

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBC Civil Action No. 270 of 2011

BETWEEN : JOSEPH MORRELL, of Lot 69, Milverton Road, 10 Soqeloa Lane,
Raiwaqa, Suva.

PLAINTIFF

AND PIO BURESE of Lot 68, Milverton Road, Soqeloa Lane, Raiwaqa,
Suva

DEFENDANT

Counsel : Mr Rayawa A. for the Plaintiff
Ms Tikoisuva N. for the Defendant

Date of Hearing : 5th and 6th of August, 2015

Date of Judgment : 10th December, 2018

JUDGMENT

INTRODUCTION

1. This is an action filed by the Plaintiff seeking inter alia damages for encroachment of a fence wall, damages for nuisance and or failure of duty of care in the construction of a fence wall by Defendant. The Plaintiff is claiming for damages for economic loss the value of the property and damages for loss of enjoyment of Plaintiff's property due to obstruction of light and air and nuisance caused. Alternatively, the Plaintiff is seeking demolishing of the wall fence. The Defendant denied encroachment to the Plaintiff's land and sought dismissal of the action. Both sides relied on the survey reports prepared by their respective surveyors but neither side called evidence of the surveyors at hearing. The survey reports are conflicting as to the encroachment of the Defendant on the common boundary between the parties. The survey report of the Defendant does not show encroachment to Plaintiff's land.

FACTS

2. The Plaintiff's case is that of negligence and nuisance and there are certain facts in this case that are not in dispute, though no fact was agreed at the Pre-trial Conference.
3. That the Plaintiff and the Defendant are neighbours. The Plaintiff owns Lot 69 Soqeloa Place in Raiwai. The Defendant owns Lot 68 Soqeloa Place, Raiwai he does not reside in the said premises. He resides in Lot 11 Soqeloa Place, Raiwai.
4. That the Defendant constructed a fence wall separating Plaintiff's land (Lot 68 Soqeloa Place) from Defendant's land (Lot 69 Soqeloa Place).
5. It is also admitted that the Defendant constructed the concrete wall without seeking approval from the relevant authorities, including City Council, Housing Authority, Director of Land, etc.
6. The Defendant stated that he sought approval of the fence wall after construction, by submitting an application, but there was no evidence of either rejection or acceptance of that.
7. In the statement of claim Plaintiff is claiming for
 - a. Economic loss on the value of the property to be assessed by the court, and
 - b. Loss of enjoyment of the Plaintiff's property to be assessed by the court.
8. Alternatively the Plaintiff seeks an order for abatement and demolition of the Defendant's wall adjoining Plaintiff's land.
9. The Plaintiff gave evidence and marked documents from P1 to P8. The Plaintiff in his evidence stated that he was informed by the Housing Authority that there was a gap of 6 feet between common boundary between the Plaintiff's house and the boundary. The photographs as well as oral evidence produced indicated that the gap between the wall of the Plaintiff's house and the Defendant's fence wall was about 3 feet and it was a small gap.
10. The Plaintiff informed that the wall was constructed on a sewage line, which was on the Plaintiff's land.
11. The Plaintiff stated that he informed the person who did the construction work for Defendant as well as the Plaintiff that the fence wall had encroached his land. The Plaintiff had also met relevant authorities including Housing Authority.
12. The Plaintiff had also met a senior Engineer by the name of Naitani of Suva City Council and he had also confirmed that there should be 6 feet distance, from the Defendant's wall.

13. The Plaintiff had also met a senior Surveyor Mr. Mike Tupua of Department of Survey and he had also confirmed that there should be 6 feet distance between the Plaintiff's house and fence wall of common boundary.
14. The Defendant gave evidence and admitted the construction of fence wall without obtaining prior approval. He said that he had submitted an application for approval after construction and awaits a reply.
15. The Defendant denied that his construction of fence wall had cause a nuisance to the Plaintiff. He said he had relied on the peg marks on the ground for demarcation of the boundary wall between the Plaintiff and him.
16. In the Minutes of the Pre-Trial Conference the issues to be determined by the Court. The issues are:
 - (1) Whether the fence constructed by the defendant encroaches onto the property belonging to the Plaintiff,
 - (2) Whether the fence constructed by the Defendant affects the Plaintiff's common law rights to sunlight and air and thereby causing nuisance,
 - (3) Whether the defendant was negligent and breached his duty of care towards the Plaintiff.

ANALYSIS

17. The Plaintiff in the written submission stated Section 7 of the Town Planning Act of Fiji Cap 139 states as follows:

*"7 (1) Subject to the provisions of this section, the permission of the local authority shall be required in respect of any development of land carried out **within a town planning area** during the period before a scheme affecting such areas has been finally approved.*

(2) The use for the display of advertisement of any external part of a building which has not formally been used for that purpose shall be treated for purposes of this section as involving a material change in the use of that part of the building.

(3) The local authority shall not grant or reuse permission under this section without the prior consent of the Director and the Director may approve such grant or refusal either unconditionally or subject to conditions and may prohibit such grant or refusal.

(4) In dealing with applications for permission to develop land under this section, the local authority and the Director shall have regard to the matters

set out in the Schedule to provisions proposed to be included in a scheme and to any other material considerations.

(5) Regulations may be made by the Minister prescribing matters relating to the control of development under this section, and in particular, without prejudice to the generality of the foregoing, scheduling and development of any class in respect of which permission under this section shall be deemed to be granted by the regulations themselves.

(6) Where any development of land has been carried out without the grant of permission required in that behalf under this section, or any conditions subject to which permission was granted under this section have not been complied with, the local authority may at any time, and at the cost of the person in default, take such steps as may be required for restoring the land to its condition before the development took place, or for securing compliances with the conditions, as the case may be, and any expenses lawfully incurred by the local authority in so doing may be recovered as a civil debt.

(7) Every person who –

- (a) carries out any development of land without the grant of permission required in that behalf under the provisions of this section; or*
- (b) contravenes or fails to comply with any conditions subject to which permission has been granted under the provisions of this section; or*
- (c) obstructs or interferes with the exercise by the local authority of the powers vested in it by the provisions of this section,*

shall, in addition to any civil liability, be guilty of an offence and be liable on conviction to a fine not exceeding one hundred dollars or to imprisonment for a period not exceeding three months, and if such contravention, failure to comply, obstruction or interference is continued after the conviction, he shall be guilty of a further offence and liable on conviction to a fine not exceeding twenty dollars for every day on which the contravention, failure to comply, obstruction or interference is so continued.' (emphasis added)

18. At the hearing there is no proof that area in dispute was within a town planning area. In the statement of claim there is no pleading as to relevant provision in the Town Planning Act of Fiji. Even if I am wrong on that, Section 7 of the Town Planning Act of Fiji deals with criminal liability and does not create separate civil liability for the Plaintiff to rely on.
19. The ownership of the land by respective parties is not disputed and P1 is Plaintiff's Housing Authority Lease. This is a document that binds the two parties to the said lease conditions. If the conditions are breached the parties to the said lease can take appropriate action and a third party cannot rely on that.

20. The Plaintiff contends that Defendant had breached the clause 6 of the Housing Authority Lease.
21. The Plaintiff also relied on Housing Authority Lease to show that Defendant had breached it by construction of wall over a sewage line. This is a matter for the relevant authorities to seek appropriate action including removal of that, under relevant statutes.
22. In this action apart from oral evidence there is no proof of the manner in which the fence wall had created a danger to the Plaintiff as part of that is over a sewage line.
23. The plaintiff contends the Defendant has common law duty of care towards the Plaintiff not to conduct and development on his land that would encroach upon the Plaintiff's land.
24. The Defendant in the written submission submitted Section 109 of the Property Act if the court finds that that the Defendant had encroached on the Plaintiff's land. This is not pleaded in the defence.
25. The first issue for the Court to consider is whether there is an encroachment.
26. Both the parties agree the fence wall construction was done in late October 2008 by the Defendant. This was shortly after the Defendant bought the property from one Mr Latchman. The Defendant, in his evidence, says that the reasons for the construction of the fence was done soon after it was purchases as the safety and security of him and his family was paramount. This cannot be accepted as he admitted that he and his family do not reside on it. In his evidence he said he bought the land as an investment.
27. The evidence before the Court in relation to the encroachment are the survey reports marked P5 and P5. P 4 is Wood and Jepsen Report, and P 5 is survey report from Rupeni Consultants Report.
28. The Defendant state Rupeni Consultants Report submitted by the Plaintiff and marked as P5 is not credible and reliable for following reasons:
 1. The Report was made without a certification by the Surveyor that the Report was made in accordance with the requirements of the Surveyor Regulations;
 2. The Report was made where the surveyor did not consider the original points and pegs and conducted the survey without giving reasons why he did not consider the original survey plan.
 3. None of the surveyors was called and the Plaintiff did not dispute the veracity of the Wood and Jepsen Report obtained on behalf of Defendant.
29. Both parties had obtained survey reports. Only the survey report of the Plaintiff indicates that Defendant had encroached Plaintiff's land. Defendant's survey report indicates no encroachment on the Plaintiff's land.

30. None of the surveyors who prepared the reports that were marked gave evidence. 'P5' had not even considered the earlier survey report 'P4' as P4 and P5. When the two reports indicate conflicting professional opinions on the curtail issue they should give an explanation to justify their opinion.
31. The survey report of the Plaintiff had used an old survey mark on the Grantlam Road in order to determine the demarcation of the boundaries.
32. Why such an effort was needed and whether it is more accurate needs to be explained either through oral evidence or at least in the report. No such evidence available to weigh the evidential value of the two survey reports.
33. 'P5' had relied on a survey plans DP 3660 and SO 3708. Why they relied on that and why such reliance was more accurate needs explanation. In contrary survey report 'P4' stated it complied with survey regulations.
34. Even considering other evidence such as photographic evidence I am unable to come to a conclusion as to the issue of encroachment.
35. On the balance of probability the Plaintiff had failed to prove encroachment of the wall fence to the Plaintiff's land.
36. The survey report of the Plaintiff indicate about 10.1 cm (101mm) encroachment. This again is contrary to the oral evidence where the Plaintiff stated that the wall had encroached about 3 feet (about 90 cm). This 10 cm was at the highest point according to the Plaintiff's survey report and this contradict the Plaintiff's oral evidence where he stated that Housing Authority as well as Suva City Council had indicated about 6 feet gap between the Plaintiff's house and common boundary.
37. The total area encroached by the Defendant in P5 is 1.03 square meter. This shows that the oral evidence of the Plaintiff regarding 6 feet gap between the boundary wall and his house is not correct.
38. So the maximum encroachment of 10.1 cm, according to the survey report was very much less than what the Plaintiff had stated as the encroachment.
39. The Plaintiff stated that he had has suffered damages in the loss of the value of his property.
40. At the hearing the Plaintiff did not produce evidence to assess the loss of the value to the property. No evidence of any valuation of the property was submitted for assessment of such a loss.

41. The Plaintiff is claiming for deprivation of light and fresh air due to the construction of the wall. These are based on common law.
42. On the second and third issues, the Plaintiff claims Nuisance as a result of the breach of duty of care by the Defendant in not considering the Plaintiff's common law rights to air and sunlight. These rights are statutorily dealt in Property Law Act.
43. Section 107 of the Property Law Act, Cap 130 is also relevant to the above issues. It states as follows:

"Access or use of light or air

107.-(1) Subject to the provisions of subsection (2) no tenement shall be servient to any other in respect of the access of either light or air, and no person shall have or acquire by prescription, grant or otherwise any claim or right to the access of light or air to any land or building from or over the land of any other person.

(2) A grant of the right of access of light or air made at any time after the commencement of this Act may be enforced if the grant -

(a) is made by an instrument in an appropriate form provided by the Land Transfer Act; (Cap. 131.)

(b) is duly registered under the provisions of that Act; and

(c) limits and defines the area or parcel of land on, to or over which the uninterrupted access of light or air, or light and air, is intended to be provided for.

(3) Every such grant shall, if duly registered as required by subsection (2), confer upon the owner for the time being of the dominant tenement such rights as may be therein defined in respect of the access of light or air, or light and air; and those rights shall ensure, unless otherwise provided, notwithstanding that any buildings erected upon the dominant tenement may be altered or destroyed and replaced by other buildings.

*(4) The erection of **buildings of any height not encroaching upon the area limited and defined as aforesaid shall not be deemed to be an infringement of the right or derogation from the grant**" (emphasis added).*

44. So, in order to claim right to light and air as a common law right it needs to be registered as a specific right in terms of Section 107(2) of Property Act and if not it cannot be claimed as a right in terms of Section 107(1) of Property Law.
45. There is no specific grant to the Plaintiff in terms of Section 107(2) of Property Act hence the claim for right to light and fresh air fails.

46. Section 107(4) of Property Act specifically state that even in case of special grant of right to air and light in terms of Section 107(2) the height of a building without any encroachment does not create infringement of the said grant.
47. I have considered the photographic evidence submitted that indicate that fence wall was constructed close to the Plaintiff's house. He had also indicated that part of the fence wall was over a public sewage line. Since the Defendant had submitted an application for approval of the wall these are matters for relevant authorities to consider in granting approval for the said wall. The claims of the Plaintiff are based on common law rights.
48. The Plaintiff seeks relief for breaches in duty of care by the Defendant which has resulted in the water flow onto the Plaintiff's property. The two properties are not situated at the same level and Plaintiff's land is at lower level. Hence natural runoff will be through Plaintiff's land and fence wall is not the sole reason for that.
49. For avoidance of any doubt dismissal of this case is not an approval of the application of the Defendant seeking approval of wall fence pending before relevant authorities.

CONCLUSION

50. The Plaintiff's claim for encroachment of the Defendant is not proved on the balance of probability. Both sides have produced conflicting survey reports regarding the encroachment of the fence wall on the boundary between Plaintiff's and Defendant's land. The survey report obtained on behalf of the Plaintiff had not relied on the survey marks on the site but had relied on survey marks on Grantham Road and they were brought to the site by traverse as shown on drawings. There is no explanation given on the survey report why such a measure would be more accurate than the method used by the survey report obtained by the Defendant. The survey report of the Defendant specifically indicates that it was done in compliance with the survey Regulations and it is correct. There is no such statement in 'P5'. Since there is no proof of encroachment on the balance of probability the next issue is whether the claim of height of wall can be subject to a claim for obstruction of light and or fresh air. This is expressly denied in terms of Section 107(1) of the Property Act unless qualified in terms of Section 107(2) of the Property Act. There is no proof of specific grant under Section 107(2). The Plaintiff has not proved the economic loss due to the actions of the Defendant. The Plaintiff's claim for damages for light and fresh air cannot be sustained as Section 107(2) of Property Act is not proved. Hence the claim encroachment and or nuisance and or breach of duty of care is not proved on the balance of probability. The writ of summons is struck off and considering the circumstances of the case no costs awarded.

FINAL ORDERS

51. a. The writ of summons is struck off and Statement of Claim is dismissed.
b. No costs.

Dated at Suva this 10th day of December, 2018




.....
Justice Deepthi Amaratunga
High Court, Suva