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

CIVIL ACTION NO. HBC 61 OF 2014

BETWEEN : **LIVAI DERENALAGI** and **MANOA LABALABA** suing on their behalf and on behalf of the majority members of Mataqali Nalagi of Nawaka Village, Nadi.

Plaintiffs

AND : **JOELI BULU, MANASA QORO,** and **SEMESA LEWAIVI** as Trustees of Mataqali Nalagi all of Nawaka Village, Nadi

1st Defendants

AND : **APENISA NAEVO, NEMANI TUBELILI** and **ALIPATE BALEBALE** as Trustees of Tokatoka Waiwaitu Trust all of Mataqali Nalagi, Nawaka Village, Nadi.

2nd Defendants

AND : **MATAIASI NABAU** and **LALAI DRIU** as Trustees of Nalagi Youth Club both of Mataqali Nalagi, Nawaka, Village.

3rd Defendants

AND : **ITAUKEI LAND TRUST BOARD** a Statutory body formed under Cap. 134

4th Defendant

Appearances: Mr. Nacolawa for the Plaintiff
Mr Vuataki for the 1st, 2nd and 3rd Defendants.

RULING

Introduction

1. By Summons dated the 5 May 2014 the first three defendants sought the following orders:-

(i) That the Plaintiff's claim be struck out;

(ii) That alternatively, the Plaintiff to amend his claim by removing the words "on behalf of the majority members of the Mataqali Nalagi" from paragraph 1 of their claim.

(iii) Such further or other orders as the honourable Court may determine.

(iv) Costs of this application to be costs in the cause.

Background

2. The application was supported by the affidavit of Apenisa Naevo the first named second defendant who is authorised to swear the affidavit on behalf of the three named 2nd defendants. It appears from this affidavit that the dispute from which the action arose are relevant to the concerns of the members of the Mataqali within the Chiefly Mataqali of Nalagi in Nadi. It relates to the distribution of funds. The deponent very briefly states that the Plaintiff's do not represent the majority of the members of the Mataqali as stated in their claim. In this regard it annexes to the affidavit a signed statement of 61% of the members of the iTokatoka Waiwaitu of the Mataqali Nalagi who do not support the plaintiff's claim. That in the circumstances, the Plaintiffs have no locus to bring the action. The affidavit further states that there are other motives behind the bringing of the action. The action as a whole is an abuse of process and will prejudice the fair trial of the action.

3. A further supplementary affidavit was later filed on 9 May which in effect clarifies the claim by the defendants that the plaintiffs are not true representatives of the Mataqali and therefore have no locus to bring this action.

4. The plaintiffs in opposing the application filed an affidavit which states briefly that the purpose of the action is to ensure transparency in the distribution of the Mataqali funds. The plaintiffs further states that as far as they are aware the majority of the Mataqali members agree with the need for transparency. The Plaintiffs also claim that some of the signatories of the consent presented signed the papers presented to them out of respect for the chiefs. The action as far as the plaintiffs are concerned would clarify issues of abuse of Mataqali funds and even if the defendants are correct, the trustees of the Mataqali funds are duty bound to inform the members of the Mataqali

on how their funds were distributed. That some of the members of the Mataqali have not received any funds or were informed of how it had been distributed for the last eight (8) years.

5. The defendants affidavit in reply raised the following points, firstly that there was decision made that the distribution of funds are to be used solely for the purposes of education wedding and funerals. The second reason is that the request is from themselves and not from the majority of the Mataqali members. That the Plaintiffs themselves have benefited from the above arrangements and their motive in raising these matters relate more to their disappointment in the installation of the Chiefly title than the matters raised. The matter should therefore be struck out.

Striking Out

6. The power to strike out an action is set out in Order 18 rule 18(1)(2) & (3), the rules states:-

> *Strike out pleadings and indorsements*
>
> *18.-(1) The Court may at any stage of the proceedings order to be struck out or amend any pleading or the indorsement of any writ in the action, or anything in nay pleading or in the indorsement, on the ground that –*
>
> *(a) It discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) it is scandalous, frivolous or vexatious; or*
>
> *(c) it may prejudice, embarrass, or delay the fair trial of the action; or*
>
> *(d) it is otherwise an abuse of process.*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *18(2) No evidence shall be admissible on application under paragraph (1)(a).*
>
> *18(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.*

7. From the outset it is noted that the plaintiffs are "*suing on their behalf and on behalf of the majority members of the Mataqali Nalagi of Nawaka Village, Nadi*".

8. The question before the Court then is, are the plaintiffs true representatives of the Mataqali so as to give them the locus to bring the action and if they are not true representative of the Mataqali then the action be struck out or in the alternative be amended.

9. Both Counsels provided useful written submissions which is taken into consideration in the matter. The defendant's position is that the plaintiffs are not representatives of the majority of the members of the Mataqali and therefore could not act on their behalf and hence have no locus to bring the action. The plaintiffs states that they do and can therefore seek redress from the Courts. Both parties in their affidavits provided annexures which shows that they have the support required. This point is on the whole moot although in considering this point the members of the Mataqali are clearly split and its investigation is of no benefit except to split it further. The defendants rely on the High Court decision of the Hon Justice Byrne in ***Vunisa –v- Director of Lands*** where this issue was determined. Here the Hon Justice Byrne relied on the unreported case of ***Ro Alivereti Lagamu Tuisawalu & Ors –v- Fiji Industries Ltd*** *(HBC 164/97* where he ruled that individual members of the Mataqali who cannot produce evidence of consent from other members to act on their behalf did not have any locus to bring any proceedings. The plaintiffs on the other hand relied on the Supreme Court decision in ***Waisake Ratu No. 3 and Anor –v- Native Land Development Corporation and NLTB*** *(1991) 37 FLR 146* in which Hon Justice Cullinan states at page 185 "*... I would then be slow to hold that Fijians could not seek a remedy in the Court in respect of an infringement of a customary right ... It must be remembered that the litigant seek not the customary but a common law or equitable remedy.*

All that is necessary for the litigant to do is to establish the right. Once the right is established as part of the customary law of Fiji and therefore as part of the law of Fiji, how then can the right be regarded as other than a legal right? Again once it is established that a legal right has been unlawfully or unjustifiably infringed I cannot see why, in an appropriate case, even a declaration or an injunction much less damages would not follow.

10. I agree with the plaintiff's view that the Supreme Court decision in *Waisake Ratu No. 3* gave each individual members of the Mataqali the right to institute proceedings where that individual's customary right

is infringed. What the proceedings is about is the distribution of rental proceeds from the Mataqali land, portions of land in which they have a customary right. This customary right is said to be akin to a legal right in the English context as stated in the above case. It is the alleged infringement of this legal right which prompted the plaintiffs to seek a remedy from the Courts. Whether there is indeed an infringement of this right is yet to be determined. It is therefore clear that the two plaintiffs can bring the action in their own capacity. Whether the plaintiffs represent the majority of the Mataqali, as was stated earlier is moot, its determination is more divisive within its environment and serves no purpose in determining the action and should not in my view be the basis of striking out or amending the action.

11. There are numerous decisions in this jurisdiction on the question of striking out which has been previously determined and I do not wish to list them all. The principles which determine whether a matter is to be struck out are clear. Firstly the Court's power to strike out a matter is discretionary and therefore must be exercised sparingly. In this regard it must be shown that no cause of action exists, it was considered not enough to say that the case is weak or unlikely to succeed. What is considered more important are the rights of the community to seek redress from the Courts and of course the other side of this argument is to protect another member of the community from being brought to Court unnecessarily. These principles were elaborated by the Hon Justice Kirby in the Australian case of ***London v Commonwealth*** *[No 2] 70 ALJR 541 at 544 - 545.* The principles are:-

> *1. It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided (**General Street Industries Inc v Commissioner for Railways (NSW)** (1964) 112 CLR 125 at 128; **Dyson v Attorney-General** (1911) 1 KB 410 at 418.*
>
> *2. To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action (**Munnings v Australian Government Solicitor** (1994) 68 ALJR 169 at 171f, per Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (**Dey v.***

Victorian Railways Commissioners *(1949) 78 CLR 62 at 91..*

*3. An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone, sufficient to warrant summary termination. (**Coe v The Commonwealth** (1979) 53 ALJR 403; (1992) 30 NSW LR 1 at 5-7. Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

*4. Summary relief of the kind provided for by O 26, r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer. (**Coe v The Commonwealth** (1979) 53 ALJR 403 at 409). If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

*5. If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleadings. (**Church of Scientology v Woodward** (1980) 154 CLR 25 at 79. A question has arisen as to whether O 26 r 18 applies only part of a pleading. (**Northern Land Council v The Commonwealth** (1986) 161 CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and*

6. The guiding principle is, as stated in O 26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.

12. The statement of claim against the first three defendants is in respect of their duties as trustees of, firstly the Mataqali Nalagi Trust, secondly for the extinct Tokatoka Waiwaitu Trust and lastly for the Nalagi Youth Club. The lack of transparency in accounting to the members of the Mataqali, who are members of these trust by the trustees is the matter in dispute. In my view it is not necessary for them to be members of the Nalagi Youth Club for example, to seek accountability for the distribution of the resources obtained or accrued or derived from customary source to which they have a legal right. It is the transparency in accountability which is at the centre of the claim.

13. The claim ought not be looked upon by the defendants as being motivated by the disappointment of the plaintiffs regarding the Chiefly title, such an assumption draws away from the need to steer themselves to what is more equitable within their environment. It has a much larger dimension and benefit than what has been proposed as the basis of the application to strike out the action. It is clear in my view that there is a cause of action and it ought to be pursued.

14. The issues are not in my view frivolous or vexatious. A matter is considered frivolous if it is of little importance or weight and this matter is certainly important to the Mataqali in respect of the transparency of the distribution of the rental proceeds from its customary land. Neither is the matter vexatious or instituted without sufficient ground, the fact that the trustees have not accounted to the members of the Mataqali for the last eight years is sufficiently serious to warrant the action.

15. I am further of the view that the defendants have not shown that on the face of the pleadings the plaintiffs have no reasonable cause of action. The very basis of their opposition to the claim is that the plaintiffs have no locus to bring the action or that the motives in bringing the action relates to motives other than the transparency or accountability. I am not convinced that these assertions are convincing enough to warrant a striking out of the action.

Conclusion

16. Given the above reasons the Court is not satisfied that the plaintiffs do not have any locus to bring this action. The Court is further not convinced that the claim should be amended to show that the plaintiffs are not representatives of the majority of the Mataqali since the determination of this point is more divisive within the environment from which Mataqali's in general should operate. It is sufficient that the plaintiffs or any other member of the Mataqali to seek transparency and/or accountability for the distribution of the funds obtained from resources to which they have a legal right. Further and more importantly the claim is not frivolous or vexatious but is a

matter which requires serious attention. And therefore the plaintiffs have a cause of action and ought not be struck out.

Orders

17. The Court therefore makes the following orders:-

(1) The application to strike out or amend the writ is dismissed;

(2) That costs be in the cause.

(3) That the matter to be put before the Master for directions.

13/02/2015

HIGH COURT OF FIJI LAUTOKA

Master H Robinson

High Court

At Lautoka.

..... February 2015