

Civil Action No. 288 of 2011: Josese Litidamu vs iTLTB, Heaven On Earth In Kadavu Limited and iTLFC

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. 288 of 2011

Between:	Josese Litidamu	Plaintiff
And:	I Taukei Land Trust Board	First defendant
And:	Heaven On Earth In Kadavu Limited	Second defendant
And:	iTaukei Land & Fisheries Commission	Third defendant

Appearances : Mr T. Bukarau for the plaintiff
Ms L.Komaitai for the first defendant
Ms Renee Lal for the second defendant
Mr R.Green with Mr Pickering for the third defendant

Date of hearing: 8 July, 2013

JUDGMENT

1. *Introduction*

- (a) The plaintiff files these proceedings as a member and on behalf of the Tokatoka Dakuibaitabu of Mataqali Baitabu, in the Yasuva Vunivetau of Kadavu. The plaintiff alleges that the iTLTB, the first defendant, had leased their reserved native land to the second defendant, "*Heaven On Earth In Kadavu Limited*" without obtaining the consent of members of their proprietary unit. The plaintiff seeks: (i) a declaration that the lease of their land is ultra vires, void and of no effect; (ii) a declaration that the first defendant had failed in its fiduciary duties as trustee, to consult and obtain the consent of their members; and (iii) that all dues paid by the first defendant to the plaintiff be refunded to the first defendant.
- (b) The first defendant, in its reply, states that the Mataqali Naivilaca is listed as the owner of the disputed land in the records maintained by the third defendant, the iTaukei Land & Fisheries Commission, not the Tokatoka Dakuibaitabu. The first defendant obtained the consent of the members of the Mataqali Naivilaca, to de-reserve the land.

2. *The plaintiff's affidavit in support*

In his affidavit in support filed in support of his originating summons filed on 15th September, 2011, the plaintiff states:

a. Tokatoka Dakuibaitabu are the traditional owners of the land "Naivakasoicake".

b. By clause 1 of an Agreement for lease of 1st April, 2004, the first defendant leased an extent of 14.3256 hectares, 35 acres, 1 Rood and 23 perches to the second defendant, comprising lands of the following :

<i>Mataqali Qara</i>	<i>5.4995 h</i>
<i>Mataqali Naitena</i>	<i>0.9108 h</i>
<i>Mataqali Saumua</i>	<i>3.0531 h</i>
<i>Mataqali Naivilaca</i>	<i>4.8622 h</i>
TOTAL	14.3256 h, 35A. IR. 23P

c. "Naivakasoicake" was initially not to be included in that lease and not contained in the original map of the lease.

d. The first defendant "somehow" increased the size of the land leased by "2.4252h or 5.99 acres". The land now included in the Agreement for Lease is as follows:

<i>Mataqali Qara Lot 1</i>	<i>- 1.6187 h</i>
<i>Lot 3</i>	<i>- 1.6247 h</i>
<i>Lot 16</i>	<i>- 1.8303 h</i>
	<i>5.0737 h</i>
<i>Mataqali Naitena</i>	<i>0.9108 h</i>
<i>Mataqali Saumua</i>	<i>3.0531 h</i>
<i>Mataqali Naivilaca</i>	<i>7.6932 h</i>
TOTAL	16,7508 h
	41A. IR. 11P

e. The increased area comprised part of land, (Lot 15) belonging to Mataqali Naivilaca. Mataqali Naivilaca had donated the land to be held as a "Kanakana" for the use and maintenance of the plaintiff's land owning unit.

f. A sum of \$ 1500 was given by Jolame Tumate of Mataqali Naivilaca to the plaintiff's brother, Laisasa Sau in early 2004, as lease monies of the "Muaidule" lease.

3. The first defendant's affidavit in reply

Ella Chambers, estate officer of the Tourism Dept of the first defendant, in his affidavit in reply states:

- i. The third defendant's Final Report, Volume 5 does not make any reference to the plaintiff's land owning unit. The Report expressly states that Lot 15 belongs to Mataqali Naivilaca. The Board conducted consultations and sought the consent of the Mataqali owners contained in that Report.
- ii. The first defendant was not informed by the third defendant,(when signatures were verified at its office) nor by Mataqali Naivilaca,(during consultations) that a "kanakana" was donated to the plaintiff's land owning unit. The Board acted in good faith and diligently, in administering its duties as trustees.
- iii. Lease monies were received by a member of the Tokatoka Dakuibaitabu.
- iv. The Board made the best attempts to ensure that the mataqalis concerned and the lessee are satisfied with the conditions of the lease.

4. The second defendant's affidavit in reply

Anneliese Schimmelpfennig, a director of the second defendant, in her affidavit in reply as so far as material, states:

- a. On 24th August, 2001, the second defendant was given an offer by the first defendant for 25 acres of land, subject to survey.
- b. The first defendant consented to the surveyor nominated by the second defendant, to conduct a survey over the "Muaidule" land. The first defendant provided maps and the various mataqalis assisted the surveyor.
- c. The second defendant forwarded the surveyor's scheme to the first defendant and advised that the total land surveyed was closer to 40 acres than 25 acres.
- d. By letter of 20th February, 2003, the first defendant provided the second defendant with the final terms and conditions for the "Muaidule" lease for 44.29 acres.
- e. On 8th December, 2003, the first defendant sent the Agreement to the second defendant for execution.
- f. By letter dated 31st March, 2004, the first defendant advised the second defendant's accountants that the land area in the lease had not changed, despite two mataqalis being left out during the discussion and negotiation stage of the lease.

- g. The second defendant proceeded to develop the land, but has faced problems, particularly with the plaintiff's land owning unit. Their land is necessary for the operation of its resort.
- h. By letter dated 3rd March, 2010, the first defendant advised the second defendant that except for the plaintiff's land owning unit and another with their conditional offer, the other landowners are grateful for the new conditions of increase in rental and village infrastructure fund.
- i. The affidavit concludes stating that the second defendant agrees to surrender the lease, provided its investment is repaid.

5. *The first defendant's reply to the second defendant's affidavit*

Solomoni Nata, Deputy General Manager of the first defendant, in his affidavit in reply to the second defendant's affidavit states:

- a) The second defendant had been put to notice on the issue of the "*I kovukovu*" before the lease was issued.
- a) The increase in the area leased was agreed to by the land owning units. The first defendant consulted and obtained the consent of the majority of the members of Mataqali Qara, Mataqali Naitena, Mataqali Sauma and Mataqali Navilaca, to de-reserve the land.
- b) The Board ensured that the second defendant and the land owning units benefitted from the development.
- c) The issuance of the lease was at the Board's discretion. The first defendant's role was to facilitate the leasing of lands within its policy.
- d) The first defendant's letter to the second defendant of 31st March, 2004, was in regard to the crop compensation of the leased land, including the Tokatoka Dakuibaitabu and Tokatoka Naocovonu.
- a) The records held by the first defendant's Reserve Department, clearly show Mataqali Navilaca as the owner of Lot 15.
- b) The duty of the first defendant is to ascertain that consent was obtained for de-reservation, in conformity with the register of members recorded in the Vola Ni Kawa Bula, in the possession of the third defendant.
- c) It is the duty of the third defendant to confirm and ascertain ownership of iTaukei lands.

- d) The first defendant ensured that all the parties concerned in the “*Muaidule*” lease are satisfied with the conditions of the lease. The Lease Agreement of 1st April, 2004, is legal and binding on the second defendant.

6. *The first defendant’s supplementary affidavit*

The supplementary affidavit filed by Ella Chambers provides that the land was excluded from native reserve by a Gazette notification. The Board was within its power to deal with the land. A tourism lease was then, issued to the second defendant.

7. *The plaintiff’s reply and affidavit in rebuttal*

Seni Patterson, a member of the Tokatoka Dakuibaitabu, replying to the second defendant’s affidavit states that the first defendant leased the land believing it belonged to another. In his affidavit in rebuttal, he states that:

- (i) The first defendant, as trustee was required to make searches with the third defendant, which has a record of iTaukei land ownership, to ascertain whether Lot 15 was encumbered.
- (ii) Funds were granted to a member of the plaintiffs’ s land owning unit gratuitously by a member of the Mataqali Naivilaca.

8. The third defendant did not file an affidavit in response.

9. *The determination*

- a. The case for the Tokatoka Dakuibaitabu is that the first defendant breached its fiduciary duties as trustees of native land, by leasing their reserved land known as “*Naivakasosoicake*” registered as “*encumbrance No.465 in the Register of iTaukei Lands (and)more particularly delineated in plan P/11/4*”, without obtaining the consent of its members.
- b. By an Agreement for Lease, the first defendant had leased a land known as “*Muaidule*” belonging to Mataqali Qara, Mataqali Naitena, Mataqali Saumua and Mataqali Naivilaca to the second defendant, for tourism purposes.
- c. The plaintiff states that the leased area, as increased, comprises part of Lot 15 which had belonged to Mataqali Naivilaca. Mataqali Naivilaca had donated that land, as a “*Kanakana*”, for the use and maintenance of the plaintiffs’ land owning unit.

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d. In support of the contention that the land belongs to Tokatoka Dakuibaitabu, the plaintiff has attached the following documents to his affidavit in support:

i. Volume 2, Folio 249 of the Register of Native Land of the Province of Kadavu dated 15th November, 1929. This reads:

ENCUMBRANCE

The boundaries described contain the following lands which have not been surveyed:

	<u>NLC Record No.</u>	<u>Name of Land</u>	<u>Owners</u>
(1)	465	Naivakasoicake	Tokatoka Dakuibaitabu, Mataqali Baitabu

ii. NLC Record No. 465 as contained in "No 458 D". This gives the name, boundary and location of the land "Naivakasoicake", as translated in the closing submissions filed on behalf of the plaintiff as follows:

The lands boundary demarcated above has been approved at the Native Land Commission .. that it is land belonging to Tokatoka Dauibautabu, of Mataqali Baitabu of Yavusa Vunivetau the members of which are enumerated in the Native Land Register for Mataqali membership of the province of Kadavu as Tokatoka No. 187. (emphasis added)

iii. The first point taken up by the first defendant in riposte, is that the Final Report, Vol 5 of the Native Lands Commission provides that Mataqali Naivilaca is the owner of Lot 15. There is no reference to the Tokatoka Dakuibaitabu, in the registers in the Final Report, copies of which are attached to the first defendant's affidavit.

Table 1 of the Index to Registers of Native Lands in the Final Report provides:

Area			Reference To Plans		Registrar of Native Lands Folio	Owned By		Register of Native Landowners Unit No.
A	R	P	Plan	Lot		Tokatoka	Mataqali	
498	0	0	P 11,4	15	249		Naivilaca	177, 178

Table 5 of the Index to Plans in the Final Report provides :

Lot No.	Area			Native Lands Commission Record No.	Register of Native Lands Folio No.	Owned By		Requirements of Native Landowners Unit No.
	A	R	P			Tokatoka	Mataqali	
15	498	0	0	458D	249		Naivilaca	177,178

- e. The next point taken by the first defendant was that the Board was admittedly, not apprised by the third defendant nor the Mataqali Naivilaca, that the Mataqali had granted a “kovukovu” to the Tokatoka Dakuibaitabu.
- f. The affidavit in rebuttal filed on behalf of the Tokatoka Dakuibaitabu states that “*the first defendant had been ignorant as to the existence of “Kovukovu” owners”(and Mataqali Naivilaca did not advise the first defendant of the existence of a “kovukovu”on Lot 15” nor “consult with us to tell us that our kovukovu will be included in the Muaidule Lease”.*
- g. It was also pointed out that in any event, inasmuch as the boundaries of the disputed land have not been surveyed as expressly stated in Volume 2, Folio 249 of the Register of Native Land, the ownership could not be confirmed, in terms of section 9 of the Native Lands Act,(cap133).
- h. Section 9 requires the iTaukei Land & Fisheries Commission to record the boundaries of native land and the names of the persons comprising the proprietary unit.
- i. Finally, it was quite correctly submitted on behalf of the first defendant that the Board is required to obtain the consent of the members of the concerned Mataqalis recorded in the Vola ni Kawa Bula. The Board had consultations with the Mataqali Qara, Mataqali Navilaca, Mataqali Naitena and Mataqali Saumua and obtained their consent
- j. It was not contended by the plaintiff that the members of the Tokatoka Dakuibaitabu were registered as native land owners in a VKB.
- k. On this point, I would refer to the case of *Mataitoga v NLTB*,[2007] FJHC 147 where Jitoko J stated :

The second pre-requisite for de-reservation of a native reserve land is the consent of the native owners. The Court has already observed above that the consent is mandatory and under Regulation 2 of the Native Land (Miscellaneous Forms) Regulations, means “the consent” of the majority of the adult native owners. Who is a native land owner? He or she must be registered in the Register of Native Land Owners, the “I Vola ni Kawa Bula” (“VKB”) compiled and maintained by Native Land Commission as required under Section 9 of the Native Lands Act (Cap. 133). (emphasis added)

- l. The first defendant states that the Board then, proceeded to de-reserve the land, in terms of section 17 of the Native Land Trust Act,(cap 134).

m. The Gazette of 17th November, 2003, provides:

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.*
- n. That leads me to the significant point in this case.
- o. It emerged in a letter of 31st March, 2004, from the first defendant to the second defendant's Accountants, that the third defendant had confirmed to the first defendant that Mataqali Baitabu's encumbrance on Mataqali Naivilaca's land, (Lot 15) was to be considered as a landowner. The letter continues to state that the compensation payable to Mataqali Baitabu was assessed as \$2,794.32.
- p. The affidavit in support of the plaintiff avers that a sum of \$ 1500 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 first defendant to the grant of the lease to the second defendant.
- s. It would appear that Tokatoka Dakuibaitabu's disenchantment to the lease manifested, when they made a conditional offer to an increase in annual rental, as stated in a letter of 3rd March, 2010, from the first to the second defendant.
- t. For completeness, I would note that the first defendant has satisfied the first pre-requisite for de-reservation of native land under section 17, namely, a "good cause": a tourism lease. The documents attached to the affidavits filed by the first and second

defendants depict that the Board had considered the benefits the lease would bring to the respective Mataqalis, in terms of employment, lease monies and crop compensation.

- u. I conclude that the first defendant acted diligently and in good faith, in administering its duties as trustees.
- v. In my view, the “*Muaidule*” lease entered into between the first and second defendant on 1st April, 2004, is valid and binding.
- w. In my judgment, the plaintiff’s action fails.

10. Orders

- (a) I decline the reliefs sought by the plaintiff.
- (b) The plaintiff shall pay the first defendant costs in a sum of \$ 2000 summarily assessed.

13th July, 2015



A.L.B. Brito-Mutunayagam
Judge