

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. **HBC 184** of 2022

BETWEEN : **JOHN O'CONNOR** and **ILISEVA KAHAMIYA O'CONNOR** both of Lot 3,
Panoramic Road, Lami, Suva, Chief Executive Officer and Nurse respectively.
PLAINTIFFS

AND : **HASMAT ALI** of Lot 2, Panoramic Drive, Veisari, Lami, Suva, Occupation
unknown.
DEFENDANT

BEFORE : **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Ms. Devi V.** for the Plaintiff

Mr. O'Driscoll G. for the Defendants

DATE OF DECISION: 12th June, 2025

DECISION

[Leave to Amend Plaintiff's Statement of Claim]

A. Introduction

1. The Plaintiffs sought for the Leave to Amend its Statement of Claim filed on 01st June 2022 with costs.
2. The application is made pursuant to **Order 20 Rule 5 of the High Court Rules, 1988**.
3. The Defendant did not file and serve any response to the Plaintiff's Affidavit in Support. However, opposed the application and made oral argument and submissions instead.

B. The Law

4. **Order 20 Rule 5** has given the Court's discretionary powers to allow the Plaintiff and/or any other party to the proceedings to seek an amendment to their pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct.
5. In **Ketteman and Others v Hansel Properties Ltd** (1988) 1 All ER 38, Lord Keith of Kimkel observed that:

"The rule is that, amendments should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of cost."
6. Hence, a wider objective approach of allowing the parties to the proceedings to present and put forward their real issues clearly in dispute is the founding principle in order to determine an application in such nature, however, it must be subjected to the issue of prejudice caused to the other party.

C. Determination

7. The substantive issue that is impending before this court for hearing and determination is that of 'Encroachment'.
8. Parties are neighbors and the Plaintiff's and Defendant's property are situated side by side and share a common boundary.
9. The Plaintiff's contention is that the Defendant has constructed a wall [fence], at the rear of his Lot 2 and has encroached on the Plaintiff's property by an area of 1.5 square meters.
10. The Plaintiff further contends that the Defendant was negligent on failing to observe the boundary perimeters, thus encroaching onto Lot 3 on DP 6177 of which the Plaintiffs are proprietors of.
11. The Defendant provided the Survey Report from Wood and Jepson Consultants which showed no encroachment onto the Plaintiff's property.

12. Subsequently, the Plaintiff filed a Summons and sought for an order for the appointment of an Independent Registered Land Survey to carry out boundary redefinition of CT No. 25326 Lot 3 on DP 6177 and CT No. 35525, Lot 2 on DP No. 8191 accordingly.
13. The Ministry of Lands Independent Survey Report showed encroachment by 3m² and not 1.5m² after carrying out boundary redefinition on both pieces of property CT No. 35525 on Lot 2 on DP 8191 and CT No.25326 on Lot 3 on DP 6177.
14. The pleadings in the within action was closed and the Independent Survey Report, that was sought and received was some 07 years months after. Due to the survey report not received in time, the Statement of Claim was filed with an encroachment of 1.5m² then. The area of 3m² encroachment (on the latest survey report) could not be pleaded then, and will now form part of evidence.
15. The amendment now sought by the Plaintiffs to its Statement of Claim is on the basis of the survey report dated 09th February 2023 received some 07 months later showing encroachment of 3m² obtained by the parties through a consent order and will form part of evidence at trial proper.
16. Therefore, upon a further consideration of the material fact that of the Independent report obtained by parties consent order from the Ministry of Lands Survey encroachment report showing a 3m² encroachment onto the Plaintiff's property, that I am prompted to accede to the summons filed by the Plaintiff for the amendment of its Statement of Claim.
17. In the interest of Justice and there being no prejudice caused to the Defendant and since the amendment sought would not result in any injustice to the Defendant not capable to being compensated by an award of costs, therefore, the Plaintiff's Summons for amendment sought herein succeeds accordingly.

D. Costs

18. The parties made oral submissions, written submissions and argued the issue of 'Amendment' of the Plaintiff's Statement of Claim.
19. It is only just and fair that the Plaintiff is entitled to costs in the circumstances.
20. I accordingly grant an order for a summarily assessed costs of \$2,000 to be paid within 14 days by the Defendant to the Plaintiff.


E. Orders

- (i) The Plaintiff's Summons seeking for an order for amendment of its Statement of Claim succeeds and is accordingly allowed.
- (ii) The 'amended' Statement of Claim to be filed and served to the Defendant within 21 days timeframe.
- (iii) The Defendant to pay the Plaintiff summarily assessed costs of \$2,000 within 14 days timeframe.

(iv) Matter adjourned and returnable for Mention only.

Dated at Suva this 12th day of June ,2025.




VISHWA DATT SHARMA
PUISNE JUDGE

cc. Lajendra Lawyers
O'Driscoll & Co.