IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU 0063 of 2015
(High Court of Fiji Civil Action No. HBC 288 of 2011)

BETWEEN : **JOSESE LITIDAMU OF TOKATOKA DAKUIBAITABU**

Appellant

AND : **iTAUKEI LAND TRUST BOARD**

1st Respondent

AND : **HEAVEN ON EARTH IN KADAVU LIMITED**

2ND Respondent

AND : **iTAUKEI LAND AND FISHERIES COMMISSION**

3rd Respondent

Coram : **Basnayake JA**
Prematilaka JA
Jameel JA

Counsel : **Mr. T. Bukarau for the Appellant**
Ms. L. Komai Tai for the 1st Respondent
Ms. R. Lal for the 2nd Respondent
Ms. T. Baravilala with Ms. O. Solimailagi for the 3rd Respondent

Date of Hearing : **22 August 2017**

Date of Judgment : **14 September 2017**

JUDGMENT

Basnayake JA

[1] This is an appeal against the judgment of the learned High Court Judge dated 13 July 2015 declining the relief sought by the appellant (plaintiff) by way of originating summons dated 15 September 2011. The appellant *inter alia* sought a declaration that the leasing (of the land called "Naivakasosoicake" being an encumbrance, belonging to the appellant,) is *ultra vires*, void and of no effect. By this judgment the learned Judge whilst dismissing the appellant's action, held that the 1st respondent had acted diligently and in good faith in administering its duties as trustees and the "Muaidule" lease entered into between the 1st and the 2nd respondents on 1 April, 2004 is valid and binding.

[2] The appellant had filed this case in a representative capacity, on behalf of the owner, Tokatoka Dakuibaitabu, Mataqali Baitabu of the Yavusa Vunivetau in the province of Kadavu. The summons was accompanied by an affidavit of the appellant. The appellant states that they are the traditional owners of the land called, "Naivakasosoicake", in extent 1 acre and 2 roods as per the Register of Native Lands (pg. 31-2 of the Record of the High Court (RHC)). This land is registered as an encumbrance of a larger land of 498 acres, owned by Mataqali Naivilaca and delineated marked lot No. 15 in plan P/11,4 (pgs. 34, 44-46 of RHC).

[3] The appellant claims that on 1 April 2004, the 1st respondent (iTLTB) leased to the 2nd respondent a land called "Muaidule" on an agreement of lease (pg. 35-43 RHC). The appellant claims that the land owned by them and known as "Naivakasosoicake" has not been included in this agreement. The land covered by this agreement was 14.3256 hectares or 35 acres, 1 rood and 23 perches. The owners of this land are Mataqali Qara, Mataqali Naitena, Mataqali Sauma and Mataqali Naivilaca. This land called "Muaidule" is on the map (plan) at page 44 of RHC. This map was prepared on 26 November 2003.

[4] The appellant claims that the 1st respondent had increased the extent of this land by annexing the land called "Naivakasosoicake" belonging to the appellant, in a map prepared on 19 April 2004 (page 46 of the RHC). Thus the land area of "Muaidule" had been increased to 16.7568 hectares or 41 acres 1 rood and 11 perches. The extent of "Muaidule" had been enlarged by 2.4252 hectares or 5.99 acres. The appellant claims that the appellant's land is caught up with this enlargement. The appellant complains that this annexure was without their consent.

The grounds of appeal

[5] In the Notice of Appeal, 12 grounds of appeal have been mentioned. However, the learned counsel did not address court on each ground as some are overlapping. Hence I do not wish to go over each and every ground. In a nutshell, the main or rather the only ground of appeal is whether the learned High Court Judge erred in law by considering the acceptance of payment by the appellant's brother from a member of Mataqali Naivilaca on account of Muaidule lease as amounting to "consent" under section 17 (1) of the iTaukei Land Trust Act (iTLTA). In terms of section 17, there cannot be a de-reservation without the consent of the owner. The appellant's complaint is that the de-reservation was done without his consent. The learned Judge dismissed the appellant's action on the ground that the appellant had waived consent by accepting payment.

The Judgment

[6] The learned Judge first summarized the plaintiff's case. He stated that the plaintiff alleged that the 1st respondent (iTLTB) had leased their reserved native land to the 2nd respondent without obtaining the consent of members of their proprietary unit. The 1st respondent stated that according to the records maintained by the 3rd respondent (iTaukei Land and Fisheries Commission) the owner of the disputed land is Mataqali Naivilaca and not Tokatoka Dakuibaitabu. The 1st respondent had obtained the consent of Mataqali Naivilaca to de-reserve the land.

[7] The learned Judge said that according to the plaintiff the increased area (lot 15) belonged to Mataqali Naivilaca, who had donated the land claimed by the plaintiff as a "Kanakana" for the use and maintenance of the plaintiff's land owning unit (LOU). A sum of $1500.00 was given by Jolome Tumate of Mataqali Naivilaca to the plaintiff's brother, Laisasa Sau, in the early part of year 2004 as the lease monies of the "Muaidule" lease.

[8] The learned Judge said that the 1st respondent in reply said in his affidavit that the 3rd respondent's final report does not make any reference to the plaintiff's LOU. The report expressly states, that lot 15 belongs to Mataqali Naivilaca. The 1st respondent had sought the consent of the Mataqali owners whose names contained in the Final Report. The 1st respondent further said that when the signatures were verified at its office, the 3rd respondent did not inform the 1st respondent that a "Kanakana" was donated to the plaintiff LOU.

[9] The learned Judge had observed that, according to an affidavit of the 2nd respondent, even the survey was done by a surveyor nominated by the 2nd respondent. Further the 2nd respondent had advised the 1st respondent that the total land surveyed was closer to 40 acres and not 25 acres. The 2nd respondent further added that the 1st respondent on 20 February 2003 provided the 2nd respondent with the terms for Muaidule lease for 44.29 acres. The 2nd respondent stated that the 2nd respondent faced problems with the appellant's LOU. The 2nd respondent had stated in their affidavit that the appellant's land was necessary for the operation of its resort.

[10] The 1st respondent stated in reply that it had obtained the consent of the majority of the members of Mataqali Qura, Naikua, Sauma and Naivilaca, to de-reserve the land. The 1st respondent stated that the records held by the 1st respondent's Reserve Department clearly showed Mataqali Naivilaca as the owner of lot 15. The 1st respondent stated that it is the responsibility of the 3rd respondent to ascertain the ownership. However, the learned Judge also made reference to a letter by the 1st respondent to the 2nd respondent dated 31 March 2004 with regard to the inclusion of Tokatoka Dakuibaitabu and Tokatoka Naocovonu for crop compensation of the leased land.

[11] The learned Judge had observed that the plaintiff's name had not been registered as native land owners in a *Vola ni Kawa Bula* (**Mataitoga v NLTB** [2007] FJHC 147). The learned Judge further said that the 1st respondent had taken up the position that the de-reservation was done in terms of section 17. The learned Judge had also observed a letter dated 31 March 2004 addressed by the 1st respondent to the Accountants of the 2nd respondent that the 3rd respondent had *confirmed to the 1st respondent that Mataqali Baitabu's (appellant) encumbrance on Mataqali* Naivilaca's land (lot 15) was to be considered as a land owner. The letter states that the compensation payable to Mataqali Baitabu was assessed at $2794.32.

[12] The learned Judge's conclusions are found in paragraphs p, q and r of the judgment which I have reproduced;

> "p. *The affidavit in support of the plaintiff avers that a sum of $1500.00 was given by a member of Mataqali Naivilaca to a member of the Tokatoka Dakuibaitabu, in early 2004, as monies of the "Muaidule" lease. One of the reliefs claimed by the plaintiff is that monies received by his land owning unit be refunded to the first defendant.*
> *q. In my view, the Tokatoka Dakuibaitabu, by accepting the monies waived its rights to take up the position that its consent was not obtained for de-reservation of its kovukovu.*
> *r. In my judgment, Tokatoka Dakuibaitabu by its conduct, acquiesced and concurred with the 1st defendant to the grant of the lease to the 2nd defendant"* (emphasis added).

Thus the learned Judge dismissed the appellant's action.

Submission of the learned counsel for the appellant

[13] The learned counsel for the appellant submitted that by a resolution the 1st respondent had approved an area of 17.9235 hectares to be excluded from the Native Reserve for the purpose of leasing it out to the 2nd respondent for tourism purposes. The gazette notification has been reproduced in the judgment which is as follows:-

Gazette of 17 November 2003

Notice is hereby given that at it's 362nd meeting held on 23rd October 2003, at Lautoka, the Board approved by resolution, the following land parcels to be excluded from native reserve on stipulated terms:

In the province of Kadavu

1. *An area of about 17, 9235 hectares (subject to survey) owned by mataqali Qara (TT 172), Mataqali Naitena (TT 173, 174) of Yavusa Naitena, Mataqali Saumua (TT 175, 176), Mataqali Naivilaca (TT 177, 178) of Yavusa Lenisau of the village of Drue, District of Sanima found on **Lots 1, 2, 3, 4 and 15** on NLC Sheet Reference P/11, 4 for a term of 60 years from 1st January, 2003, to be leased to Muaidule Sunset Beach Resort for tourism purposes.*

[14] The learned counsel submitted that part of lot 15 is the appellant's land called "Naivakasosoicvake" which had been included into this gazette notification. The learned counsel complained that by so doing the 1st respondent has failed to comply section 9 of the iTaukei Land Trust Act (iTLTA). The section with a heading, **Conditions to be observed prior to land being dealt with by way of lease or licence** is as follows:-

> **9.** ***No iTaukei land shall be dealt with by way of a lease or licence under the provisions of this Act unless the board is satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the iTaukei owners, and is not likely during the currency of such lease or licence to be required by the iTaukei owners for their use, maintenance or support.***

[15] The learned counsel submitted that the 1st respondent has failed to make inquiries whether the land is encumbered or not. The Registers are kept in the custody of the 3rd respondent. The learned counsel submitted that as required by section 17 of the iTLTA, the appellant's consent was not obtained for an exclusion. Section 17 (1) is as follows:-

> 17(1): ***The Board may, upon good cause being shown and with the consent of the itaukei owners of the land, exclude either permanently or for a specified period any portion of land from any itaukei reserve.***
>
> Sub sections (2) and (3) not reproduced.

Receipt of payment

[16] The learned counsel strenuously submitted that no payment was received by the appellant from the 1st respondent. The learned counsel admitted that a member of Tokatoka Dakuibaitabu, had received a payment by a member of Mataqali Naivilaca. The money received was retrieved from the member of Tokatoka and deposited in the Lawyers trust fund awaiting the outcome of this case. The learned counsel submitted that the distribution of rents and purchase money has to be done in terms of section 14 of the iTLTA. The relevant sub section is as follows:-

> *14 (1) Not reproduced. (2) Subject to the other provisions of this section, the purchase money received in respect of a sale or other disposition of iTaukei land, shall, after deduction therefrom of any expenses incurred by the Board in respect of such sale or other disposition, be either distributed in the manner prescribed or invested and the proceeds so distributed as the Board may decide. Sub sections (3) to (8) not reproduced as not relevant (*emphasis added*).*

The learned counsel submitted that the money paid does not come under section 14.

The submissions of the learned counsel for the 1st respondent

[17] Prior to the hearing, written submissions were filed only for the appellant. The learned counsel for the 1st respondent sought to file her submissions on the following day. Written submissions for the 1st respondent were filed on 24 August 2017.

[18] The learned counsel submitted that Table 1 of the index to Register of Native Lands in the Final Report had identified Mataqali Naivilaca as the Land Owning Unit and not Tokotoka Dakuibaitabu. It is the position of the 1st respondent that the 1st respondent had obtained the consent of the proper land owning unit.

[19] The learned counsel submitted that although the appellant has a registered encumbrance, no survey was done. Therefore the encumbrance is not registered in the name of the land owning unit in the Final Report. The Final Report was provided by the 3rd respondent.

The 1st respondent always relied on the Final report in the execution of duties concerning de-reservation. The learned counsel submitted that the 1st respondent is not required to examine the Register of Native Lands to ascertain ownership. The Final Report is contained in page 379 (Vol 11 RHC). The learned counsel relied on section 9 of the iTaukei Lands Act (Cap 133). The relevant portion of the provision reads as follows with the heading, "**Boundaries of land and names of owners to be recorded and surveyed**:

> 9 (1) ***In all cases in which the Commission decides the ownership of any land it shall record the boundaries of such land and in all cases in which the land is decided to be the property of an iTaukei it shall record the names of the persons comprising the proprietary unit in respect of that land".....***

[20] The learned counsel submitted that the fact that the encumbrance was not surveyed prevents Tokatoka Dakuibaitabu from being considered as an owner and hence was not listed in the Final Report. However a member of Tokatoka had received lease money from the 1st respondent. The appellant admitted that one of its members had received money. The learned counsel submitted that the fact that the money was received with the knowledge that it is money from the 1st respondent and on "Muaidule" lease amounts to a waiver.

[21] The 1st respondent's position is that the money paid by a member of Mataqali Naivilaca was a payment by the 1st respondent. The 1st respondent is relying on a note at page 408 (Vol II). According to this note a sum of $1800.00 was allocated to Tokatoka Dakauibatabu and Tokatoka Nasevovonu.

[22] The learned counsel submitted that the land that is subjected to the lease is owned by four Mataqalis namely, Mataqali Qara, Mataqali Naitena, Mataqali Saumua, and Mataqali Naivilaca. The encumbrance claimed by the appellant is in lot 15. The learned counsel submitted that the 1st respondent had obtained the consent of the owner of lot 15, namely of Mataqali Naivilaca. The 1st respondent is not required to obtain the consent of any encumbrance holder. However in the year 2002, there was an increase in the acreage from 25 acres to 40 acres at the request of the 2nd respondent (pg. 414 Vol. II). The 1st

respondent had agreed to this increase as the consent of the owner of lot 15, Mataqali Naivilaca had already been obtained. The encumbrance of the appellant was not in the 25 acre land.

[23] With the increase of the land area, the 3rd respondent having raised issues with regard to the ownership, the 2nd respondent was put on notice (pg. 371 Vol. II). The learned counsel for the 1st respondent submitted that there was pressure by the 2nd respondent and the other Mataqalis to the issue of this lease (pg. 371).

Submissions of counsel for the 2nd and the 3rd respondents

[24] The learned counsel for the 2nd respondent submitted in open court that the 2nd respondent is prepared to surrender the lease subject to payment of damages by the 1st respondent. The learned counsel further submitted that the land would be of no use if it is without the appellant's land being included in the lease.

[25] The learned counsel for the 3rd respondent admitted the appellant's ownership. The appellant's ownership was admitted in the High Court as well (pg. 545 Vol II). The learned counsel submitted that the appellant's encumbrance is registered in the Register of iTaukei Lands (pg. 31-32 RHC Vol 1). The learned counsel submitted that the 1st respondent examined the Register initially. However when the extent of the lease was increased, no search was done in respect of ownership. The learned counsel concedes that, consent of the appellant is required for de-reservation.

Legal Matrix

[26] Ownership of the appellant to the land called "Naivakasosoicake" is admitted by the 3rd respondent who is the holder of the Register of iTaukei Lands. The 3rd respondent also admits the requirement of consent from the owners for de-reservation under section 17 (1) of the iTLTA. The 1st respondent does not admit the appellant as owner for the reason that the appellant's name does not appear in the Index to Register of Native Lands in the

Final Report. The Final Report identifies Mataqali Naivilaca as the land owning unit of lot 15 and not the appellant.

[27] The 1st respondent also takes the view that the land claimed by the appellant has not been surveyed as required by section 9 of iTaukei Lands Act. At the same time the 1st respondent claims that a payment was made by the 1st respondent to the appellant on account of the lease entered with the 2nd respondent. The 1st respondent claims that this payment was made by the 1st respondent. While claiming that the appellant is not the owner, should the appellant be paid? Only iTaukei owners needs to be paid (section 17 (1) iTLTA). This indicates the recognition by the 1st respondent of the appellant's ownership. With the acceptance of ownership, the respondent needs the consent of the appellant for de-reservation. The appellant states that he never consented. The 1st respondent states that the appellant waived the consent that is required under section 17 of the iTLTA with the acceptance of payment. The 1st respondent also opined that consent of the appellant was not required as he is not an owner. Thus the 1st respondent has taken two contrasting positions.

[28] The 1st respondent could have found out the ownership of the appellant if a search was done with the 3rd respondent. The 1st respondent admitted to not doing a search. It is the 1st respondent's position that a search is not necessary. However the learned counsel reveals the truth for entering into the lease without a search. The agreement was hurried up due to pressure brought about by the 2nd respondent and the other Mataqalis. The expansion was done at the instance of the 2nd respondent. The survey was done by the 2nd respondent. The 2nd respondent admits the necessity of having the appellant's land included in the lease. According to the 2nd respondent the lease is of no use without the appellant's land. The appellant had been obstructing the inclusion of his land to the lease from the beginning. The appellant did construction work on the land and prevented the 2nd respondent from using it.

[29] The question is whether the appellant waived the requirement of consent that is needed under section 17 (1) of iTLTA. Does the acceptance of money amounts to a waiver? This is the reason for dismissal the of the appellant's action in the High Court.

[30] Prior to seeking cover under the "waiver", the 1st respondent should admit the ownership of the appellant. The 1st respondent denies the ownership of the appellant. In terms of section 17 (1) of the iTLTA, an exclusion could be done "**with the consent of the iTaukei owners of the land**". If the appellant is not accepted as an iTaukei owner, why should the 1st respondent seek his consent? The payment itself does not appear to have been done formally. There is no dispute that the appellant had immediately deposited that payment in a trust fund. That was in protest. This is the reason why the appellant sought a relief from the court to allow him to return this money. I am of the view that the 1st respondent has failed to obtain the consent of the appellant as required under section 17 of the iTLTA which is a fundamental condition precedent to de-reservation.

[31] Consent could be given only by the iTaukei owners. The 1st respondent's stand is that the appellant is not an iTaukei owner. If that is so, the appellant is not qualified to give consent. If he cannot give consent, he is unable to waive it. Therefore I am of the view that the learned Judge had erred in concluding that the appellant waived the consent. I conclude that the appellant has neither given his consent nor waived it. Hence the 1st respondent has failed to adhere to the law as required under section 17 (1) of iTLTA. The appellant has proved his ownership and with that he continues to be an iTaukei owner. There cannot be a de-reservation of his land without his consent. I am of the view that the lease entered into between the 1st respondent and the 2nd respondent is bad in law and is void and of no effect.

[32] The appellant instituted this action to have the lease agreement entered between the 1st and the 2nd respondents declared void and of no effect. The learned Judge has declined the appellant's relief and further declared that the lease is valid and binding. I am of the view that the learned Judge has erred in law by declaring the lease valid and dismissing the plaintiff's originating summons. Hence I set aside the judgment of the learned Judge

dated 13 July 2015 with costs in a sum of $5000.00 payable by the 1st and the 2nd respondents in equal share to the appellant.

[33] The appellant sought in the originating summons "*an order that all dues paid to the plaintiff by distribution from the Second Defendant through the 1st Defendant be refunded to the 1st Defendant for onward return to the 2nd Defendant*". I am of the view that this relief should be allowed. The appellant is allowed to settle the above payment with the 1st respondent within a period of 3 months from today. The appeal is allowed.

Prematilaka JA

[34] I agree with the reasons, findings and proposed orders of Basnayake JA.

Jameel JA

[35] I have read the draft judgment of Basnayake JA, and agree with the reasons, findings and proposed orders.

The Orders of the Court are:

1. *Appeal allowed.*
2. *The judgment of the High Court dated 13 July 2015 set aside.*
3. *The appellant is entitled to costs of this Court in a sum of $5000 payable in equal share by the 1st and the 2nd respondents.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL