

IN THE HIGH COURT OF FIJI

At Labasa

Civil Jurisdiction

CIVIL ACTION NO. 0072 OF 2000

Between :

<u>NATIVE LAND TRUST BOARD</u>	Plaintiff
- and -	
<u>THE ATTORNEY GENERAL OF FIJI</u>	First Defendant
<u>THE DIRECTOR OF LANDS</u>	Second Defendant
<u>THE DIRECTOR OF ROADS</u>	Third Defendant
<u>MINISTER OF WORKS AND INFRASTRUCTURE</u>	Fourth Defendant
<u>DIVISIONAL SURVEYOR NORTHERN</u>	Fifth Defendant
<u>BASIR KHAN</u> s/o Puran Singh	Sixth Defendant
<u>BASIR KHAN</u> s/o Puran Singh trading as <u>S.B. Holdings Ltd.</u>	Seventh Defendant

Counsel : Mr. H. Robinson for the Plaintiff
Mr. H. Rabuka for Defendants 1-5
Defendants 6 & 7 - Not Served

Dates of Hearing : 22nd and 23rd January, 2007
Date of Ruling : 2nd February, 2007

RULING

- [1] The members of the Mataqali Naisogolaca of Dogotuki state they are the owners of native land including the islands of Nabinivonu and Navuso. The Native Land Trust Board sues on their behalf for various declarations and damages.
- [2] The claim concerns the years 1979 to 1998 when the plaintiffs say that the first five defendants by themselves or through agents issued gravel extraction licences to the sixth and seventh defendants. Those latter defendants carried out gravel extraction work and caused much damage to the land and customary interest of the Mataqali Naisogolaca.
- [3] On 27th of June 2006 the plaintiffs claim was struck out as "nothing has been done by the plaintiffs to progress the matter for two and a half years. There was no real pursuit of the action".
- [4] On 23rd of October 2006 a motion to reinstate this action was filed and was heard in January 2007.
- [5] The chronology of events is as follows :
- | | | |
|---|---|---|
| 20.11.00 | - | Writ filed. |
| 19.12.00 | - | Acknowledgment of Service and Intention to Contest from defendants 1-5. |
| 22.1.01 | - | Defence of defendants 6 and 7 filed. |
| 1 year delay with no progress in court. | | |
| 22.3.02 | - | Notice of Intention to Proceed filed. |

6 months delay with no progress in court.

- 20.9.02 - Plaintiff seeks to transfer case to Suva.
- 28.11.02 - Plaintiff's transfer request withdrawn.
- 20.2.03 - Defendants 1-5 ask for time to file strike out motion.

6 months delay with no progress in court.

- 28.8.03 - Plaintiff's application for judgment in default of defence from defendants 1-5.
- 17.9.03 - Defence of defendants 1-5 filed. Summons to strike out plaintiff's claim as being vexatious, frivolous and abuse of process of the court.
- 30.10.03 - Strike out application heard. Leave given to withdraw Writ of Summons and amend proceedings to Originating Summons.
- 20.11.03 - Originating Summons filed.
- 21.11.03 - Further 7 days granted to plaintiffs to serve Originating Summons.
- 19.1.04 - Originating Summons served on defendants 1-5 (note : Originating Summons has never been served on defendants 6 and 7).

Two and a half years delay with no progress in court.

- 27.6.06 - Defendants strike out motion heard. Case struck out.
- 23.10.06 - Motion to reinstate.
- 22 & 23.1.07 - Reinstatement application heard.

- [6] I have before me in support of the motion the affidavit of Semi Siosio who describes himself as a member and an elder of the Mataqali Naisogolaca and authorised by the members to make the affidavit. He summarises the alleged facts which give rise to this action. He said it was taking a long time to get an assessment of the damage through an environment impact study. The expertise was not available in Fiji and assistance was sought from New Zealand.
- [7] Semi Siosio said that on the 28th of June 2006 "on one of my visits to the NLTB I was informed that the matter has been struck out for want of prosecution. I do not understand what that means and was informed that when a case had taken too long to be completed and that nothing has been done to try and complete it the court can have the matter struck out or removed completely from the court list". It is to be hoped that the plaintiffs' lawyer explained to him the chronology of events and responsibility for the delay.
- [8] It is noted that although Mr. Siosio states he made visits to the N.L.T.B. he knew of the strike out the day after it happened. He considers an injustice would be done if the case was not reinstated and it is wrong for the Mataqali and its members to suffer if lawyers do not do their job.
- [9] I must look to the interests of the defendants in this matter as well as those of the plaintiffs. In 2001 there was a gap of a year when nothing was done to progress this matter in court. In March 2002 Notice of

Intention to Proceed was filed and then nothing was done for a further six months.

- [10] When the defendants brought a motion to strike out the plaintiff's Writ of Summons the plaintiff sought and obtained leave to change their process to one begun by Originating Summons. Costs were awarded against the plaintiff when that occurred in October 2003.
- [11] It was not until a further two and a half months later that defendants 1-5 were served. Defendants 6 and 7 have never been served with the Originating Summons.
- [12] A further two and a half years from January 2004 then passed by with nothing been done by the plaintiffs to advance the claim in the court. I do appreciate that environmental damage studies take time and the expertise is not available in Fiji. However, it would appear that the plaintiffs had only started seeking this expertise over three years after commencement of the action, accepting what counsel says from the bar table. Even that was not done with any real expedition. Counsel stated the plaintiffs "started to get the evidence in 2004, October. ... There was some correspondence. It was a matter of costs. There were no further records after November 2004. Understand are waiting for time for New Zealand people to be available".
- [13] The defendants strongly oppose the application. They point out they were not aware of any correspondence to New Zealand. It would be prejudicial to the defendants to allow the action to continue. Defendants 6 and 7 have not even been served with the Originating Summons. The defendants say this is not a question of a dilatory plaintiff, there is no interest in pursuing the proceedings and the whole matter is an abuse of process of the court.

- [14] It must also be noted that there was a 4 month delay between the striking out of this case and the filing of the Motion to reinstate.
- [15] It should be pointed out that the plaintiff's lawyer before me for this application was only instructed on behalf of the plaintiffs a short while ago.
- [16] One must also wonder, had the court not listed the case in June of 2006, how many more years would have passed by with no action by the plaintiffs.
- [17] In the case of NBF Asset Management Bank v. Adi Sainimili Tuivanuvou, Civil Action 0174 of 2000 I stated at para. 13 :

"The general public would be surprised and understandably incredulous if it were widely known that a case can be commenced, then left to lie for years then still be able to be pursued, unless it could be shown it was not possible to have a fair trial or there was serious prejudice to the defendant.

"It is paradoxical that the onus is upon the defendant to have to show unfairness or prejudice when the whole circumstance is brought about by a dilatory plaintiff."

- [18] I then went on to consider these issues as highlighted by Lord Woolf in *Grovit and Others v. Doctor and Others* [1997] 2 ALL E.R. 417. At p.419. Lord Woolf emphasised the point that "... the principles laid down in *Birkett v. James* are unsatisfactory and inadequate". The reasons for this conclusion were set out.
- [19] In the judgment of the 4th July 2006 in *Bhavis Pratap v. Christine Mission Fellowship*, Civil Appeal ABU0093 of 2005, the Fiji Court of Appeal affirmed the principles in *Birkett v. James* [1978] A.C. 297.

- [20] The power to strike out proceedings must be used sparingly. Case management principles should not be allowed to undermine the delivery of justice to the parties. At the end of the day one must always stand back and have regard to the interests of justice. That regard must not only be to the interests of the plaintiff in having his action tried but to defendants and the public at large in not being subjected to the cost and worry of civil litigation which is pursued sporadically or left to lie for years and then resuscitated. The interests of justice in this regard also include the interests of other litigants before the court who are willing and able to pursue their cases with diligence and expedition and find they are delayed by dilatory plaintiffs.
- [21] The delay by the plaintiffs in this case is certainly contumelious. It is debatable as to whether it was intentional and whether it was delay on the part of the plaintiffs or their lawyers or both.
- [22] There has certainly been inordinate and inexcusable delay in this case. There were gaps of one year, then six months then, two and a half years when nothing was done in court to progress the case. Even when it was being pursued in court it was not done with any great expedition. Further, it took four months after the case was struck out for a motion to reinstate to be filed.
- [23] The 6th and 7th defendants are yet to be served with the Originating Summons which was filed in November 2003.
- [24] Whilst I do not have specific affidavits from the defendants it is clear that much of this case will turn upon the oral evidence of witnesses and what or was not done to the land concerned. These events took place between 8 and 17 years ago. There will be another 1 to 2 years before this matter comes to trial. In my judgment, there will be real prejudice to the defendants in finding and bringing to court the witnesses concerned

and being able to rely on their testimony with any degree of persuasion after such a long time.

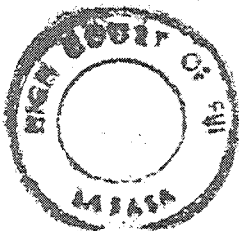
[25] I do note that both parties agree that an Arbitration Tribunal has already considered issues which appear to be the main stay of these proceedings. In the absence of a copy of that Tribunal's proceedings and determinations I cannot take it into account in this ruling.

[26] I also point out that in coming to my conclusions I have approached this case on the basis that it is for the defendants to show why this case should be struck out rather than the plaintiffs show reinstatement should take place. However, even in this regard, the affidavit of Semi Siosio does nothing to explain the long delays when nothing happened, and the dilatory approach even when matters were moving.

[27] It is important in cases of this kind, when proceedings are struck out or there is a refusal to reinstate, that counsel for the plaintiffs gives the litigants a full copy of the judgment and explains the reasons for the conclusions.

[28] Having approached this matter afresh as to whether or not it should be struck out, in my judgment, there is no alternative to it being struck out or technically as far as the application is concerned a reinstatement is refused.

[29] The defendants are entitled to their costs of this application which I asses at \$200.00.



A handwritten signature in black ink, appearing to read "R.J. Coventry".

(R.J. Coventry)

JUDGE