IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0061 OF 2017
[High Court Civil Action No. HBC 32 of 2011 and HBC 22 of 2012]

BETWEEN : **THE TRUSTEES OF VANUALEVU MUSLIM LEAGUE**
1st Appellant

BASHIR KHAN
2nd Appellant

AND : **VCORP LIMITED** formerly known as **CENTRE POINT HOTEL MANAGEMENT LIMITED**
1st Respondent

LABASA TOWN COUNCIL
2nd Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Dayaratne, JA

Counsel : **Mr. A. K. Singh for the 1st and 2nd Appellants**
Mr. A. Sen for the 1st Respondent
Mr. S. Sharma and Ms. S. Ravusoni for the 2nd Respondent

Date of Hearing: **13 November, 2019**

Date of Judgment: **29 November, 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusions of Lecamwasam JA.

Lecamwasam, JA

[2] This is an appeal against the judgment of the High Court of Labasa dated 11th May 2017. The facts in brief are:-

The appellants (1st and 2nd plaintiffs) and the first respondent (1st defendant) are occupying adjacent lands. The land of the first respondent is on a lower elevation over which the appellants claim an easement. With that background, parties have led evidence as to how they derived their rights to the respective lands and the enjoyment of the alleged easement. The respondent's position is that they were given a lease by the I-Taukei Trust Board. They claim that there was no easement whatsoever over the land since the time they acquired lease rights, which is denied by the appellants. With this background, the parties went to trial. The learned Judge dismissed the application of the appellants (plaintiffs) making the following orders:-

> ***"(a). The plaintiff's claim for declaratory and injunctive orders are dismissed in its entirety.***
> ***(b). The plaintiffs are jointly and severally liable to pay to VCORP exemplary damages in the sum of $50,000.***
> ***(c). The plaintiffs are jointly and severally liable to pay VCORP damages for trespass to land in the sum of $50,000.***
> ***(d). The plaintiffs must within 14 days remove any structure that is erected on VCORP's ITL No. 30080, failing which, VCORP is entitled to remove the said structure from its property to develop its land.***
> ***(e). The plaintiffs are immediately and permanently restrained from trespassing onto VCORP's ITL NO. 30080 and also from discharging waste or storm water onto the same.***

(f). VCORP is at liberty to develop its land. The plaintiffs are restrained from interfering with VCORP's development of the land. VCORP must comply with condition 8 in paragraph 97 of the judgment. Until VCORP is able to comply with condition 8, the plaintiffs are to discharge its storm water only in the common drain provided by LTC.

(g). VCORP's counterclaim for special damages and claim for unlawful arrest, malicious prosecution and intimidation are dismissed.

(h). The plaintiffs are to pay costs to the defendants in the following manner:

- ***(i) $6,500 to the 1st defendant.***
- ***(ii) $2,500 each to 2nd and 4th, 5th, and 6th defendants. The costs to the 4th, 5th, and 6th defendants to be paid collectively which means that only $2,500 shall be paid to 4th, 5th and 6th defendants.***
- ***(iii) $1,500 to 3rd defendant.***

Costs to each defendant must be paid within 14 days."

[3] Being aggrieved by the above orders, the plaintiff-appellants filed the instant appeal on the following grounds of appeal:-

Ground 1 – That the learned trial Judge erred in law when she awarded damages for trespass to the property that was not pleaded or preyed in the first defendant's counter claim (para 76 of p.17 of the judgment).

Ground 2 – That the learned Trial Judge erred in law and facts when she failed to give notice or invite plaintiff regarding her visit to the scene and her decision that the drain was freshly dug rather than it was natural water way (para 67 – 71 .p16).

Ground 3 – That the learned trial Judge erred in law and facts regarding section 21 of SLA. (para 79 -86 p.18-20 and para 92 p.21).

Ground 4 – That the learned trial Judge erred in law and facts when she held that the defendant committed fraud and/or used documents forget (sic) to support the easement and thereby stop the development of the first defendant's property when in fact:

- *(a) Plaintiff through 3rd defendant made an application by submitting his plan to be approved by the Town and Country Planning (p.108.p25)*
- *(b) It was the Minister for Lands and Mineral Resources that issued stop work notice on 5th September 2011.*
- *(c) the Appellant misled the court and defeat the system; and/or*

(d) *His conduct was outrageous without any firm evidence; thereby occurring miscarriage of justice.*

Ground 5 – The learned Trial Judge erred in law and facts when she awarded punitive damages against the plaintiff.
Ground 6 – That the learned Trial Judge erred in law and facts when she held that the grant of injunction had hindered the development when in fact the first respondent continued the development of the property.(p.29 para124-125; p.29 – para 128 -129; p.30).

Ground 7 – That the learned trial Judge erred in law when she held that the appellant should take the storm water 30 meters to the common drain beside Savilla house when she failed to consider the facts that:

(a) *That it was more than 30 meters through the property of another.*
(b) *That Labasa Town Council was aware that the Appellant's storm water would be falling at the back when it initially approved the construction of the building.*
(c) *That it was impossible to direct the water to the common drain beside Savilla House.*

[4] In addition to the 7 grounds of appeal above, the first respondent also raised the following additional grounds of appeal;-

(1) *That the learned trial Judge erred in awarding damages conservatively which were inadequate.*
(2) *That the learned trial judge erred in law in failing to award appropriate damages under other heads as claimed by the first respondent/defendant.*
(3) *The first respondent/defendant deserves the right to file further grounds on the receipt of the court record.*

[5] In view of the above position, I will now deal with the grounds of appeal in seriatim.

<u>Ground 1</u> – that the learned trial Judge erred in law when she awarded damages for trespass to the property that was not pleaded or prayed in the first defendant's counter claim (para 76 of p.17 of the judgment).

The first respondent made the following averment at paragraph 43, pages 68-69 of his counter claim:

> *"43. At the time of filing the ex-parte notice of motion, the plaintiff had **encroached** upon the first defendant's lease and had constructed thereon an illegal structure and was unlawfully discharging storm and waste water".*

In addition, the first respondent claimed exemplary damages from the plaintiff thus;

> *"47. a…*
> *b…*
> *c. that the plaintiff knew of their illegal encroachment and unlawful discharge of storm water onto the first defendant's land".*

It would be farcical to construe the words ***encroach*** and ***encroachment*** to mean anything other than trespass in this context.

[6] It is pertinent to mention that the Appellant in his synopsis drew the attention of Court only to paragraph 50 of the Counter Claim. Paragraph 50 cannot be read in isolation. It must be read with paragraphs 43 and 47 of the Counter Claim. When taken cumulatively, it is obvious that the Respondent prays for damages for trespass in his counter claim.

[7] Therefore, I find that the learned trial Judge has not erred in awarding damages for trespass in view of the specific averments pleading for damages. In view of such, the first ground of appeal fails.

[8] <u>Ground 2</u> – *That the learned Trial Judge erred in law and facts when she failed to give notice or invite plaintiff regarding her visit to the scene and her decision that the drain was freshly dug rather than it was natural water way (para 67 – 71 .p16).*

At the same time as being a frivolous ground of appeal, the proceedings patently refute this claim encapsulated in ground 2 above. In page 403, the Appellant, Mr. Bashir Khan makes the application for a visit of the court in the following words...:"*I want the court to see"*. Hence, the court initially made a visit in response to the application of the Appellant. Again at page 413, Mr. Hannif (Counsel for the Appellant) enquires the learned judge as to her preferred time for the visit in the following words: " *My Lady, in responding in respect to the visit would your Ladyship*

want to do it early in the morning at 9.30 or". The discussion that ensued pertained to the site visit, at the end of which the parties had agreed to do the site visit on the following day in the presence of all Counsel. Therefore, the appellant cannot claim to have been unaware of the site visit, as such details have been discussed by the parties in open court. It is also incorrect to say that the court failed to give notice of the site visit as it is obvious that the Appellants were well represented by their Counsel in court as well as during the visit. For the foregoing reasons the 2nd ground of appeal fails.

[9] <u>Ground 3</u> – *the learned trial Judge erred in law and facts regarding section 21 of the State Land Act (SLA). (para 79 - 86 p.18-20 and para 92 p.21).*

The learned judge has not erred with regards to section 21 of SLA. She has adverted her attention to the facts in relation to Section 21 but has refused to consider those in view of the fact that this submission was never a part of the claim, the pleadings, or the pre-trial conference minutes. However, through an abundance of caution she has dealt with it in paragraphs 81 to 86 of her judgment. In any event, as the corpus of the dispute had been a land under the ITLTB, it cannot be subject to the SLA. Therefore ground 3 also fails.

[10] <u>Ground 4</u> – *that the learned trial Judge erred in law and facts when she held that the defendant committed fraud and/or used documents forget (sic) to support the easement and thereby stop the development of the first defendant's property when in fact:*

(a) Plaintiff through 3rd defendant made an application by submitting his plan to be approved by the Town and Country Planning (p.108.p25)
(b) It was the Minister for Lands and Mineral Resources that issued stop work notice on 5th September 2011.
(c) the Appellant misled the court and defeat the system; and/or

(d) His conduct was outrageous without any firm evidence; thereby occurring miscarriage of justice.

[11] After a careful consideration of the facts before me, I am satisfied that the document submitted by the Plaintiff to the Town and Country Planning was an application for the approval of the plan. There appears to be no evidence to prove that the plan was submitted on the pretext of an approved plan. As per paragraph 8 of the Supplementary Record on pages 150-151 the plan had been submitted merely as a plan to be approved. Therefore this plan cannot be treated as a forged document nor can it be used to demonstrate that the Plaintiff/Appellant had attempted to commit a fraud. The learned High Court Judge had extensively dealt with all the material before her sacrificing time and labour to do justice in this case. It is evident that she had comprehensively dealt with the facts of the case running up to 164 paragraphs of her judgment.

[12] However, I cannot agree with the findings she had made in regard to the plan that was tendered to the Town and Country Planning. This plan, which the learned High Court Judge refers to in paragraph 102 of her judgment, has obviously been submitted with the Plaintiff's supplementary affidavit in the injunction application. This is supported by the claim of the 2nd Respondent in paragraph 8 of the petition which reads as follows and has not been refuted by evidence to the contrary: "we applied to the Town and Country Planning Office through the 3rd Defendant and paid lodgment fees for our **plan to be approved** by the Town and Country Planning Office for the drainage reserve and easement on Lot 1 as shown on Plan annexed as "C" in the Affidavit."

[13] Hence, I am satisfied that the respondents had not surreptitiously tendered this plan to court representing it as an approved plan. In light of such clear evidence it is not possible for me to come to a conclusion of forgery or fraud. I find that the learned High Court Judge had erred in hastening to a conclusion as seen in paragraph 102 of

her Judgment in respect of the plan that was tendered. Therefore, I hold with the Appellant and conclude that the fourth ground of appeal succeeds.

[14] <u>Ground 5</u> – *That the learned Trial Judge erred in law and facts when she awarded punitive damages against the plaintiff.*

As the mere tendering of the above plan does not constitute forgery or fraud the question of punitive damages does not arise. As such, I uphold the fifth ground of appeal.

[15] <u>Ground 6</u> – *That the learned Trial Judge erred in law and facts when she held that the grant of injunction had hindered the development when in fact the first respondent continued the development of the property.(p.29 para124-125; p.29 – para 128 -129; p.30)*

[16] The learned High Court Judge at page 38 paragraph 125 of her judgment has observed: *"125. There is clear evidence that the kindergarten was demolished on 17 May 2012. It is also accepted by Mr. VD that* ***before the injunction was obtained, and even after it was obtained, VCORP continued the development work on the land."***

While an affirmation of the above ground of appeal will not accrue any benefit to the appellant since under paragraph 164 none of the orders has any bearing on the development work in relation to the pre or post injunction period, in view of the above observations of the learned High Court Judge, I find that the learned Judge had rushed to an unsustainable conclusion. I fear to tread in that direction. Therefore, I uphold the above ground of appeal and answer in favour of the Appellant.

[17] <u>Ground 7</u> – *That the learned trial Judge erred in law when she held that the appellant should take the storm water 30 meters to the common drain beside Savilla house when she failed to consider the facts that:*

(e) *That it was more than 30 meters through the property of another.*

(f) *That Labasa Town Council was aware that the Appellant's storm water would be falling at the back when it initially approved the construction of the building.*

(g) *That it was impossible to direct the water to the common drain beside Savilla House.*

Paragraph 97 of the judgment of the learned High Court Judge is adequate evidence that the learned Judge has sufficiently lent her mind to all the facts laid down by the appellants before making the order. She had made all attempts to make an order acceptable to all the parties in relation to the main dispute of discharging storm and waste water. Paragraph 97 states:

> *"97. It is clear from the 5th defendant's final approval for rezoning that the re-zoning is subject to certain conditions to be fulfilled by VCORP. There are 11 conditions to be fulfilled and condition 8 relates drainage easement which will solve the plaintiff's concerns as well. Condition 8 of the approval reads:*
> ***"That a two meter (2m) Drainage Easement shall be formed along the SW, N, and NE boundary of the subject site. The drainage retention, detention and conveyance systems shall be designed to eliminate and reduce the Storm water runoff impact of adjacent properties including outfalls into the Labasa River".***

In view of the above reasoning, Ground 7 too fails.

[18] Adverting to the Respondent's notice, I find that the learned High Court Judge has awarded sufficient damages to the Respondent. Therefore, there appears not to be any necessity to enhance the damages that have already been awarded. As a result, the grounds of appeal urged by the Respondent are refused.

[19] The Learned High Court Judge, in dealing with exemplary damages (beginning from paragraph 102) had considered damages for trespass to land as well as evidenced by the parenthetical clause under the caption for exemplary damages, which reads:

F. Exemplary Damages

[Including damages for Trespass to Land]

[20] The Learned Judge, in Paragraphs 113 and 114 of the judgment states thus:

> *113. The purpose of exemplary damages is punitive in nature. It is to punish a party for its misconduct. I find that the type of misconduct that the plaintiffs' have demonstrated deserves punishment. The conduct was full of malice so that Mr. Dayal, a young business man does not come into competition* ***with the tycoons like Mr. Bashir Khan*** *(referring to the 2nd Appellant). Mr. Bashir Khan therefore lied, forged and mistreated Mr. Dayal being fully aware that he had no locus standi to bring the proceedings in the first place.*
>
> 114. *If the justice system does not punish for conduct of this nature, it will condone forging of documents, misleading of Court, and bringing frivolous actions and continuing the same on a fraudulent footing. The perpetrators of the law will not learn that such conduct can be subject to civil penalty too. Mr. BK has not so far been charged for perjury. This is a matter that I will not delve into save to say that his conduct should not be promoted for him to believe that there is no deterrence in a civil cause for that. For such reprehensible conduct a meager sum of damages would not be adequate. It will neither be an adequate punishment nor a deterrent in future* ***as Mr. BK is a financially powerful party*** *to the case.*

[21] The above paragraphs suggest that the learned Judge was guided by her personal knowledge of the locale rather than by the evidence before court. The fact that no evidence was led to this effect was pointed out by the Counsel at the time of argument before this court as well. Therefore I find that her personal biases have propelled her to don the role of a witness in order to impose heavy damages against the Appellant. A Judge should not be motivated by extraneous factors such as wealth of a person unless in the context of a tax or revenue application. The quantum of damages imposed should reflect only the real damages caused. I conclude that the imposition of FJ$50,000 under 164(b) of Final Orders is excessive. Therefore, I restrict it to FJ$30,000. The sum of FJ$50,000 under 164(c) is reduced to $20,000 for the same reasons.

[22] In view of the above position, I have answered grounds of appeal Nos. 4, 5 and 6, in the affirmative, partly allowing the Appeal. Order (b) of the learned High Court judge is set aside and substituted with an amount of FJ$30,000 while order 164(c) is set aside and substituted with an amount of FJ$20,000. The remainder of the grounds of appeal is rejected. I order parties to bear their own costs in this court.

Dayaratne, JA

[23] I agree with the reasons and conclusions arrived at by Lecamwasam JA.

Orders of the Court:

The Orders of the Court are:

1) *Appeal is allowed in part.*
2) *Orders (b) and (c) of the High Court are substituted with FJ$30,000 and FJ$20,000 respectively.*
3) *The counterclaim of the Respondent is refused.*
4) *Parties to bear their own costs in this Court.*
5) *I do not interfere with the Orders i, ii, and iii under Order (h) of the High Court. Hence those orders are affirmed.*

Hon. Mr. Justice E Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice S Lecamwasam
JUSTICE OF APPEAL

Hon. Mr. Justice V Dayaratne
JUSTICE OF APPEAL