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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Civil Jurisdiction

Action No. 160 of 1980

Between

KIRPAL CHAND
s/o Jagarnath — Plaintiff

- and -

SUKH RAJI d/o Durjan — 1st Defendant
NATIVE LAND TRUST BOARD — 2nd Defendant

Messrs. M. T. Khan & Co. — Solicitors for the Plaintiff
Messrs. Tappoo, Krishna & Co, — Solicitors for the 1st Defendant
A. Qetaki, Esq. — Solicitor for the 2nd Defendant

J U D G M E N T

Both the plaintiff and the first defendant are lessees of the Native Land Trust Board of land in the Saweni area. They do not have leases, the land has never been officially surveyed and demarcated on a registered plan. They both have approval notices, both notices referring to C.S.R. farm numbers (in the case of the plaintiff, farm No. 540 and in the case of the first defendant farm No. 551), both notices saying "subject to survey". They are both shown on the old C.S.R. area map. In that map the two pieces of land are not shown adjoining. If the map is anything to go by the farm adjoining the plaintiff's land curbs round, separating the plaintiff's and first defendant's land and appears to form a sort of peninsular jutting into the plaintiff's land.

But in the extreme tip of the peninsular appears an area of about 1 acre or less marked as "marginal land" (plot 1/29.) It appears that this peninsular of land is a ridge of higher land unsuitable for cultivation, apparently the sort of land used to graze animals or build houses. In fact on that rige of land the first defendant has built her house - on the portion nearest her own far , next to it the previous owner of the plaintiff's land built a house of sorts or a store, and then on the tip on the peninsular on the portion described as marginal land a house was built for one Ram Kissun who married the first defendant's daughter.

The first defendant said that when the lease was transferred to her when her husband, the previous lessee, died, officials pointed out to her where her boundary was, and the disputed area of land was included in her land. I seriously doubt that; I think he was just saying that now for purposes of this issue. I think the history of this issue reveals that the first defendant never

seriously believed the land to be hers and was always prepared to settle for the portion of the higher land on which her own house was built. Suruj Pal the previous lessee of the plaintiff's land always considered the land to be his, but said he let the first defendant build her house on part of the ridge and let Ram Kissun's house be built on the portion described as marginal land.

I am sure that Suruj Pal's evidence shows more convincingly the true position; i.e. that he always considered the ridge of higher land, jutting into his land as part of his land, or at least land over which he had some sort of control, and that as a neighbourly gesture, a matter of convenience between neighbourly farmers who didn't want to use good planting land for building houses and stores, he, the first defendant and Ram Kissun built houses or stores on the ridge.

It must have come as rather a surprise to everyone including the first defendant when the old C.S.R. map revealed the isolated portion of land - 1/29 referred to as marginal land. No lease or approval notice appears to deal with this plot, or refer to it, but the old C.S.R. register seems to show it allocated to the first defendant. There was nothing to show how it came to be the first defendant's, why it became the first defendant's, and there was nothing to show that the first defendant was paying rent for it, or even knew of it. I would venture to suggest that this marginal plot was overlooked by everyone including the officials who showed lessees/the boundaries of their plots and it was overlooked when their approval notices were issued. And it was only when Native Land Trust Board officials, for the purpose of this matter researched old CSR records that this came to light. Perhaps it was a pity that it did so as it turns out.

In the meantime the plaintiff had taken action in the Magistrate's Court against Ram Kissun to get him removed from the plot he was occupying. In that action it was accepted that the disputed area was part of the plaintiff's land, and that Ram Kissun had no right or title to the land. Neither the first defendant nor the Native Land Trust Board were parties to that action, which ended in a settlement, Ram Kissun agreeing that the land was the plaintiff's land, and agreeing to move out. In a supplementary agreement both the plaintiff and the present first defendant agreed to let Ram Kissun have a small portion of each of their land to build a new house on. They also agreed not to raise objections if Ram Kissun was able to obtain a separate title to this portion of land.

The basis for this settlement was a survey of the land carried out about this time by a Mr. Chang on behalf of the Native Land Trust Board. The land had never been properly surveyed before so there was no question of taking a set survey point and working back from that. The C.S.R. maps, though accurate in many ways, were no basis for an accurate survey, and the very practical, perhaps the only workable policy adopted, was to get the adjoining land owners together on site and work out an acceptable boundary on the basis of existing occupation

and use. The acceptable boundary was then pegged and ultimately to be included in a registered survey plan.

Mr. Chang put the boundary between the plaintiff's and first defendant's land just below the first defendant's house so that the marginal plot and the area where the plaintiff or his predecessor had put a house or store was included in the plaintiff's boundary. The first defendant in this court has tried to persuade me that she never agreed to that boundary, but I do not believe her. I accept what Mr. Chang said, that the boundary was agreed and accepted by both parties and I believe that the first defendant has changed her mind since, probably at the instigation of her sons, because she is an old, very simple woman, in the hopes of getting all the disputed land. She also now says that she only signed the terms of settlement in the Magistrate's Court because she was told to sign, and didn't realise what she was signing. I dismiss that allegation by her also.

There is no doubt in my mind that this agreed boundary provided a sound basis for a settlement to the parties in what could become, and I think has become, a situation fraught with difficulties and one that could cause endless friction in the future.

But when the terms of the settlement and the agreed boundary were referred by the parties to the Native Land Trust Board for them to be endorsed, the Native Land Trust Board refused to accept them. In fact refusal was based solely on the ground that the Native Land Trust Board was not a party to the settlement - as seems to be implied by the Native Land Trust Board's pleadings, I think that refusal is very short sighted and petty. But I must accept, after hearing Mr. Noakes' evidence that was not the sole reason for the stand taken by Native Land Trust Board. In the first place the first defendant herself did not sign as a party to the agreement, only as a party to the supplementary agreement. Also the so-called agreed boundary, was based on the belief that Ram Kissun was a squatter on the disputed portion of land; whereas on the basis of the old CSR records, that area of marginal land was allocated to the first defendant, and she would have been occupying it through her son-in-law.

The settlement, if accepted by NLTB, might have ended with their being obliged to recognise Ram Kissun's separate title to the piece of land on which his house was built. But the settlement might have been used to negotiate a proper settlement satisfying all the parties and NLTB, but as it was for the reasons I have stated, it was and is worthless, as a binding settlement.

In addition the plaintiff cannot rely on the boundary worked out by Mr. Chang and used as a basis for the settlement. That boundary was based on a misconception. In any case Mr. Chang went back to the area, having been instructed by the NLTB to resurvey it on the basis that the marginal land was allocated to the first defendant. On this basis and on the basis of occupation Mr. Chang then

drew up another plan, replacing the previously agreed boundary with one that leaves the area of Ram Kissun's house part of the first defendant's land but isolated and surrounded by the plaintiff's land.

There is no reason to believe that this plan does not fully conform to the normal NLTB policy of fixing boundaries, in accordance with agreement between the parties if possible, and in accordance with existing occupation and use. This plan is Exhibit D5. It has not been officially approved by NLTB, or registered, and I gather from Mr. Noakes that NLTB does not altogether approve of it. I am not surprised. But it is difficult to understand exactly what is the position taken up by NLTB on this matter. They did not approve the earlier boundary drawn up by Mr. Chang, though clearly this would have been the best solution in all the circumstances. Mr. Chang was then sent back with instruction to demarcate the boundary of the marginal plot, which he did and plotted the boundaries according to existing occupation and usage. Does NLTB now want another survey done or does it want to do without a survey altogether? It has not stated its position in any positive way and has merely pleaded denials in a rather general way.

What the plaintiff has asked for is

a) an injunction restraining NLTB from registering any survey plans or other legal documents so that the disputed area of land is leased to the first defendant Sukhraji;

b) an order that the plaintiff is rightly entitled to the disputed area of land as part of the land leased to him under his approval notice.

The difficulty with this pleading is that it refers to the "disputed area of land" without defining exactly what piece of land is meant. If the disputed area is in the area of marginal land numbered 1/29 on the CSR map, or the small area shown on Exhibit D5, then the prayer must fail. That area was never part of the plaintiff's land, and he cannot rely on the first survey carried out by Mr. Chang, which was not based on all the facts. The fact that at that time the parties themselves were ignorant of the true position, and acquiesced in what Mr. Chang thought was an agreed boundary, is neither here nor there. The fact is that the piece of marginal land appears to have been allocated to the first defendant, though she may not have been aware of it, and was occupied by her through her son in-law. Nor does the settlement in the Magistrate's Court affect the position, because, although it was a genuine attempt to do justice between all the personnel concerned, the first defendant was not a party to it, and did not sign the main settlement.

If the "disputed area" is a larger area of land, is it the whole of the area up to the agreed boundary originally marked by Mr. Chang, the whole of the area up to the boundary fixed in accordance with the settlement in the Magistrate's Court, or what area? The plaintiff as I have said cannot rely on the

first agreed boundary marked by Mr. Chang which was not based on all the facts. He cannot rely on the boundary fixed in the settlement since the first defendant was not a party to the agreement fixing the boundary, and Ram Kissun had no authority to agree any boundary.

I think the most the plaintiff can ask for is that the boundary be determined in accordance with the second plan draw up by Mr. Chang, Exhibit D5.

This would allocate to him that portion of land on the ridge occupied and used by his predecessor in title and himself. That would lead though to a horrible situation with Ram Kissun's house site left in an isolated position and I can foresee endless trouble in the future over access roads.

On the other hand it would be quite wrong for the Native Land Trust Board to ignore Mr. Chang's second attempt to fix the boundary in view of the specific instructions given to him by NLTB and the fact that all along until NLTB dug into the old CSR records the plaintiff, and everyone else was convinced that most of the ridge area came within the plaintiff's area of land.

It is perhaps a pity that the Court does not have power to put a compromise boundary more or less where Mr. Chang put it at his first attempt, and say to the parties "The plaintiff is to have all the land this side and the defendant is to have all the land the other side."

I have expressed to all the parties fears lest the court be dliged to give a judgment that would perpetuate for ever the sort of situation shown in Exhibit D5, in the hope that the parties themselves could see the wisdom coming to a settlement. Unfortunately the parties were unable to agree on a fair and sensible division of the land. The first defendant clearly is not satisfied with the fact that she has already got about two acres more land than was specified in her approval notice; she seems to want the whole of that ridge of land almost dividing the plaintiff's land in half, including the portion on which the plaintiff or his predecessor had built a house or store. The plaintiff not unnaturally doesn't want to lose that portion of the ridge on which h has a store or house, and doesn't want an isolated pocket of land stuck in the middle of his land as shown in Exhibit D5. As I have said what the position of the NLTB is I don't know. I asked counsel for the NLTB but he seemed unable to reply. I accept that the NLTB had good grounds for not accepting the settlement reached in the Magistrate's Court, because it could not be binding on NLTB or the first defendant. I accept that it had good grounds for querying Mr. Chang's first survey since it was based on incorrect knowledge of the facts. But why, having given Mr. Chang fresh instructions does it now wish to repeduate Mr. Chang's second survey because Mr. Chang only did what he was instructed to do by NLTB? I appreciate what Mr. Noakes said in evidence about divisions of land not being

viable propositions. I would think that the division of land envisaged in Exhibit D5 is not a viable proposition. But what is the alternative?

The first defendant would not be in a worse position than she was in before, and neither would the plaintiff except the extent that whereas before they lived in harmony and access never seemed to be a problem, now there is friction between the parties and access could present endless problems. But it would be quite unfair to take away from the plaintiff part of the ridge that he always thought of as his and give it to the first defendant, who never considered it to be hers until the NLTB gave her other ideas.

So far as the plaintiff's prayers are concerned, I cannot order that the plaintiff is entitled to the disputed area as being part of Approval N tice 4/7/2875, because clearly marginal plot 1/29 was not his and was apparently the first defendant's although she may not have been aware of it, and was being occupied by her. With regard to the first prayer I cannot order that the NLTB be restrained from taking what steps are necessary to confer on the first defendant a lease of the marginal plot 1/29. But the Court can and does order that NLTB be restrained from taking any steps to give title to the first defendant of any other land except as surveyed in Exhibit D5.

This is not a happy solution, but I hope that it is still not too late for the parties to sit down together and try to work out a more satisfactory solution for all concerned; and one that is fair to the plaintiff and the first defendant.

Question of costs to be subject of further argument.

LAUTOKA,
1st May, 1981

(sgd.) G. O. L. Dyke
Judge