

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 4 of 2013

BETWEEN : Housing Authority

PLAINTIFF

AND : Ilisapeci Jiuta

DEFENDANT

COUNSEL : Mr. D Sharma with Ms. C Panikar for the Plaintiff
Ms. S Kunatuba for the Defendant

Date of Judgment : 22 August 2013

JUDGMENT

1. The Plaintiff, Housing Authority by its originating summons dated 10 January 2013, is seeking following orders:
 - i. *A declaration that the Defendant, being the registered lessee of the land known as Lot 19 DP 5828 has deliberately and knowingly encroached on the adjacent land known as Lot 18 on DP No. 5828 and comprised in Housing Authority Lease No. 125252 by building a structure over a portion of the land in Lot DP 5828 without the consent or knowledge of the Plaintiff, the registered lessee of land in Lot 18 DP 5828.*
 - ii. *An order that the Plaintiff within a specified period of time remove the encroaching structure from Lot 18 DP 5828.*
 - iii. *An order that in the event that the Plaintiff fails to remove the encroachment within the time specified the Plaintiff and its agents are to be at liberty to remove the encroachment.*

- iv. Alternatively, that the Defendant be ordered to pay compensation to the Plaintiff in the sum of \$5,000.00 for the encroachment together with all associated costs to have the land resurveyed and a new sublease issued with the new land area and demarcated boundary line between Lot 18 and Lot 19 on DP 5828.*
 - v. Such further or other relief as seems just and equitable to this Honourable Court.*
2. Fantasha Angela Lockington, General Manager Customer Relations, of the Plaintiff filed an affidavit sworn on 9 January 2013, in support of summons.
 3. Ilisapeci Namuaira Jiuta, the Defendant in this case, filed an affidavit in response sworn on 19 March 2013 to the affidavit in support of summons.
 4. This matter was set down for hearing on 27 June 2013. Both counsel made oral submissions and filed written submissions thereafter simultaneously.

Plaintiff's Case

5. The Plaintiff was issued a special lease by the Director of Lands over crown lease 125252. The lease was issued over an area of 78 acres 3 roods and 8 perches for a term of 99 years commencing from 1 February 1971.
6. The Plaintiff subdivided the land in crown lease no. 125252 and started to sell off individual Lots to its customers.
7. The lands that are subject to this case are Lot 18 and Lot 19 of the subdivision known as the Daniva Road subdivision. The two blocks of land are specifically located at Lot 18 and Lot 19, Ura Place, Nasinu.
8. Lot 19 was transferred to the Defendant on 15 September 1987 and sometime thereafter, the Defendant encroached on to Lot 18 by building structure over a part of Lot 18. The Defendant's building onto Lot 18 an approximately 62.50square meters at Lot 18. Such encroachment was done without the prior consent or knowledge of the Plaintiff.
9. The Plaintiff states that the encroachment was done deliberately by the Defendant and she knew or ought to have known that Lot 18 was zoned as civic and no residential structure or part thereof should have been built.

10. By a letter dated 25 January 2012, the Defendant had written to the Plaintiff expressing an interest to buy the land in Lot 18. The Defendant has stated that she was prepared to pay the costs of rezoning of the community land.
11. There had been several correspondences between the Plaintiff and the Defendant on this matter.
12. On 17 July 2012, the Plaintiff advised the Defendant that it had no problem with selling but subject to certain conditions as the land needs to be rezoned to residential.
13. The Defendant by her email dated 27 August 2012 informed the Plaintiff to take in to account any proposed sale price the costs that she alleged to have incurred in maintaining the civic Lot since 1986. The Defendant wanted the Plaintiff to deduct \$5,600.00 from the sale price. On 29 August 2012, the Plaintiff emailed the Defendant for proof of maintenance cost of \$5,600.00.
14. On 3 September 2012, and 11 September 2012 the Defendant emailed the Plaintiff and ask for a copy of the title and a letter of offer as she needed them to arrange a loan from Bank of South Pacific.
15. On 15 September 2012, the Plaintiff emailed and informed her that a few matters had to be sorted out.
16. The Plaintiff had not issued the letter of offer to the Defendant although there were several correspondences between two parties.
17. On 24 September 2012, the Plaintiff advised the Defendant that the property in issue had been allocated to build a house for Iliesa Delana.
18. The Plaintiff by its letter dated 15 October 2012 informed the Defendant that the current valuation of the encroached area is \$5000.00 and asked to pay for the encroachment area and costs for altering the titles or otherwise to remove the encroachment and restore the land.

19. The Plaintiff states that the Defendant neither compensated the Plaintiff for the encroachment nor removed the same despite several requests.
20. The Plaintiff further states that due to unsatisfactory conduct on the part of the Defendant, the Plaintiff is unable to issue the sub lease to Iliesa Delana.
21. The Plaintiff relied on Section 109 of the Property Law Act which deals with encroachments for the recovery of the encroached area in Lot 19.

The Defendant's Case

22. The Defendant having admitted the encroachment asserts that said encroachment was not intentional or result of gross negligence, there is valid and enforceable contract between the Plaintiff and the Defendant for sale of purchase of Lot 18 Ura Place on DP 5828, and in breach of the said agreement, the Plaintiff has subleased in Lot 18 to a 3rd party, and finally that the Defendant has a reasonable basis for the legitimate expectation from the Plaintiff.

The Determination

23. The first issue for determination of the court is whether the Plaintiff is entitled to the relief sought, in term of Section 109 of the Property Law Act.
24. Section 109 of the Property Law Act provides:

(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 referred to as the encroaching owner) or by any of his predecessors in title, either the encroaching owner or the owner of the piece of land encroached upon any 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 or 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;

(4) Any order under the provisions of this section, may be made upon and subject to such terms and conditions as the court thinks fit, whether as to the payment by the encroaching owner or any other person of any sum or sums of money, or the execution by the encroaching owner or any other person of any mortgage, lease, easement, contract or other instrument, or otherwise;”

25. In careful examination of the above section, it is clear that the Plaintiff needs to establish that encroachment was intentional and not arise from gross negligence, encroaching building was erected the encroaching owner and whether it is just and equitable to grant relief sought by the Plaintiff.
26. Having considered the affidavit of the Defendant it is abundantly clear that the encroaching building was erected by the encroaching owner as the construction of the building work was begun by the Defendant and her late husband through a construction company in 1998.
27. The second issue which lies at the heart of this case is whether the encroachment is intentional and not arise from the gross negligence or not.
28. The Defendant in her affidavit deposed inter-alia that there was no ulterior motive or intention to encroach Lot 18 as it had taken place due to ignorance of their basic reading and understanding of maps, surveys, boundaries and pegs. She further deposed that she and her late husband trusted their building contractor in their house extension and it was the contractor subsequently brought to their attention that there was an encroachment. She further proceeds to state that it is the Defendant who brought to the notice of the Plaintiff as soon as she became aware of the encroachment for regularisation of the said encroachment through purchase of the entire Lot 18.

She has supported this position with several correspondences written by her in this regard to the Plaintiff.

29. It is clear that the Defendant after the encroachment has made genuine attempt to purchase Lot 18 which is declared as 'civic' zone. However the court is not inclined to accept her mere subsequent conduct alone to decide that the encroachment is not intentional. It is not disputed that the area of encroachment is 62.50 square meter. Area of encroachment is one of the material factors to ascertain whether the encroachment is intentional or not. If the extent of encroachment is smaller, court may come to a conclusion that encroachment could be accidental.
30. In this instant case, the Defendant was in possession of the properly demarcated survey plans and titles received from the Housing Authority. She knew or ought to have known boundaries of her Lot. She deposed that she has no knowledge of construction industry and gave a contract to a construction company to erect the house. Obviously, she needs to provide the approved or authorized plans to any contractors to commence a construction. She has not submitted or annexed any approved plan received from a relevant authority. The failure of the Defendants to submit approved plans to demonstrate to court that construction was done unintentionally would necessarily draw an adverse inference against the Defendant. In my view, the approved plan for a construction is a material document. She further deposed that it is the contractor who had encroached and it is the constructor who brought to their notice about the encroachment. No affidavit from the contractor to support her assertion.
31. Considering all the above circumstances court is of the view that the encroachment is intentional and not arise from gross negligence and not otherwise.
32. The Defendant also asserts that there is valid and enforceable contract constituted in considering the correspondences exchanged between parties.

It transpired from the documents and the correspondences submitted to court along with the affidavits that there was an offer to the Defendant for an acceptance. However it appears that, instead of accepting the offer of Housing Authority, the Defendant has made a counter offer to the Plaintiff. As per the letters and emails send by the Plaintiff, the court is unable to find any letter or email which constitutes as a letter of acceptance of the counter offer. It is further observed that the Defendant was awaiting the rezoning of the Lot 18 and the costs for rezoning from the Plaintiff. Thus, I conclude that there was no formation of a valid and enforceable contract between parties.

33. This court also opined that in the event of the allocation of the Lot 18 to the 3rd party by the Plaintiff, the remedy for an alleged breach of the agreement for the Defendant is damages or the specific performance which needs to be considered in a separate and distinct action morefully by way of Writ of Summons.
34. In terms of Section 109 of the Property Law Act, I hold that the Defendant has failed to submit any valid or accepted grounds for relief.

Final Orders

- a. The Defendant shall pay compensation to the Plaintiff in a sum of \$5,000.00 for the encroachment together with associated costs to have the land surveyed and a new sublease issued with the new land area and demarcated boundary line between Lot 18 and Lot 19 on DP 5828, within 60 days from this judgment.
- b. In the event that the Defendant fails to pay as per the order (a), Defendant is ordered to remove the encroaching structure from Lot 18 on DP 5828, within 21 days after the expiration of 60 days from this judgment.

- c. In the event that the Defendant fails to remove within the time period stipulated above, Plaintiff and/or its agents are at liberty to remove the encroachment.
- d. The Defendant is ordered to pay for the costs of the demolition and removal of the structure after 7 days from demolition and removal.
- e. The Defendant shall pay the Plaintiff costs summarily assessed in a sum of \$1,000.00.
- f. Parties are at liberty to apply.

Susantha N Balapatabendi
JUDGE