as alleged by the plaintiff. She has purchased the land with the existing boundary wall reasonably and genuinely believing that is within the land she was purchasing. She can be considered to be *bona fide* purchaser. The *bona fide* is fortified by the fact that she had removed the wall that

was encroaching on the plaintiff's land after the plaintiff issued notice for such removal.

[23] The first defendant could, under section 109 of the Property Law Act, have applied to the court for a vesting order giving her an estate or interest in the land encroached upon or create an easement in favour of her on the basis that the encroachment was not intentional and did not arise from negligence. Instead, she had removed the alleged wall that encroached on the plaintiff's property. Of course, after the plaintiff issued notice to remove. This demonstrates her good faith.

[24] There is no evidence demonstrating that the first defendant intentionally encroached on the plaintiff's land with the view to causing damages to the plaintiff.

[25] In my judgment, the plaintiff's claim for damages for encroachment on the land should fail. Accordingly, I would dismiss the plaintiff's claim for damages for encroachment or trespassing on the land, but without costs. Cost order was not made because the first defendant did not participate at the hearing.

**Result:**

1. Plaintiff's claim against the first defendant for damages dismissed.
2. There will be no order as to costs.

*Hollinsworth*  
14/10/20

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M. H. Mohamed Ajmeer

JUDGE



At Lautoka

14 October 2020

Solicitors:

Patel & Sharma, Barristers & Solicitors for the plaintiff