

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

**CIVIL APPEAL NO. HBA 1 OF 2022.**  
**M.C.Lautoka Civil Case No-87/2018**

**BETWEEN** : **MAHENDRA SHARMA** of Naikabula, Lautoka, and Businessman  
**1<sup>st</sup> APPELLANT**  
**(ORIGINAL 1<sup>ST</sup> PLAINTIFF)**

**AND** : **MAHENDRA SHARMA** of Naikabula, Lovu, Lautoka, in the Republic of  
Fiji, Businessman, as the Administrator in the **ESTATE OF RAJENDRA**  
**SHARMA** late of 153 triangle Road, Massey, Auckland, New Zealand,  
Builder Intestate and in propria persona  
**2<sup>ND</sup> APPELLANT**  
**(ORIGINAL 2<sup>ND</sup> PLAINTIFF)**

**AND** : **MOHAMMED IBRAHIM** of Naikabula, Lautoka and/ or the Occupants  
upon Asdullah Khan's Property  
**1<sup>ST</sup> RESPONDENT**

**AND** : **HASMAT KHAN** of Naikabula, Lautoka and/ or the Occupants upon  
Hasmat Khan's Property  
**2<sup>ND</sup> RESPONDENT**

**AND** : **SHAFIQ KHAN** of Naikabula, Lautoka and/ or the Occupants upon  
Safiq Khan's Property  
**3<sup>RD</sup> RESPONDENT**

**AND** : **ITAUKEI LAND TRUST BOARD** a body corporate duly constituted  
under the iTaukei Land Trust Act Cap 134.  
**4<sup>TH</sup> RESPONDENT**

**BEFORE** : Hon. Mr. Justice Mohamed Mackie

**APPEARANCES** : Mr. M. Kumar, for the 1<sup>st</sup> Plaintiff.  
: 1<sup>st</sup> to 3<sup>rd</sup> Respondents appear in person.  
: Mr. Ratule K, for the 4<sup>th</sup> Defendant

**DATE OF JUDGMENT** : 12<sup>th</sup> February, 2024

## **JUDGMENT**

### **A. INTRODUCTION:**

1. This is a timely Appeal preferred by the Plaintiff-Appellant ("the Appellant") on 29<sup>th</sup> December 2021, with the Notice of Intention of Appeal being filed on 17<sup>th</sup> December 2021, against the Ruling pronounced by the learned Resident Magistrate (the Magistrate) of Lautoka on the 15<sup>th</sup> December 2021.
2. By the impugned Ruling, the Magistrate had made the following Orders;
  1. *That the application to strike out the action is granted on the basis that the Court has no jurisdiction.*
  2. *The Plaintiff is to pay costs to the 4<sup>th</sup> defendant summarily assessed at \$500.00.*

### **B. BACKGROUND HISTORY:**

3. The Appellant on 21<sup>st</sup> August 2018 filed his writ of Summons and the Statement of Claim at the Magistrate's Court of Lautoka against the 1<sup>st</sup> to 4<sup>th</sup> Defendant-Respondents ("the Respondents") seeking the following reliefs:
  1. *An Order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants do forthwith remove the present fence constructed beyond their lawful boundaries at their own cost.*
  2. *An Order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants do forthwith remove all structures , buildings, obstructions erected beyond their lawful boundaries at their own cost.*
  3. *An Order that 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be restrained from interfering with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' erection of a fence along their lawful boundaries.*
  4. *An Order that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs be authorized to enter upon and remain on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' lease hold and remain thereon to carry out necessary erection of a proper fence along the lawful boundary.*
  5. *An Order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally pay all costs of removal and clearance of the offending structures and together with the costs of erection of a proper fence along the lawful boundary.*
  6. *An Order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally pay reasonable compensation for the loss of use of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs' property by the construction of the illegal fence and such compensation to be paid within the jurisdiction of the Magistrate Court.*
  7. *An Order that the 4<sup>th</sup> Defendant at its own expenses take all necessary steps to confirm the lawful boundary between the parties leasehold.*
  8. *An Order that the Defendants jointly and severally pay costs of these proceedings.*

### **Application for Strike Out:**

4. When the action was to continue in normal way, the 4<sup>th</sup> Defendant, having filed the Notice of Intention to Defense on 5<sup>th</sup> June 2019, subsequently filed a Notice of Motion on 12<sup>th</sup> July 2019, along with an Affidavit in support sworn by CEMA ROKOMATU, Senior Estate Officer, seeking reliefs, inter alia, to have the claim struck out alleging it is an abuse of process pursuant to Order 18 Rule 18(1) (d) of the High Court Rule 1988 and under inherent jurisdiction of the Court.
5. The Magistrate, after entertaining written submissions from the Plaintiff and the 4<sup>th</sup> Defendant, by his Ruling dated 14<sup>th</sup> August 2020 made the following orders:
  1. *The application by the 4<sup>th</sup> Defendant to strike out the claim is dismissed.*
  2. *The Plaintiff and the Defendants are ordered to file submissions on the issue whether this Court has jurisdiction to deal with the claim that has been filed in Court. Each party given 14 days to make submissions, simultaneously.*
  3. *No Orders as to Costs.*
6. By the said Ruling, apart from refusing to strike out the Claim as per the Application of the 4<sup>th</sup> Respondent, the Magistrate in the absence of an application on the part of any Respondent, and acting on his own motion went one step further and directed the parties to file written to decide whether his Court had the jurisdiction to deal with this claim.
7. Accordingly, after entertaining written submissions from the Appellant and 4<sup>th</sup> Respondent, the Magistrate on 15<sup>th</sup> December 2021 proceeded to make the impugned Ruling referred to in paragraph 2 above to strike out the Appellant's action, which contradicted his earlier Ruling made on 14<sup>th</sup> August 2020 (referred to in paragraph 5 above) by which he had refused to strike out.
8. As a result, there are two conflicting Rulings made by the same Court on the same striking out application preferred by the same defendant pursuant to Order 18 Rule 18 (1) (d) of the High Court Rules 1988.

### **C. GROUNDS OF APPEAL:**

9. Aggrieved by the above Ruling dated 15<sup>th</sup> December 2021, the Appellant has filed this Appeal on 6 grounds of Appeal, out of which, in my view, grounds 1, 2 and 4 are meritorious enough to dispose this Appeal. I shall not proceed to consider the grounds 3 and 5 as I have my reservation whether the Magistrate should have considered the matters therein, when he was called up on to decide the matter only under section 20 of the Fencing Act.
10. I shall leave out the ground 6 as well since the leading of both oral and documentary evidence need not have, necessarily, warranted the decision in favor of the Appellant as averred in the said ground of Appeal No-6. Further, since the issues herein are already

decided or to be decided by the Supreme Court, I am of the view that this Court should not delve into it.

11. I shall reproduce the grounds of Appeal 1 to 6 as follows for the sake of clarity and easy reference.

1. The learned Magistrate erred in law and in fact in dismissing the 4<sup>th</sup> Respondent's application to strike out the Appellant's claim and then striking out the Appellant's claim on irrelevant and unsupported basis.
2. The learned Magistrate erred in law and in fact in dismissing the Appellant's claim on a misconceived basis that is the Appellant's claim was based on equity and not on an Application of a statutory provision, namely the Fencing Act.
3. The learned Magistrate erred in law and in fact in dismissing the Appellant's claim when there was no evidence from the Respondents that any survey Plan and not necessarily that Appellants would have shown that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents had encroached on the Appellant's property.
4. The learned Magistrate erred in law and in fact in dismissing the Appellant's claim on an erroneous basis.
5. The learned Magistrate erred in law and in fact in dismissing the Appellant's claim when there was no correct survey forthcoming from the 4<sup>th</sup> Respondent to challenge the Appellant's survey.
6. The learned Magistrate erred in law and in fact in dismissing the Appellant's claim prematurely that is without the reception of oral and documentary evidence, which would have found a case in favor of the Appellant under the Fencing Act.

**D. ANALYSIS AND DETERMINATION:**

12. At the brief hearing held before me, learned Counsel for the Appellant made oral submission, in addition to the contents of the written submission filed, particularly stressing on the 1<sup>st</sup> ground of Appeal. Learned Counsel for the 4<sup>th</sup> Respondent, having considered the current issue before the Court highlighted by the Counsel for the Appellant, intimated that the intervention of this Court may be warranted for the Appellant's Appeal to be considered favorably and the substantial matter to be duly dealt with by the Magistrate.
13. As alluded to by me in paragraph 8 above and submitted by the Counsel for the Appellant, the Magistrate, who dismissed the Application for Strike Out on 20<sup>th</sup> August 2020, could not have revived the same Application again and allowed it by his subsequent Ruling made on 15<sup>th</sup> December 2021. Thus, the ground 1 should succeed.
14. What the Magistrate was expected to perform was to exercise his jurisdiction conferred under section 20 of the Fencing Act, and not to consider any other extraneous matters that he was not called upon adjudicate. After dismissing the Application for striking out on 20<sup>th</sup> August 2020, rightly or wrongly, he could have either proceeded to fix the matter for formal proof, as none of the Respondent had filed their statement of defense, or afforded them an opportunity to file the same and proceeded for trial.

15. As the 1<sup>st</sup> to 3<sup>rd</sup> Respondents were without any legal representation and all the Respondents were mainly focusing on the Striking out Application preferred by the 4<sup>th</sup> Respondent, before the Magistrate, the most prudent next step after dismissing the said striking out application, in my view, was to afford them an opportunity file their statement of defense in order to proceed for trial. However, liberty of giving an opportunity to file statement of defence should be left in the hands of the Magistrate, who hears the substantial matter.
16. Further, even if a party moves to decide the matter on a preliminary issue like the question of jurisdiction, always it is prudent to decide such a matter after taking the evidence at the trial proper, in order to avoid any possible miscarriage of justice.
17. Learned Magistrate has clearly erred, not only, by striking out the action on a non-existent striking out Application, but also by proceeding to decide on the question of jurisdiction, on his own move, and dismissing the action in the absence of any evidence and an Application by the Respondents to that effect.
18. Accordingly, I decide to allow the Appeal by setting aside the Ruling dated 15<sup>th</sup> December 2021 and direct the matter to be heard by another Magistrate, who is left at liberty to decide whether to allow the Respondents to file their Statement of Defence or not, considering the overall circumstances.

**E. FINAL ORDERS:**

1. The Appeal is allowed.
2. The impugned Ruling pronounced by the learned Magistrate of Lautoka on 15<sup>th</sup> December 2021 is hereby set aside.
3. The matter be heard and disposed by another Magistrate of Lautoka as expeditiously as possible.
4. No costs ordered and the parties will bear their own costs.
5. The original case record, along with a copy of this judgment, be dispatched to the Magistrate's Court of Lautoka forthwith.
6. These Orders be sealed and served on the Respondents.

  
**A.M. Mohamed Mackie**  
Judge



**At the High Court of Lautoka on this 12<sup>th</sup> day of February, 2024.**

**SOLICITORS:**

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| <b>For the Appellant:</b>                            | <b>Messrs Fazilat Shah Legal, Barristers &amp; Solicitors</b> |
| <b>For the 4<sup>th</sup> Respondent:</b>            | <b>In-house Solicitors for T.L.T.B.</b>                       |
| <b>1<sup>st</sup> to 3<sup>rd</sup> Respondents:</b> | <b>Appear in person.</b>                                      |