

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

Civil Action No. HBC 99 OF 2013

**BETWEEN** : **MILIANA NEIVALU** of Moala Village, Nadi, Domestic Duties  
for and on behalf of herself and the members of Rororo  
Family.

**PLAINTIFF**

**A N D** : **ILAMI LUTUMAILAGI** and **JOELI LUMUNI** all of Moala  
Village, Nadi, Driver and Farmer respectively as Trustees of  
Mataqali Nalubati.

**1<sup>ST</sup> DEFENDANT**

**A N D** : **KENI VARO** of Moala Village, Nadi, Hotel Worker.

**2<sup>ND</sup> DEFENDANT**

**Appearances** : Ms P. Mataika with Mr I.Tikoca for plaintiff  
Mr E. Sailo with Mr A. Turuva for defendants

**Date of Trial** : 01 February 2017

**Date of Judgment** : 02 May 2017

**J U D G M E N T**

## **Introduction**

[01] The plaintiff brings this action and seeks the following relief:

- a) A declaration that Plaintiffs are entitled to use Nukuvatu Island as their danudanu and eating place.
- b) A declaration that Plaintiffs are entitled to remove and sell sand on Nukuvatu Island as part of their danudanu rights.
- c) An injunction restraining the Defendants and or their servants, agents or howsoever from preventing the Plaintiff's from removing and selling sand from Nukuvatu Island and or in any way harassing the Plaintiffs concerning such removal.
- d) General, aggravated and penal Damages.
- e) Any other order the honourable court deems just.
- f) Costs on indemnity basis.

[02] Along with the writ of summons, statement of claim endorsed, the Plaintiffs also filed a Notice of Motion seeking an interim injunction restraining the defendants from stopping, interfering, hindering or barring the Plaintiffs, their agents and servants removing sand and gravel from the land in dispute until further order. Upon hearing the applicant, by his order dated 28 November 2013, Weeratne J (as he was then) granted the injunction as sought by the Plaintiffs subject to the plaintiffs depositing 10% of sales proceeds in court on an on-going basis weekly on every Friday of the week, while the extraction work is being carried out by the Plaintiffs. However, on 1 September 2016 the court [I] discharged the

interim injunctive orders granted in favour of the Plaintiffs upon the application made by the Defendants because the plaintiffs failed to comply with the condition which the injunctive orders were made upon.

[03] The substantive trial commenced on 1 February 2017. At the trial both parties called three witnesses each in support of their respective case. At the end of the trial, both parties wished to file written submissions. In order to facilitate this, the court granted 28 days for both parties to file the written submissions simultaneously. However, only the Plaintiff filed written submissions as ordered. The Defendant did not file any submissions.

### **Background Facts**

[04] The background facts as stated on the statement of claim are as follows:

- (a) The Plaintiff, Miliana Neivalu is a member of Tokatoka Nalubati of Moala village in Nadi and sues on her own behalf and on behalf of Rororo House and its members.
- (b) The First Defendants, Ilami Lutumailagi and Joeli Lumuni are Trustees of Mataqali Nalubati of Moala Village in Nadi.
- (c) The Second Defendant, Keni Varo is a member of Mataqali Nalubati and Tokatoka Nalubati of Moala Village in Nadi.
- (d) Mataqali Nalubati is made up of a sub unit named Tokatoka Nalubati.
- (e) Tokatoka Nalubati is the registered owner of various lots of land around Moala village.

- (f) The members of the Tokatoka cultivate, allot and deal with lands of the Tokatoka as amongst themselves according to their native custom.
- (g) The native custom of the Tokatoka members is that land once cleared and planted is known as "danudanu" and the sole right of planting of any "danudanu" is vested in the person who first planted it and his descendants.
- (h) The "danudanu" by such custom and usage became the eating place or "kanakana" of such descendants.
- (i) The Tokatoka has three major families or houses; namely; Nalubati House, Rororo House and Nakulubokola House each with discernible danudanu or eating places on Tokatoka Nalubati lands are: a. **Nalubati House with danudanu** on land known as Nani, b. **Rororo House with danudanu** on land known as Nukuvatu island (hereinafter "the land") and c. **Nakulubokola House with danudanu** on land known as Dredge.
- (j) In or about 2009 after the last crop of cane planted on the land by a member of Rororo House, the State through the Ministry of Primary Industries and Agriculture started to dump dredged river sand on the land by agreement of 17<sup>th</sup> February, 2009 with the Plaintiffs for the purpose of raising its ground level and required slope on the land by deepening the river flowing beside the land.
- (k) Upon hiring contractors to clear and sell the sand to recover costs and loss of use of agricultural use of the land, the Defendants on or about 30<sup>th</sup> May, 2012 and 21<sup>st</sup> day of May 2013 without just cause

and reasonable excuse forcibly entered the land and trespassed onto Plaintiff's danudanu and threatened the Plaintiffs with violence and forcibly stopped the Plaintiffs and their contractors from clearing the sand and recovering loss of use of the land.

### **Case for the Defendant**

[05] On the statement of defence, the defendants state that:

- (a) The dispute to the danudanu was resolved by the iTaukei Land & Fisheries Commission in the meeting, convened by them, held on 2<sup>nd</sup> July 2013. Such decision was related to the Plaintiff.
  
- (b) Further the decision of the iTaukei Land & Fisheries Commission is final and can be appealed to the Appeal Tribunal under section 7 of the Native Land Act. That the Court cannot determine the issue that already determined by the Commission vide their letter dated 9<sup>th</sup> July 2013 confirming the Yavusa Nacaqaru consists of a Mataqali Nalubati, Tokatoka Nalubati. The Mataqali Nalubati owns 3 parcels of land - Lot 41 on Plan H/17, 22 H/18, 1 consisting of 4 acres 1 rod 18 perches and 3 rods 7 perches accordingly. There is no iTaukei Land owned individually by this Mataqali or any records depicting lands reserved for planting.

### **Agreed Facts**

[06] The following facts are agreed facts according to the Pre-Trial Minutes ('PTC') dated 4 November 2015:

- 6.1 The Plaintiff is a member of Tokatoka Nalubati of Moala village in Nadi.

6. 2 The First Defendants are Trustees of Mataqali Nalubati of Moala Village in Nadi.
6. 3 The Second Defendant is a member of Mataqali Nalubati and Tokatoka Nalubati of Moala Village in Nadi.
6. 4 The native custom of the Tokatoka members is that lands once cleared and planted is known as "danudanu."
6. 5 Dredged river sand from the Nadi River was dumped on Nukuvatu Island.

### **Issues**

[07] The issues, as agreed by the parties, to be determined by the court are as follows:

7. 1. Who owns Nukuvatu Island?
7. 2. Whether the Tokatoka has three major families or houses namely; Nalubati house, Rororo House and Nakulubokola House?
7. 3. Is Nukuvatu Island the danudanu of Rororo House?
7. 4. Whether Rororo House is entitled to remove the river sands dumped on Nukuvatu Island?
7. 5. Whether the Plaintiff is entitled to General, aggravated and penal damages?
- 7.6. Whether the Plaintiff is entitled to costs?

## **Plaintiff's Evidence**

[08] The Plaintiff called three witnesses, namely Miliana Neivalu, the Plaintiff ('PW1), Poate Ratu, Turaga-Ni Koro ('PW2') and Peniasi Lagi ('PW3').

[09] In her evidence, PW1 states that:

- a. She belongs to the province of Ba, Sikituru District, Nacaqaru Village, Moala, Nadi. There are four Mataqali in the village. She belongs to Nalubati, Tokatoka Nalubati. Three family make up Nalubati, i.e. Nalubati, Rororo and Nakulubokola. She belongs to Rororo. She has 7 siblings. Only three of them are alive. They are: Mereleini, Aliti Bale and herself. They are all in Vola ni Kawa Bula.
- b. She has authority to represent her sisters (PE1).
- c. She lives in Moala village. She plants and cultivates. She was born in Moala. Since birth she has been there. She plants and cultivates on Nukuvatu. Her grandfather, her father and brother also planted. She did not plant after her brother. Her family planted there. It was given to her clan. Mataqali distributed.
- d. 'Danudanu' or Kanakana-same land has been distributed to eat from there. The particular land is given to the family to plant and eat. The land belongs to Rororo family. She produces an affidavit sworn by her for the case (PE-3).
- e. There is an agreement signed between Turaga ni Koro, Moala village, the Permanent Secretary to Ministry of Primary Industries and Agriculture, her sisters and herself (PE-4).

- f. She says, *'Nukuvatu Island is our Danudanu. That is why we entered into agreement with the Permanent Secretary, MOPIA.'*
- g. Turaga ni Yavusa knows about this agreement. Jolame Navoyo is the Turaga ni Yavusa. Turaga ni Yavusa chief of the (her) family. Turaga ni Yavusa takes the decision. He consented to the agreement. Turaga ni Koro passed the message about the agreement to Turaga ni Yavusa.
- h. Turaga ni Koro looks after the well-being and the needs of the village.
- i. After two weeks of the agreement, we started dumping sand. It took 3 to 4 years for her to dump. After that her clan told her to stop the dumping.
- j. She says, *'we extracted gravel on our own. Our Rororo family gave permission. Danudanu belongs to our family. I didn't ask permission from anyone'*. The District Surveyor gave approval.
- k. She received a letter from the iTaukei Lands and Fisheries Commission (TLFC), (PE5) and she gave instruction to her solicitor to reply (PE-6).
- l. She says, *'Mataqali stopped her and the Ministry from extracting and dumping. They stopped her from extracting from her own 'Danudanu'. They told her children on couple occasions. They came and stopped the work. On the second occasion, it was her and her children, they used harsh words. It hurt her a lot because it is her 'Danudanu.'*
- m. She spent about \$5,000.00 to \$10,000.00 for the case. She wants orders not to interfere with the work.



[10] Under cross-examination, PW1 states:

- a. She is the registered member of Tokatoka, Nalubati. The defendants are also members of the Tokatoka and belong to the same Mataqali.
- b. She confirms that she is suing on her own and on behalf of the Rororo family and all traditional matters have already been done. Her birth certificate does not show her Mataqali, Tokatoka and Yavusa. The Vola ni Kawa Bula or Birth Certificate does not state 'Rororo.' She is not registered under the name of Rororo. Nukuvatu Island is Native Land. There is no lease on that land. She is not leasing on the land. The land is registered as Tokatoka Nalubati with iTaukei Lands Commission. The land is not registered with Rororo House.
- c. She said, 'no' to the suggestion that you have sole right of planting on the land.
- d. When asked, did you tell the land is registered under Tokatoka Nalubati before the agreement? She said, '*Don't recall.*'
- e. Poate (Turaga ni Koro) is her sister's son. However, she doesn't call him by his name. She did not know his age and his education level at that time.
- f. She admitted the letter written by her son to Turaga ni Koro seeking his consent is in English language. She admitted that the word 'Rororo' is not mentioned in that letter.
- g. She denied omitting the word 'Rororo' deliberately.

- h. She said that she was with her grandfather, her father and her brother, but when she left the village she is not planting.
- i. She admitted that her brother's son Nemani is not registered under her family name and he is registered under his mother's name. His mother does not belong to Tokatoka Nalubati. She also admitted that none of her sisters' children is registered under Tokatoka Nalubati. She further admitted that she did not have any children registered under Tokatoka Nalubati and that 'Danudanu' was given to her to live and eat on.
- j. She says, 'I don't have title under my name or my elders'. The land was distributed to us. I am not planting. There is sand there. I can't plant because of the sand on the land. However, she admitted that she entered into the agreement for dumping on the land, but with consent.
- k. She denied that she lost the right when she entered into agreement for dumping and said she signed when there was sand already.
- l. She said 'yes' when it was put to her that she could have cleared the sand and retained her right. She also maintained that her family still has the right over 'Danudanu'.

[11] In re-examination, PW1 stated that VKB is not in the Birth Certificate. Only Mataqali, Village, Tokatoka and Yavusa will be on the Birth Certificate. She had right to enter into the agreement. Native reserve does not need lease for Mataqali. Nukubati Island is Native Reserve. Turaga ni Yavusa gave permission to put sand on Nukubati Island. I still have my 'Danudanu' rights.

[12] Poate Ratu (PW2), in examination in chief states that:

- a. He was elected as Turaga ni Koro last year. He was also Turaga ni Koro from 2008 till 2014.
- b. He looks after welfare, handling any plight of the villagers and their health.
- c. Turaga ni Yavusa was Lemeki Voriri who could not finish his term. He's passed away.
- d. The Nalubati constitutes of one family in Rororo, which includes Nakulubokola. Nalubati includes family Vunarara, four big families- Rororo, Nalubati, Vunarara and Narovadrau.
- e. In Rororo family, only three ladies are surviving- Miliana Neivalu, Mereleini Druma and Bale.
- f. They have been allocated land, Nukuvatu - Kanakana. They are planting ever since he (PW2) came to the village. 'Danudanu' is distributed to a family for them to eat from and survive. They have sole right in Nukuvatu to live from. Each family has 'Danudanu' allocated to them. It is common practice in the village, Moala.
- g. There is an agreement made between the government and Rororo family. He witnessed the agreement in his capacity as Turaga ni Koro. The agreement was made because they own 'Danudanu' in Nukuvatu. Turaga ni Yavusa knew about this and signed on behalf of the Turaga ni Yavusa for Nacaqaru, Jolame Navoyo. He consented to the agreement (PE-7).
- h. He confirmed that Rororo family still has their 'Danudanu' right.

[13] PW2 under cross-examination states:

- a. He admits that the plaintiff is his mother's sister, but giving evidence for the plaintiff as Turaga ni Koro.
- b. Villagers abide by laws-by-laws and the laws of the government.
- b. As Turaga ni Koro he reports to the Provincial Office, Ba. He meets them every three months. He does not know who Roko reports to. He does not know above that level.
- d. The matter may have been reported to the Ministry, but he didn't know.
- e. It was hard to resolve this dispute, because he is one of the members of Rororo. His mother was member of the family.
- f. He could not recall receiving a letter from Koya's office, but he confirmed instructing Pillai & Naidu to reply.
- g. Roko convened meeting twice. On both occasions, the defendants did not attend. There was a meeting with iTaukei Lands Commission. However, he does not know the result of the meeting. The result might have gone to Mataqali.

[14] Last witness for the plaintiff was Peniasi Lagi (PW-3) who in evidence states:

- a. He is 71 years old and a traditional priest in Moala and Yavusa Natutale.

b. Miliana belongs to Nalubati-her Tokatoka is Nalubati. Eight families make up of Nalubati or Tokatoka. Miliana belongs to Rororo. He knows Rororo family for 30 years. Rororo have their Kanakana in Nalubati. Nukuvatu was allocated to Rororo to eat from. He did not know who allocated. Rororo use the land to plant. They planted on the land. He was familiar with them on Nukuvatu. They have right to plant there. They did not lose their right.

[15] Under cross-examination PW3 states that Nalubati is registered for Tokatoka Nalubati. Mataqali is still owners.

**Defendants' Case.**

[16] Defence called three witnesses, namely Ilami Lutumailagi (DW-1), Sitiveni Qalovaki (DW-2) and Peceli Nakavolevu (DW-3).

[17] DW-1 in evidence-in-chief states:

a. He is trustee of Mataqali.

b. 'Danudanu' is given to families to eat from and not to earn from.

c. Dispute arose when they started selling sand and not followed the procedure of informing the land owners. They failed to inform Mataqali, Tokatoka and Yavusa. We have to sit and talk. We were able to settle the dispute before the iTLC's intervention. The iTLC confirmed the land belongs to Tokatoka Nalubati and Mataqali Nalubati. Miliana was present in the second meeting. Trustees of Mataqali Nalubati, all members of Mataqali Nalubati were also present at the meeting. Some of the Yavusa members were also present. They confirmed the land belongs to Tokatoka Nalubati and Mataqali

Nalubati. At the meeting, Miliana did not raise her 'Danudanu' right. No other grievances were raised by Miliana.

- d. We did not stop the work. We stopped Miliana in the middle of the night with the contractor before dredging sand. We have to safeguard the interest of Mataqali. Miliana is not entitled to remove sand from Nukuvatu Island. Sand belongs to Mataqali Nalubati. She did not consult with us.
- e. She (Miliana) extracts sand and sells to non-members of Mataqali Nalubati. How much money they get they only know. The money is still with her. The extraction started in 2013. No money was ever distributed among members of Mataqali Nalubati and Tokatoka Nalubati.
- f. We have license for extracting sand issued to Mataqali Nalubati. We never used the license. Miliana has no license because the land belongs to Mataqali Nalubati and Tokatoka Nalubati. The matter is before the court that we are not using the license. The land was not given for extracting sand. The money she collected from selling sand is to be given to us for distribution. We also ask the court to stop her from extracting sand. Miliana is my niece. We are her father's brothers. The dispute has created division in the Mataqali members.

[18] Under cross-examination, DW1 states:

- a. The gravel came from the river and then it's dumped onto the land. It came from the sea because of the dredging.
- b. The Mataqali had no knowledge of any agreement that was done between the Rororo family and the Government.

- c. He said, 'yes' to the question that from 2009 to 2012 are you aware that the Rororo house could not plant on their 'danudanu'.
- d. He said he cannot recall when the Government Department came to dredge the sand/gravel from the sea.
- e. He denied the suggestion that from 2009 to 2012 the Mataqali did not get involved with the gravel on 'danudanu' because no extraction and once the plaintiff started extracting to have her 'danudanu' used up again.
- f. He said that the 'danudanu' was distributed for them (Rororo family) only to eat from.
- g. He confirmed that the plaintiff does not have license to extract gravel and he had a license from 27 March to 31 December 2013.

[19] DW2 in evidence states:

- a. He is working with the iTaukei Land and Fisheries Commission for 15 years.
- b. He said kanakana or 'danudanu' is where you eat from. It is a village custom. He read Commissioner Maxwell's definition of 'danudanu'.
- c. The owner of the 'danudanu' is the Tokatoka itself.

[20] During cross-examination he confirmed that in the case of Nalubati, Tokatoka, Mataqali Nalubati there is no 'kanakana' or 'danudanu' that is situated in the Tokatoka Mataqali 'Nalubati'. He also confirmed that the land belongs to Tokatoka Nalubati.

[21] DW3 states in his evidence that:

- a. He has been working for the Department of Lands since 2009.
- b. He says there is a guideline to determine the quantity and the amount that is payable on the quantity of sand extracted. Current gazette price is \$2.00 per cubic metre for royalty. This may be stated in the licence issued. The royalty gets amended every year. However, he is not sure of the royalty rate in 2013.

[22] Under cross-examination DW3 confirmed that without license, extraction is illegal.

### **Discussion and decision**

[23] The plaintiff's claim hinges on her 'kanakana' or 'danudanu' rights. According to native custom of the Tokatoka members, the land once cleared and planted is known as "danudanu".

[24] The plaintiff is a member of Tokatoka Nalubati of Moala Village in Nadi. The first defendants are Trustees of Mataqali Nalubati of Moala Village. The second defendant is a member of Mataqali Nalubati and Tokatoka Nalubati of Moala Village.

[25] It has been common ground that Nukuvatu Island is owned by Mataqali Nalubati and Tokatoka Nalubati of Moala Village in Nadi. It is also common ground that there are three houses or families in the Tokatoka of Nalubati namely Rororo, Nalubati and Nakulubokola. The plaintiff belongs to Rororo family.

[26] According to the plaintiff, Nukuvatu Island was allotted to her grandfather to clear out and to plant for the Rororo family and it was passed down through their family generation. The plaintiff said her father



planted and after her father, his brother did and she did not cultivate after her brother passed away.

[27] The defendants did not seriously challenge the plaintiff's 'danudanu' right on the Nukuvatu Island. What the defendants challenge is the plaintiff's right to extract sand from that island.

[28] Both parties place reliance on the Commissioner Maxwell's definition of 'danudanu'. Commissioner Maxwell printed by Government Printer in 1915, which defines 'danudanu' as:

***“Land once cleared and planted is known as “danudanu” and the sole right of planting of any “danudanu” is vested in the person who first planted it and his descendants.”*** (Emphasis provided)

[29] No evidence was led to contradict the above definition of 'danudanu'. The plaintiff and the defendants admit the definition given in the Commissioner Maxwell.

[30] I would, therefore, find that the Commissioner Maxwell's definition of 'danudanu' that the sole right of planting of any 'danudanu' is vested in the person who first planted it and his descendants.

[31] The plaintiff derives 'danudanu' right from her descendants. This is not disputed by the defendants. I accordingly hold that the Nukuvatu Island is the 'danudanu' of Rororo house.

Whether 'danudanu' right includes any rights other than planting and eating?

- [32] On the strength of the 'danudanu' right on the Nukuvatu Island, the plaintiff entered into an agreement with the Ministry of Primary Industries to dump river sand on the Nukuvatu Island for their (plaintiff's) benefit.
- [33] In evidence, the plaintiff states that Mr Jolame Navoyo who is the Turaga in Yavusa/Head of Tribe of Nacaqaru, Turaga ni Mataqali/Head of Clan of Nalubati and Turaga ni Tokatoka/Head of sub-clan of Nalubati gave his full consent to the Rororo family to remove the river sand dumped on Nalubati Island.
- [34] The plaintiff should not have entered into an agreement with the Ministry of Primary Industries exercising her 'danudanu' right in the first place to dump river sand on the Nukuvatu Island, over which she has her 'danudanu' right. Judging from the accepted definition of 'danudanu', 'danudanu' right includes only planting and eating and nothing else. By entering into an agreement to dump river sand on the Nukuvatu Island, the plaintiff has acted against her 'danudanu' right. The plaintiff has made the Nukuvatu Island infertile because the huge heap of river sand covers the entire Nukuvatu Island. In order to regain her 'danudanu' right, the plaintiff needs to remove the sand therefrom. Currently, she has no license to do so. However, this can be done with the consent of and in consultation with the land owners who can obtain license to remove the sand from the Nukuvatu Island and make it fertile.

Whether the plaintiff is entitled to general, aggravated and penal damage?

- [35] The plaintiff has sole right to plant and eat on Nukuvatu Island. She did not plant after her brother. She has left the village. It is not clear when her brother last planted on the island in question. The plaintiff by her

own action has made her 'danudanu' right impossible to exercise. There is no evidence in court showing that the defendants trespassed and disturbed or prevented the plaintiff from exercising her 'danudanu' right on the Nukuvatu Island. I, therefore, find that the plaintiff is not entitled to claim any damages from the defendants.

### **Conclusion**

[36] I conclude, for the foregoing reasons, and make a declaratory order that the plaintiffs are entitled to use Nukuvatu Island as their 'danudanu' and eating place. I would make no order as to costs. Each party will bear their own costs.

### **The result**

1. There will be a declaratory order that the plaintiffs are entitled to use Nukuvatu Island as their 'danudanu' and eating place.
2. Each party is to bear their own costs.

*M. H. Mohamed Ajmeer*  
..... 2/5/17 .....

**M. H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**02 May 2017**

Solicitors:

For plaintiff: M/s Vuataki Law, Barristers & Solicitors

For defendants: M/s K Law, Barristers & Solicitors