

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 203 of 2022

BETWEEN : **RAHMAT ALI and AKROOM BI aka AKRUM BI** as the
Executors and Trustees in the Estate of Sultan Begg of Pritam
Singh Road, Makoi, Nasinu, Fiji, Retired and Domestic
Duties, respectively.

PLAINTIFFS

AND : **MUKUTAR ALI** of Waila, Nausori, Nasinu, Fiji, Occupation,
Unknown

1st DEFENDANT

AND : **MOHAMMED SALMAN KHAN** of Waila, Nausori, Nasinu,
Fiji, Occupation unknown.

2nd DEFENDANT

Coram : **Banuve, J**

Counsels : **Sairav Law for the Plaintiffs**
Legal Aid Commission for the Defendants

Date of Hearing : **19 June 2024**

Date of Ruling : **26 June 2025**

RULING

A. Introduction

1. The Plaintiff filed an Amended Originating Summons on 28th February 2023 supported with the Supplementary Affidavit of Rahmat Ali deposed on 20th April 2023.
2. In the Summons the following orders are sought from the Court;
 - (i) ***THE Defendants immediately remove the fence blocking the access way onto the Plaintiff's land bearing description:***
 - a. All that piece of parcel of land known as "Davuilevu" being part of Lot 5 on DP No 7003 being CT No, 27194 allocated as Lot 13 containing an area of approximately 461 square meters situated in the District of Naitasiri.***
 - (ii) ***FOR an order that the cost of this application be paid by the Defendants on an indemnity basis.***
 - (iii) ***FOR such other order or orders this Honorable Court deems fit to make in the circumstance of the case***
3. The Plaintiffs are the Executor and Trustee of the Estate of Sultan Begg, who had entered into an Agreement for Lease with Mohammed Shamim for Lot No 13, being part of Lot 5 on DP No 7003, CT No 27194 for 99 years from 18/1/2001.
4. Stamp duty was paid and the Agreement was registered
5. The said lot is served by an access road and the Defendants who have lots in the immediate area also use the said access road.
6. The Defendants erected a fence on part of the access road to their property in 2019. The Plaintiff had reported the matter to the Police, however the fence remains

7. The fence is causing obstruction of passage which leads to the Plaintiff not accessing his property.

B. The Defendants Position

8. Like the Plaintiffs,¹ the Defendants purchased lots 11² and 12³ from the registered proprietor Mohammed Shamim, prior to his demise in 2017. His widow, Amina is in the process of applying for the grant of probate in the Estate of Mohammed Shamim.
9. None of the lots allocated to the respective parties have been issued with individual titles, rather they are all covered by the head title CT 27194, Lot 5 DP 7003, still held in the name of the late Mohammed Shamim, pending the grant of probate to the executor of his estate.
10. The Plaintiffs grievance is that normal access to his land described as Lot 13, has been blocked because the Second Defendant, Mohammed Salman Khan the owner of Lot 12 has built a fence on his property, which blocks the Plaintiff's passage on the common access road, to his property.

C. Analysis

11. The Court notes that the Plaintiffs do not make any attempt to identify the specific provision in the *Property Law Act* [Cap 130], on which the Amended Originating Summons, filed on 28 February 2024,⁴ is premised.
12. Both parties have filed written submission which the Court has noted, although the Plaintiffs, again do not elaborate in their submissions which provision of the Property Law Act they seek relief under.
13. The Defendants in their submissions have helpfully discussed section 109 of the Real Property Act which appears in Part X entitled '*Easements, Encroachments and Mistake*'. This provision appears also in the laws of certain Australian states

¹ Agreement dated 18 September 2001 over Lot 5 DP 7003 CT 27194 allocated as **Lot 13**, area of 461 sqm

² Agreement dated 22 May 2001 over Lot 5 DP 7003 CT 27194 allocated as **Lot 11**, area of 490 sqm

³ Agreement dated 20th October 2014 over Lot 5 DP 7003 CT 27194 allocated as **Lot 12**, area of 490 sqm

⁴ Nor was this done in the Originating Summons filed on 23 June 2022

such as the *Property Law Act 1969 (WA)* s 123, covering encroaching buildings as well as cases of mistake as to the identity of land.⁵

14. The Defendants contend that the Plaintiffs grievance that the gate which the Second Defendants built on the frontage of his land, adjoining the common access road, constitutes an encroachment to his estate or interest in Lot 13 in accordance with section 109-(1) of the *Property Law Act* [Cap 130]. The relevant provision states;

Power of court to grant special relief in cases of encroachment

109-(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 as the piece of land encroached upon), whether the building was erected by the owner of the first-mentioned land (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 may 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.

15. Whilst the Court finds the Defendants submissions helpful in relation to their reference to relevant provisions in the *Land Transfer Act 1971*, they do not find their reference to section 109 of the *Property Law Act*, apposite to the case pursued by the Plaintiffs, for the following reasons;

- (i) The *Property Law Act* [Cap 130], consolidates the law relating to property, and incidental purposes, such as the resolution of boundary encroachment disputes between adjacent property owners. Section 2 of that Act defines 'owner' to mean the owner of any property or any estate or interest therein and includes proprietor, to denote the person who for the time being is registered as the proprietor of land subject to the provisions of the *Land Transfer Act*.

⁵ Sackville & Neave '**Australian Property Law**' 12TH ED, Lexis Nexis Australia, 2025, paragraph 1.113, p 80

- (ii) Section 109 of the *Property Law Act* [Cap 130], deals therefore with the resolution of boundary encroachment disputes between registered owners of land, subject to the provisions of the Land Transfer Act, as clarified in section 37⁶ of that Act which appears in Part V, entitled '*Effect of Registration*'. This is confirmed by the authority relied on by the Defendants –*Pratap Singh v Prasad & Nasinu Town Council* –Civil Action No. HBC 149 of 2020.
16. The Plaintiffs are not the '*owners*' of the land known as "Davuilevu," on DP 7003, CT 27194 allocated as Lot 13, as that term is defined in the Property Law Act, as they have not obtained a separate registered title to that land to assert property rights, or purposes incidental to it, such as asserting encroachment to the boundary of his property, as the basis for seeking relief under the Property Law Act.
17. Moreover, the dispute in this instance is not one concerning boundary as specified in section 109 of the Property Law Act, arising from the erection by the Defendants of a building⁷ which encroaches on adjoining land . Rather, the alleged encroachment relates to passage on the common access road.
18. The Court does not find that any private right of the Plaintiff infringed for it to intervene, pursuant to section 109 of the Property Law Act.
19. The right to use the common access road is one granted by the landlord to his tenants which includes the Plaintiffs and Defendants, in this instance, and it is expressly stated in clause 2 (j) of the standard Lease Agreement, for example, that the Landlord may re-align or deviate the access road through any other lots, for any reason of development, if required in future.
20. Until the Plaintiffs obtain registered titles to their land, their recourse for the resolution of disputes over the common road access to their land does not lie in the Property Law Act, but in the Lease Agreement, and must depend on their convincing the landlord, (the executor or the administrator of the Estate of

⁶ 37. No instrument until registered in accordance with the provisions of this Act shall be effectual; to create, vary, extinguish or pass any estate or interest or encumbrance in, or over any land subject to the provisions of this Act, but upon the registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.

⁷ The word '**building**' in s 109(1) of the Act is not confined to building in the strict sense but extends to everything necessary to the integrity and usability of the structure-*Patel v Narayan* [2008] FJHC 46

Mohammed Shamim), that they have a justifiable grievance that may warrant re-alignment or deviation of the access road, for example, to address their concerns.

ORDERS:

- 1. The Amended Originating Summons filed on 28th February 2023 and the relief sought therein are refused and dismissed in its entirety.**
- 2. Parties to bear their own costs.**



Savenaca Banuve
Savenaca Banuve
Judge

Dated this 26th day of June, 2025.