

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

CIVIL ACTION NO. HBC 163 OF 2019

BETWEEN : **ATTORNEY GENERAL OF FIJI** for and on behalf of the Director of Lands.
PLAINTIFF

AND : **SADIQ KHAN** father's name Mustafa Khan, of Nasilivata Road, Namaka, Nadi Businessman
DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. J. Mainavolau, for the Applicant
Mr. Prakashan, for the Defendant

DATE OF HEARING : 1st June, 2022

DATE OF DECISION : 22nd August, 2022

RULING

A. INTRODUCTION:

1. This ruling is pronounced pursuant to the hearing held before me on 01st June 2022, to decide the amount of compensation to be paid to the Defendant on account of the compulsory Acquisition of a piece of land comprising an area of approximately 170-m2 (Area 1) out of the Defendant's freehold land in the extent of 692m2 situated in the district of Nadi, being lot 1 on Deposited Plan No.8128 on Certificate of Title No.31521.

B. BRIEF HISTORY:

2. On 1st July 2019, the Plaintiff, Attorney General, made an application to this court , by way of Originating Summons, seeking, *inter-alia*:

(1) For an Order authorizing the compulsory Acquisition of the aforesaid piece of land called Area-1;

(2) For an Order for the compensation to the Defendant on account of compulsory Acquisition in accordance with the Plaintiff's valuation report obtained through the valuation carried out on 11th December 2018; and

(3) For an Order for the Costs to be paid by the Defendant or in the manner the Court thinks fit.

3. The Plaintiff made this Application pursuant to sections 3, 6, and 7 of the State Acquisition of Lands Act 1940 and Order 28 of the High Court Rules of 1988.
4. The facts and circumstances, that warranted the compulsory Acquisition of the said piece of the Defendant's land (Area -1) , are articulately averred in paragraphs 7 to 12 of the Affidavit in Support filed by the Plaintiff, which are reproduced as follows for easy reference.

"7. The compulsory acquisition is required for the Queens Road Upgrading project, which, inter alia, involved remedial works on the route known as the Nasilivata Bypass Road which currently links Cava Road and Nasilivata Road"

"8. The Defendant's land is situated at the corner of Queens Road between Nasilivata Road and the old Cava Road which is now closed to traffic"

"9. Traffic on the existing Cava Road currently flows through the Nasilivata Bypass Road, onto Nasilivata Road and then onto Queens Road, which is a very busy highway with heavy traffic flow as it intersects at the Wailoaloa junction with Denaru Bypass Road and Northern press Road ..."

"10. The Nasilivata Bypass Road is a Road with a sharp curve and has a blind bend at its approach towards Nasilivata Road."

"11. The remedial works involve straightening the Nasilivata Bypass Road to remove the blind bend and reduce the hazard caused to the motorist and pedestrians. The only option for straightening Nasilivata Bypass Road is to acquire Area 1 so that the portion of Cawa Road open to Motorists can;

- i. *Extend through the portion of the land to be acquired from the Defendant's land; and*
- ii. *Exit directly onto Nasilivata Road"*

12. This action is necessary as having a blind bend in the road reduces visibility for road users. This prevents road users (Motorists and Pedestrians alike) from seeing obstacles, oncoming vehicles or other hazards present ahead, which turn can cause major road accidents"

5. After the filing of the Affidavit in opposition, Affidavit in reply and the written submissions by both the parties, my predecessor Hon. A.G. Stuart -J, pursuant to a formal hearing held before his Lordship on 7th August 2020, pronounced the Judgment on 19th August 2020 granting the main relief as per paragraph 1 of the prayers to the Originating Summons, permitting the Compulsory Acquisition of the subject matter land. The Acquisition is not disputed anymore

C. **HEARING ON COMPENSATION:**

6. The remaining task before this court now is to make the decision on the amount of compensation to be paid to the Defendant on account of compulsory acquisition.
7. As per the leave granted, the Defendant has filed 3 separate Affidavits, firstly on 30th September 2020 with exhibits "A" to "I", Secondly on 19th April 2022, with exhibits "SK-1" to "SK-8" and Thirdly on 18th May 2022, with exhibits "SK-1" to "SK-5" all in support of his claim for compensation according to his Valuation Report dated 12th July 2019.
8. The Plaintiff called one witness, namely, Mr. Savenaca Ralagi, Registered Valuer (Fiji) Reg. No. 106, from Fiji Road Authority, in order to substantiate the contents of the Certificate of Valuation dated 11th December 2018 prepared by him. Accordingly, he has given oral evidence and was subjected to cross examination as well at the hearing held before me on 1st day of June 2022.
9. Neither the Defendant nor any witness on his behalf gave evidence, though the Defendant had filed Valuation Reports, the first one dated 10th July 2019 marked as "B", the second one dated 11th July 2019 marked as "C" (specifically for Rental Valuation) and the third one dated 12th July 2019 marked as "A", all prepared by one Salacieli Tagane Lomaviti, Registered Valuer No. 74(Fiji). However, the Report marked as "B" dated 10th July 2019 was subsequently withdrawn by the said Valuer through his Affidavit filed on 24th September 2020.
10. However, both the Plaintiff and the Defendant have filed their respective written submissions. The defendant has on 19th August 2022 filed his reply written submission as well. I observe that most of the contents of the Defendant's written submission are on the substantial issue, namely on the question of acquisition, which stands already determined and not on the matter under consideration.

D. **LAW ON COMPENSATION:**

Statutory Provisions:

11. The factors which guide the court in fixing compensation are set out in Section 40(2)(b) of the Constitution, which requires the compensation to be "just and equitable" taking into account all relevant factors including:
 - (i) the use to which property is being put;
 - (ii) the history of its acquisition;
 - (iii) its market value;
 - (iv) the interests of those affected; and
 - (v) any hardship to the owner."

12. Further Section 12 of the State Acquisition of Lands Act provides the mandatory factors, which the court **should take into consideration** and factors which it **should not take into consideration** in determining compensation. The factors listed in Section 12 of the Act are more detailed than those given in the Constitution.

Section 12 provides:

"In determining the amount of compensation to be awarded for land acquired under this Act

(a) the court shall take into consideration –

- (i) the market value of the land at the date of the notice of intention to take such land;*
- (ii) the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of taking possession thereof;*
- (iii) the damage, if any, sustained by the person interested, at the time of taking possession of the land by reason of severing such land from his other land:*
- (iv) the damage, if any, sustained by the person interested, at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other property, real or personal, in any other manner, or his earnings;*
- (v) if, in consequence of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any incidental to such change:*

(b) but the Court shall not take into consideration –

- (i) the degree of urgency which has led to the acquisition;*
- (ii) any disinclination of the person interested to part with the land acquired;*
- (iii) any damage sustained by him which, if caused by a private person, would not render such person liable to a suit;*
- (iv) any increase to the value of land acquired likely to accrue from the use to which it will be put when acquired;*
- (v) any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put; or*

(vi) any outlay or improvements on or disposal of the land acquired, commenced, made or effected after the date of the notice of the intention to take such land."

E. CASE LAW APPROACH:

13. It is apt to briefly discuss the matter in issue in the light of some decided authorities. In **Cedar Rapids Manufacturing and Power Company v Lacoste - (1914) AC 569, 576** in relation to the U.K. Land Compensation Act 1961, It was said:

"That the owner of the land is entitled to the value to him. This comprises all the advantages present and future, which the land possesses. However any increase to the value of the land due to the development carried out by the State, is to be disregarded (section 12(b)(v) of the Fiji Crown Acquisition of Lands Act).

The basis of the value of the land is therefore the value to the owner. However, in ***Pastoral Finance Association Ltd. -v- The Minister (1914) AC 1083***, it was held by the Privy Council that the owner is not entitled to have the capitalized value of the savings and profits which he derived from a business conducted from the use of the land included in arriving at a value for the land. At page 1088, the Privy Council said:

"Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it"

In ***Master and Fellows of University College Oxford v. Secretary of State for Air (1938) 1KB 652*** the Court held that the claimants were entitled in law to claim for injurious affection to the remainder of their property by reason of the use to which the land to be purchased may be put by the acquiring authority.

In ***R v. Mountford, ex parte London United Tramways 1901 Ltd. (1906) 2KB 814***, the Court held that in assessing compensation to be paid, the applicant was entitled to compensation for any depreciation in the value of his remaining property by reason of the land taken being used to widen a road. He was not entitled to compensation for depreciation caused by the running of trams along the street.

F. DISCUSSION:

Market Value

14. In the present case in hand, seemingly, the land in question is being used to store and, sell, among other things, old and/or secondary motor vehicle parts, Tyrese and miscellaneous scraped items.
15. The Defendant in his Affidavits has admitted that he could not continue with the construction of the proposed building because of the impending Acquisition. It is also

evident from the averments in Affidavits and the annexures thereto that due to the hindrance caused by this piece of land in dispute (Area-1), the road at that particular point is curvy, which disrupts the vision for the Drivers, Pedestrians and other road users, paving way for imminent road accidents. This seem to have, materially, necessitated the compulsory Acquisition. Vide "TK-4"

16. It is also evident that this block of land is situated at a critical location. It is a common ground that the road at that point with a bend cannot be made straight without utilizing this piece of land. Utilization of this blocks of land for residential and/or any commercial or industrial purposes in future by the Defendant or future buyers, if any, is highly unlikely, while the widening of the road, by eating into this block of land, has become an imminent public need. The photographic evidence of this block of land and the point of the bend on this road, as shown in TK-4, amply assist me in making this observation. So better or profitable usage of this block of land in future is not a relevant factor to be considered as observed in *Raja Vyricherla Narayana Gajapatiraju v Vizagapatarn - 1939 AC 302*.
17. In view of the above scenario in place, I don't think that this land would fetch any better price or attract a willing buyer from the open market for a price that the Defendant is thinking of as per his purported valuation report, which speaks only about a land yet to be developed by construction of 3 floor building on it and the would be income out of it.
18. The measure of the value of the land to be taken is the amount which the land might be expected to realize if sold by a willing seller, in the open market. (Halsbury 4th Ed. Vol 8 Para 250).
19. The definition of fair market value, according to the Valuer for the Defendant in *Attorney General of Fiji v Singh [2006] FJHC 157; Civil Action HBC 83 of 2006 (19 October 2006)*, is said to be "*the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in arms-length transaction after proper marketing, wherein the parties has each acted knowledgeably prudently and without compulsion*".
20. It was stated by Jitten Singh –J in *Attorney General of Fiji v Singh [2006] FJHC 157; Civil Action HBC 83 of 2006 (19 October 2006)* Supra

"Market value must be assessed on the basis of a willing buyer and a willing seller negotiating in a friendly and not hostile manner between fair minded people. Fair minded people do not take advantage of the others predicament with no thought except to make maximum profit out of the plaintiff's dilemma. The Constitution states that compensation must be "just and equitable" not extortionate.

The road had to go through the defendant's land. It could not go through the ocean. The defendant ought not to see this as opportunity for an extortionate

windfall. At the same time a fair minded plaintiff must be aware of the advantage it was gaining by having the road there so the figure it must offer must be in excess of the market value of the land and allowance must be made for various factors listed above”.

21. It is evident from the averments in the Plaintiff’s Affidavit in support, the Affidavit in reply and the contents of the exhibits annexed thereto, that there had been many attempts made to bring about a settlement before the commencement of the proceedings before this court.

Analysis of Evidence

22. I have before me competing Valuation Reports , Affidavit evidence and the Oral evidence of one and only witness, namely, **Savenaca Ralagi** , from the Fiji Road Authority, called on behalf of the Plaintiff , who prepared the Valuation Report dated 18th December 2018.
23. The said Valuer Mr. S.Ralagi, is a Registered Valuer with the Institute of Valuation and Estate management, holder of a Bachelor of Arts Degree in Land Management specializing in Valuation University of South Pacific and a Certificate Holder in Land Valuation from Lincoln University in New Zealand. He has served at TLTB from 1980 to 2014 and presently serves from 2014 till date at the FRA. His assessment as payable compensation is \$65,000.00.
24. Conversely, the Defendant submitted a Valuation Report dated 12th July 2019 prepared by Mr. Salacieli Tagane Lomaviti, along with his Affidavit filed on 23rd July 2019, according to which the Compensation has been assessed as \$400,000.00. This Valuer too is registered with the Institute of Valuation and Estate Management of FIJI.
25. During the hearing before me, only the Plaintiff’s Valuer Mr. S.Ralagi, gave oral evidence substantiating the contents of his valuation Report and particularly about the amount of compensation on his assessment and how he arrived at such an amount. Though, subjected to cross examination by the learned Counsel for the Defendant, his evidence has remained unassailed.
26. The only point that the learned Defence Counsel was able to make in favor of the Defendant through his cross examination was that, in the event any part of the Defendant’s building is demolished in the process of the road widening by exceeding the already marked boundary line, the Defendant should be at liberty for a further assessment of damages.
27. It is to be observed that neither the Defendant nor any other witness, particularly, the Valuer Mr. Salacieli Tagane Lomaviti, who prepared the Valuation Report for the Defendant has been called to give evidence. It can be safely inferred that the failure of the Defendant to adduce the evidence of his Valuer Mr. Salacieli Tagane, which could

have been done without any impediment, was not placed before the court as it would be unfavourable to the Defendant.

Moreover, viewing the failure to call him as a witness on a realistic basis, it had resulted in serious deficiency in proof of Defendant's claim for such an exorbitant amount in a sum of \$400,000.00 as compensation.

28. Mr. S. Ralagi's valuation for the Plaintiff was endorsed by Mr. Teke Kaa'ke in his capacity as the Chief Valuer of the Ministry of Land and there is no any reason for this Court to disbelieve or disregard such unchallenged evidence, particularly in the absence of any compelling and/ or convincing evidence by and on behalf of the Defendant before this Court.
29. In his valuation, the Plaintiff's Valuer has taken into consideration the current market value of the Defendant's land by adopting the "Sale Comparison" approach where the valuation figures are derived from the sale of other properties in surrounding areas with similar characteristics as the Defendant's land.
30. The Defendant, who submitted a Valuation Report dated 10th July 2019 for a sum of \$1,20,000.00, suddenly on 12th July 2019 submits another Report for a sum of \$400,000.00, which is mainly based on his expected future rental value of a 3 storied building, which is yet to be constructed. **The subsection (b) Vi of Section 12 of the Act, rules out any outlay or improvements unless it is proved that such improvement or outlay had taken place prior to the Notice of Acquisition.**
31. His unsubstantiated Valuation Report clearly indicated that the 3 storied building is still a proposed one and not found on the Land. The Defendant claims to have got a building Plan approved by the Local Authority. Having an approved plan (which was not submitted to Court) alone is not sufficient to claim damages.
32. In order to qualify for damages, he should have constructed the building as per the Plan adhering to the conditions therein, particularly Street line and Building line requirements, and should have obtained the Certificate of conformity. None of these documents was before the Court with clear evidence that the building he claims was constructed and completed before the date of the Notice of Acquisition.
33. It was also in Mr. S. Ralagi's evidence for the Plaintiff, that he conducted sales comparison with 16 sales of similar properties in the very area and out of those 16 he analyzed the best 6 sales on which he claim to have based his valuation. He also commented on the Defendant's Valuation and stated the said Report is insufficient as the sale comparison had been done only with 5 properties which according to him is inadequate to give a spectrum wide enough to determine the true market value.
34. The sales comparison undertaken by the Defendant's Valuer was only in relation to 5 properties, whereupon the rate per square meter of only one property was valued at

\$776.32 /m2, whereas the rate per square meter of the remaining 4 properties were valued in the realm of \$208.58 /m2 to \$ 355/m2 which rates are in close proximity with Mr. Ralagi's valuation for the plaintiff assessed at the rate of \$350/m2.

35. The valuation done by Mr. Lomaivati, on behalf of the Defendant for a sum of \$400,000.00 has remained unsubstantiated due to the Defendant's failure to call the relevant witness and the Plaintiff's witness Mr. S. Ralagi through his evidence in chief has satisfied this Court the Defendant's Valuation report is an exaggeration and unrealistic as it has been prepared basing on theories and speculations pertaining to the building the defendant has , purportedly, planned to build in the future and the earnings expected to make out of it. This has remained unchallenged by and on behalf of the Defendant.
36. Thus, Mr. S.Ralagi's evidence on behalf of the Plaintiff on the actual amount of valuation to be paid as compensation unto the Defendant is convincing and I don't see any reason to disregard and not to act upon it.
37. It is also not disputed by the Defendant that he has already been paid \$20,000.00 pursuant to an Agreement entered between the Defendant and the FRA on 23rd November 2015 on account of the Acquisition of the very lot Area 1 as evidenced by exhibit marked as TK-6 filed with the Affidavit in support for the Originating Summons.

Damage to crops and Trees:

38. The land in question is seems to be utilized as a store for the Defendant as observed above. There is no evidence of any trees or crops which are on the land to be considered when assessing in terms of para (ii) of section 12 (a) of the Act.

Severance

39. Taking only a part of a person's land may cause damage to the land left behind. It may result in depreciation in value resulting from division of land into small parts or its reduction in area and consequential loss of value for its current or potential use.

In considering this issue, I have looked at the acquisition diagram. The acquisition diagram should refer to balance area which is to be severed from the land to be acquired. It was not clear from evidence whether the balance area is also used as the store or for some other purpose. The total extent of the Defendant's land is 692 m2 out of which only 170 m2 is to be carved out. The balance area will be 522m2, which is a substantial area.

The balance area of 522 m2 will remain the property of the defendant. One must note that the proposed acquisition is to widen the existing road, out of which the Defendant too will be benefitted. However, since the Defendant does not make any serious submission in this regard, I shall not delve into it any further. None of the photographs

submitted depict a full-scale 3 storied building, except for temporary erections and concrete columns on which the Defendant seems to have proposed to build.

Damage sustained by other property or effect on his earnings

40. There is no acceptable evidence on this aspect, except for his own averments about his expected loss of future income yet to be generated after the construction of the 3 storied building in times to come.
41. In this case, there is no dispute that the Defendant's land will be used for straightening the road at the bend, which will eat into Defendant's 170 square meters of land. The Defendant is entitled for damages under this head only if it is shown that the value of remaining land has depreciated due to the Compulsory Acquisition and by virtue of the widening the road utilizing the acquired land. In this case major part of the land is to remain with the Defendant and he has not shown with clear evidence that the value of his remaining part will be depreciated.
42. The Defendant simply cannot come out with figures and expect the court to agree to those figures uncritically. However, I don't find any tangible evidence on the profit currently made out of the land in question and how much he is forced to loose on account of this compulsory acquisition.

The position taken up by the Defendant at the hearing that the demarcated boundary is uncertain cannot be accepted, when he has relied on his own valuation in arriving at the sum he claims. A survey after the completion of the road work, if needed, would reveal whether the road widening has encroached further into the defendant's land.

Change of location of business and/or Residence.

43. There is no evidence to show that the Defendant resides in the land in question and will have to change his residence due to this acquisition. Though, he has filed certain documents to prove the expenses involved on account of the removal of his goods, a container and for the demolition of the relevant parts of the existing building, no evidence has been adduced to substantiate the contents therein.

G. CONCLUSIONS:

44. I am of the view that the defendant's claim is grossly excessive. The plaintiff, I believe has offered the defendant a just and equitable compensation of \$65,000.00 for 170 m2 out of the Defendant's 692 m2 land.
45. However, on completion of Road widening work, if it is found, through a re-survey, that the process has covered any further extent of the Defendant's land, he should be at liberty to obtain compensation for the additional area at the same rate applied hereof,

unless the parties agree upon on the amount to be paid for the extra area taken. Hence I order as follows.

H. FINAL ORDERS.

1. The Court decides that the compensation to the Defendant for the Compulsory Acquisition of his land in the extent of 170 m2 be paid as per the valuation Report dated 11th December 2018 obtained by the Plaintiff.
2. Accordingly, the Plaintiff shall pay the Defendant a sum of \$65,000.00 (Sixty five thousand Fijian Dollars) being the compensation for the 170 m2 of land Acquired from the Defendant through this action.
3. Defendant's claim for enhanced compensation in a sum of \$400,000.00 as per his Valuation Report dated 19th July 2019 is declined.
4. If it is found, at the end of the Road widening work, through an agreed survey, that the Defendant has lost more than 170 m2 out of his land on account of compulsory Acquisition , the plaintiff shall pay the Defendant a further sum as compensation at the same rate applied hereof, if not agreed otherwise.
5. I make no order as to costs and the parties shall bear their own costs.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 22nd day of August, 2022.

SOLICITORS:

For the Plaintiff: Office of the Attorney General, Lautoka

For the Defendant: Siddiq Koya Lawyers, Nadi