

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 165 OF 2015

IN THE MATTER of Section 3 of the
Native Land Act Cap. 133

AND

IN THE MATTER of Section 2 and 4(1) of
the iTaukei Land Act Cap 134

BETWEEN : **EPINERI WAQABACA**, Businessman of Lot 1, Madam Place,
Raiwai, Suva, on behalf of members of Mataqali Qawaleka, in the
village of Waitabu, Tikina of Lakeba in the Province of Lau.

1st PLAINTIFF

AND **JONE LESI**, Retired of Tacirua, Nasinu on behalf of Mataqali
Lomaitilou, in the village of Waitabu, Tikina of Lakeba in the Province
of Lau

2nd PLAINTIFF

AND **SAMISONI LEDUA**, Building Contractor of Tacirua, Nasinu on
behalf of members of Mataqali Rakuta in the village of Waitabu, Tikina
of Lakeba in the Province of Lau.

3rd PLAINTIFF

AND **MALAKAI RAWAQA**, Retired School Teacher of Davuilevu
Housing, Nasinu on behalf of members of Mataqali Naqalitoka, in the
village of Waitabu, Tikina of Lakeba in the Province of Lau.

4th PLAINTIFF

AND: **LAKEBA PINE SCHEME**, an unincorporated business entity of
Tubou, Lakeba, Lau

1ST DEFENDANT

2nd DEFENDANT

3RD DEFENDANT

Date of Hearing : 29th October, 2015

JUDGMENT

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3. The Plaintiffs allege that their 'mataqali land' was included in the Lakeba Pine Scheme and desire to form their own 'Trust'. (see paragraph 2 of 1st Plaintiff's affidavit)
4. The Defendants filed affidavit in objection raising a preliminary objection as to the *locus standi* of the Plaintiffs.
5. The Originating Summons filed by the Plaintiffs seeks following orders from the court
 1. **A declaration that the Lakeba Pine Scheme was established by the late Ratu Sir Kamisese Tuimacilai Mara (hereinafter referred to as Ratu Mara) the paramount chief of Lau in the late 1960's for the people of Lakeba to jointly plant pine trees on the island of Lakeba in the province of Lau.**
 2. **A declaration that the pine trees planted and referred to in the last preceding paragraph were for the benefit of all the iTaukei people registered at any given time in the Vola ni Kawa Bula of all Mataqali's land owning units in the island and Tikina of Lakeba in the province of Lau.**
 3. **A declaration that there was no express trust made in writing and registered in the office of the Registrar of Deeds relating to the planting of pine trees for commercial purposes on Lakeba Island but a constructive or implied trust relating to the planting of pine trees by the people of Lakeba did exist subject to the determination by this Honourable Court.**
 4. **A declaration that there was no proper financial management of the income derived from the harvesting of pine trees planted on Lakeba for the last 20 years and those regarded as trustees of the existing pine trust had absolutely breached their position of trust they owed the beneficiaries where ever they live.**
 5. **A declaration that the people of the four mataqalis in the Yavusa Waitabu have the right to lease their own mataqali's land and harvest the pine trees should financially benefit every person registered in their Vola ni Kawa Bula at any given time.**

6. A declaration that the decision of the Bose Vakavanua for the island of Lakeba and headed by the 2nd Defendant has no legal or equitable right to decide or do any dealings with pines planted on any of the relevant mataqalis' land because a mandatory consent of three quarters majority of members of any of the four mataqalis have not been obtained.
7. A declaration that the 3rd Defendant and the village meeting of Waitabu has no legal or equitable right to decide and consent to the 1st, 2nd Defendant and Bose Vakavanua for the people of the island of Lakeba to harvest or do any dealings with pines planted in any of the four mataqalis' land of Yavusa Waitabu without the mandatory consent of three quarters of members of any of the four mataqalis.
8. An order that the 1st and 2nd Defendant and any other person authorised by them be restrained from harvesting or dealing with any pine trees planted or growing in whatever ways or manner on the Plaintiffs' mataqalis' land.
9. An order restraining any member/members of the 1st Defendant or any person not being a member of the four mataqalis of the Yavusa Waitabu from stopping any members of the four Plaintiffs' mataqalis from using any of the logging machineries held by the 1st Defendant to harvest pine trees on Lakeba Island.
10. An order restraining any member/members of the 1st Defendant or any other person to stop any members of the four mataqalis of the Yavusa Waitabu from using any materials provided by the Fiji Government for harvesting pines on Lakeba.
11. An order restraining any members of the 1st Defendant or any other person from stopping the free transportation of harvested pines belonging to any of the four mataqalis of the Yavusa Waitabu out of Lakeba Island or the transportation of anything connected with the harvesting of their pines into Lakeba Island.
12. An order that the Defendants pay costs of this action to the Plaintiffs on client/solicitor indemnity basis.

6. The four Plaintiffs instituted this action by way of Originating Summons as representative capacity of respective Mataqalis. This is stated in the caption of the Originating Summons. The orders sought in the originating summons consisted seven declaratory orders and five restraining orders.
7. In Mesulame Narawa & Others –v- Native Lands Trust Board & Others, Civil Action No. 0232, 1995 decided on 16th December, 1998 (unreported) Fatiaki J. (as he then was) cited Order 15 rule 14(1) of the High Court Rules of 1988 and also several local and UK decisions and finally concluded
- ‘...on the affidavit evidence before me it is not at all clear or established that the various mataqalis comprised within the Yavusa Burenitu have either a ‘common interest or purpose’ in the proceedings or that the reliefs sought especially the cancellation of the concession agreements would be ‘beneficial to all’.*
- In my view the plaintiffs have no ‘locus standi to bring or continue the present action and it is accordingly dismissed with costs ...’*
8. In Mesulame Narawa & Others (supra) the case of Timoci Bavadra –v- N.L.T.B. Civil Action No. 421. 1986 was cited where applicant sought leave under Order 15 rule 14 of the High Court Rules to institute a representative action. Rooney J held that support of majority members for the Plaintiff would not necessarily give a plaintiff a representative right to sue. The following paragraph was quoted said at page 7:
- “Even if the plaintiff could show that he had the support of the majority of the adult members of the land holding unit this would not necessarily give him or the people he represents the right to sue. That depends on the nature of a Fijian land holding unit.”*
9. This position was accepted by Fatiaki J (as he then was) and dismissed the action on the issue of locus standi in somewhat similar application where a party had come to the court seeking certain orders regarding two timber concession agreements.

10. Though the Plaintiffs have annexed a document containing signatures of the people belonging to land owning unit there is already a letter from the Police that some have already complained that they did not sign such a document. With such conflicting evidence it is not suitable for determination by way of Originating Summons. The affidavit of the 3rd Defendant state that members of the land holding unit were divided and not all of them support the Plaintiffs. The 3rd Defendant also states 34 of the list of supporting persons have confirmed that they did not sign the document that the Plaintiff annexed to the affidavit in support. He had also alleged that even an illiterate person's signature appears in the said list annexed to the affidavit in support. These are not facts that I am able to determine by way of affidavits alone.
11. The Plaintiffs cannot represent land holding unit as there were some division of opinion among them and even the issues raised by the Plaintiffs are not clear and this is evident from the letter of the Permanent Secretary for Fisheries and Forests which stated as follows
- 'Lakeba Pine Scheme is particularly unique because the late Tui Nayau, was both the traditional head of the island as well as head of government and so most decision in Lakeba went through him for endorsement. It is obvious that the success of the Lakeba pine scheme today in terms of plantation size and value is a reflection of the late Tui Nayau's leadership quality. Unlike most other Pine schemes in Fiji where land boundary and ownership is well defined, the Lakeba Pine land is not registered and therefore ownership was more or less under his authority of the Tui Nayau' (emphasis is mine)*
12. The above passage from the Permanent Secretary for Fisheries and Forest is not denied or contrary evidence produced to counter it. So the position of the said letter can be accepted and the dealings of the Lakeba Pine Scheme is under the traditional authority of *Tui Nayau*. Such a traditional authority cannot be dealt in a Originating Summons by the Plaintiffs. They have not indicated any law or basis that allows them to seek the reliefs sought in the Originating Summons.

13. In such a situation it is not possible to apply common law principles questioning the authority of the Tui Nayau. When dealing with customary issues the principles of common law may become alien. This was held in **Dikau v Native Land Trust Board** [1986] 32 FLR 179

'The Fijian land system is one which in the modern commercial world requires a legal entity to control and manage the land. The English legal system which we have adopted was not designed to cope with land system which has no physical or corporate legal owner. Creating trustees by law and vesting control and administration of all native land in trustees, which as the board is by law a body corporate with perpetual succession desirable in the best interest of the Fijian people and unborn generations of Fijians' Per Rooney J.

If the Fijian land tenure system is to endure, it must be appreciated that the interest of all members of every land owning mataqali from new born infants to the old and infirm and the interests of unborn generations of Fijians must be safeguarded and protected. The land must be controlled and administered as trust land by a trustee or Board of Trustees for the benefit of the Fijians now and in the future entitled to occupy and use such land.

Government has set up land agencies to deal with native land. One is the Native Land Commission charged with the duty of (inter alia) ascertaining what lands are the rightful and hereditary property of native owners. The other is Native Land Trust Board charged with the duty of controlling and administering all native land for the benefit of the Fijian owners.

Further held,

A mataqali cannot be equated with any institution known and recognised by common law or statute of general application. The composition, function and management of a mataqali and the regulation of the rights of members in relation to each other and to persons and things outside it are governed by a customary law separate from and independent of the general law administered in this Court. ...'

'It was established by Meli Kaliavu and Others (supra) that individual members of the mataqali have no locus standi to sue and recover damages in their own personal capacity or to obtain an injunction....' (underlining is mine)

14. At the conclusion Rooney J held that if individuals are allowed to litigate as in that instance it would bring the orderly control of Fijian land to an end. This can be applied to the present application before me. The letter of the Permanent Secretary for the Fisheries and Forest speaks for itself. The Lakeba Pine Scheme is 'unique' and its success was attributed to the leadership of the late chief. The Plaintiffs are seeking to have their own 'trust' and state that they are not benefitting from it as they are now residing in Viti Levu. They have failed to establish their status in line with the decisions presented to me at this hearing.
15. The Section 4(1) of iTaukei Land Trust (Cap 134) states that all native lands are vested with Native Land Trust Board. It had not been named as a party to this proceeding though the Plaintiffs relied on that provision in the caption of Originating Summons.
16. The Section 3 of Native Lands Act (Cap 133) cannot be relied upon in this Originating Summons as, it expressly state 'examination of witnesses' to determine the 'native customs' by a court. This court cannot be done by Originating Summons.
17. The Plaintiffs cannot sue for the reliefs that they have sought in their personal capacity as the recognized entity is land holding unit. According to the caption of Originating Summons they are suing on behalf of their Mataqali. So they are suing in representative capacity. In that event there should be common interest and purpose but from the affidavit evidence it is evident there are conflicting views among the members of the Mataqalis and all the members do not consider the Plaintiffs in their representative capacity. So there is no common interest or purpose for the Plaintiffs to sue on behalf of land holdings units.


18. In the circumstances the Plaintiffs do not have a locus standi to bring this action seeking declaratory orders and other restraining orders. The Originating Summons is struck off and the cost of this application is summarily assessed at \$2,500.

FINAL ORDERS

- a. The Originating Summons is struck off and the action dismissed.
- b. The cost is summarily assessed at \$2,500.

Dated at Suva this 5th day of February 2016




Justice Deepthi Amaratunga
High Court, Suva