IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 113 of 2005/L

BETWEEN : **POATE DAKUNI** of Nasomo, Vatukoula, Villager.

PLAINTIFF

AND : **NACANIELI RAMALASOU** of Nasomo, Vatukoula, Villager who is sued for and on behalf of the eleven (11) Committee members of the Nasomo Landowners Trust.

DEFENDANT

Counsel : Ms. Jyoti Naidu for the Plaintiff/Respondent
Mr. Sione Fa for the Defendant/Applicant

Date of Hearing : Ruling on Submissions
[Plaintiff/Respondent Submissions filed 27 January 2016
No Submissions filed by Defendant/Respondent]

Date of Ruling : 24 January 2020

RULING

INTRODUCTION

1. The defendant, Nacanieli Ramalasou, filed a Notice of Motion on 17 November 2014 pursuant to section 73(1) of the Trustees Act (Cap 65). I was informed by his counsel on 06 August 2015 that Ramalsou is deceased. At the hearing on 06 August 2015, both counsel agreed that they would file written submissions on which I was to rule. The plaintiff's/respondent's solicitors filed submissions on 27 January 2016. The defendant/applicant's solicitors have not filed any submissions.

2. The Notice of Motion sets out the names of some thirteen persons. What is being sought is an Order of this Court to have these thirteen persons replace the current sitting trustees of the Nasomo Landowners Trust (**"NLT"**). The sitting

trustees were appointed in May 2008 by Order of the Learned Master Udit. The affidavits in support of the Notice of Motion allege that these appointments were made by the Learned Master based on malicious and false information which is all contained in an affidavit sworn by Poate Dakuni on 16 May 2008.

3. It is to be noted that the Writ of Summons and Statement of Claim filed on 12 July 2015 pleaded allegations of abuse and breach of trust on the part of the then trustees. On 17 April 2008, Qoro Legal, on behalf of Dakuni, filed a Motion seeking amongst other things that Dakuni and the trustees meet and convene a meeting of all members and beneficiaries of NLT to discuss and agree on the names of the new Trustees and that the names of these Trustees be presented to the Court in a joint affidavit with the necessary consent of the majority members and beneficiaries.

4. An affidavit of Poate Dakuni sworn on 16 May 2008 was filed in Court on the same day setting out the names of the new Trustees. This affidavit was sworn with the authority of Ramasalou.

5. I set out below the particular relief which the Motion before me now seeks from this Court :

(i) a declaration that the evidence contained in the Affidavit of Poate Dakuni deposed on 16 May 2008 has been maliciously falsified by the deponent with the intent of misleading this Court.

(ii) an order that Master JJ Udit's Order granted on 29 May 2008 appointing 13 named persons therein to be members of the Board of Trustees of the Nasomo Landowners Trust, be dismissed.

(iii) an order that the following persons are appointed pursuant to section 73(1) of the Trustees Act (Cap 65) as the newly appointed members of the Board of Trustees of the Nasomo Landowners Trust namely

YAVUSA [CLAN]	**NAMES**
(a) Taladrau [4]	1. Ilisoni Tabuyalewa
	2. Viliame Rokorairaba
	3. Joape Ramalasou
	4. Semani Namulo
(b) Tovata [1]	1. Anare Nunuse
(c) Naiova [2]	1. Osea Tiko No.1
	2. Waisea Vusodamu

(d)	Nasoqo [2]	1. Isimeli Naviti No.1
		2. Alivereti Nakini
(e)	Wailevu [1]	1. Taito Koroi
(f)	Naboubuco [3]	1. Solomoni Gonevoti
		2. Tevita Natikodina
		3. Vilikesa Rokolaba

SECTION 73 – TRUSTEE ACT

2. Section 73 of the Trustees Act provides :

73.-(1) The Court may, whenever it is expedient to appoint a new trustee or new trustees , and it is inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees , either in substitution for or in addition to any existing trustee or trustees , or although there is no existing trustee .

(2) In particular, and without limiting the generality of the provisions of subsection (1), the Court may make an order appointing a new trustee in substitution for a trustee who-

(a) desires to be discharged;

(b) has been held by the Court to have misconducted himself in the administration of the trust;

(c) is convicted of any misdemeanour involving dishonesty, or of any felony;

(d) is a person of unsound mind;

(e) is bankrupt; or

(f) is a corporation that has ceased to carry on business, or is in liquidation, or has been dissolved.

(3) An order under the provisions of this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any discharged, former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section contained shall confer power to appoint an executor or administrator.

(5) Every trustee appointed by the Court shall have, before as well as after the trust property becomes by law or by assurance or otherwise vested in him, the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument (if any) creating the trust.

3. Section 73 is a two-limbed test. Firstly, it must be expedient for a substitute or additional trustee to be appointed and secondly, in some sense, because of the circumstances, the assistance of the court must be necessary.

4. Section 73(2) itself sets out some situations where the jurisdiction may need to be exercised. None of these applies in this case before me now.

5. The power conferred on this Court by section 73 is a discretionary power. The question then becomes whether or not the situation alleged in the affidavits supporting Ramalasou's Motion satisfies the two-limbed test of section 73?

SUPPORTING AFFIDAVITS

6. Ramalsou has not sworn any affidavit. However, the Motion which he purportedly filed is supported by the following affidavits (**"deponents"**) (I use the word "purportedly" with emphasis for reasons I explain further below):

   (i) of Viliame Rokoraiba sworn on 17 November 2014
   (ii) of Eparama Rogosai sworn on 17 November 2014
   (iii) of Losana Vulavou sworn on 17 November 2014
   (iv) of Vilimoni Navualiku Jr & Sr both sworn on 17 November 2014
   (v) of Navitalai Rokotuitai sworn on
   (vi) of Viliame Molikula sworn on 17 November 2014

7. The deponents all take issue with Dakuni's affidavit sworn on 16 May 2008.

DAKUNI'S AFFIDAVIT

8. In paragraph 6 of his affidavit, Dakuni had deposed the following:

   (i) that pursuant to an Order of the Court dated 25 April 2008, a meeting was called on 08 May 2008 to discuss and agree on the names of the new Trustees of Nasomo Landowners Trust.

(ii) in the meeting, the following people were appointed by the respective Yavusas (clans) to be their representatives and trustees in the Nasomo Landowners Trusts and they were:

YAVUSA [CLAN]	NAMES
(a) Taladrau [4]	Nacanieli Nalumisa
	Livai Waqairawai
	Semani Namulo
	Joape Ramalasou
(b) Tovata [1]	Ulaiyasi Yavala
(c) Naiova [2]	Poate Dakuni
	Moape Tui
(d) Nasoqo [2]	Pita Tikovagone
	Sailosi Yawari
(e) Wailevu [1]	Savenaca Lutu
(f) Naboubuco [3]	Taito Koroitamana
	Joela Lele
	Samisoni Naitoni

9. That the above-named trustees had in fact been duly appointed by their respective clans, Dakuni establishes this by annexing to his affidavit supporting documentation. The documents set out the names, address, age and signature of every member who endorses the nomination(s) for his or her yavusa.

10. It was pursuant to the above that the Learned Master Udit granted Orders which endorsed the appointment of the above-named persons as trustees of the NLT. The Order was sealed on 29 May 2008.

DEPONENTS' ISSUES

11. Viliame Molikula deposes that the court-appointed trustees *"have not done anything in accordance with their roles as Trustees"*. For that reason, the beneficiaries decided that it would be in *"our best interest that we appoint new Trustees to be endorsed by this Honourable Court"*.

12. He then deposes that a meeting was convened on 30 October 2014 where the Nasoqo Clan, Tovata Clan, Babobuco Clan, Taladrau Clan, Wailevu Clan and the Naiova Clan and *"voted for the appointment of"* their respective nominees whose names now appear on Ramalasou's Motion.

13. I note that Molikula does not set out any particulars of how the current sitting trustees *"have not done anything in accordance with their roles as Trustees"*.

14. I am not inclined to give any seriousness to this allegation.

15. Rokoraiba deposes that seven of the current sitting trustees have passed on. However, apart from Ramalasou's name, he does not name the other six deceased members.

16. He also deposes that the names of the current trustees whom Master Udit had appointed based on Dakuni's affidavit sworn on 16 May 2008, were not the names which the majority of the beneficiaries had consented to. He believes that it was Dakuni himself who had nominated these names.

17. Rokoraiba confirms though that a meeting was in fact held at the Nasomo Community Hall at 10.00 a.m. on 08 May 2008 where he was present. Interestingly, Dakuni deposes in an affidavit in reply sworn on 04 March 2015 that Rokoraiba was not present at the meeting as his name does not appear in the attendance register. I accept Dakuni on this point.

18. Relying on the minutes of the meeting, Rokoraiba deposes that only three clans were present. These clans had reached a final decision as to their respective nominations. The meeting had to be adjourned to another date to allow for the other three clans to finalise their nominations by 12 May 2008.

19. As I have said above, the affidavit of Poate Dakuni sworn on 16 May 2008 was actually made with the authority of Ramalasou. Annexed to the affidavit is an Authority signed by Ramalasou where he confirmed inter alia that he had authorized Dakuni to swear the affidavit *"on our behalf pursuant to order made by Master Udit on 25th April 2008"* and:

> *"that new trustees of Nasomo Landowners Trustees were appointed by the beneficiaries of the trust at a meeting at Nasomo Community Hall at 10. A.m on Thursday 8th May 2008"*

20. Eparama Rogosau's affidavit deposes that he did not sign to endorse the appointment of Savenaca Lutu as trustee in NLT for Wailevu Clan, yet his name and

signature appears in the documents. He also confirms that there was no meeting of Wailevu Clan on 08 May 2008.

21. Losana Vulavou and Vilimoni Navualiku's affidavits contain similar allegations to that made by Rogosau.

22. To these, Dakuni responds by saying that he was merely the Secretary of the meeting held on 08 May 2008. He further states that he had no knowledge of the truth or falsity of the allegations of Rogosau, Vulavou and Navualiku. However, if the allegations are true, then it is the deponents' respective clans which are accountable for having submitted the names.

SOME OBSERVATIONS

23. One of the preliminary issues raised in these proceedings before me was whether the Order of Master Udit on 29 May 2008 was a final order or an interlocutory order and also whether it was a consent order, which, if it was a consent order, then the applicant should have proceeded by way of a fresh writ action.

24. I am of the view that Master Udit's Order was a final consent Order.

25. I say this having reviewed the history of the case beginning with the filing of the Writ of Summons and the Statement of Claim on 12 July 2005 and also the fact that Master Udit's Order would appear to finally dispose of the issues raised in the originating process.

26. I also take into account the fact that Master Udit's Order was based on the affidavit of Dakuni which was supported by an Authority executed by Ramalasou who was being sued for and on behalf of the 11 Committee members of the NLT.

WAS RAMALASOU THE APPLICANT?

27. I have some doubts as to whether Ramalasou was actually the applicant in this case or had authorized the filing of the application. In fact, I have some misgivings as to whether or not he was alive at all at the time when the application was filed.

28. The Notice of Motion dated 17 November 2014 is purportedly made by the "Applicant/Defendant", as far as the wording of the Notice of Motion goes.

29. However, as I have said, the supporting affidavit of Viliame Rokorairaba which was sworn on 17 November 2014 deposes as follows at paragraph 2:

> *I am informed and verily believe that of the 13 (Thirteen) committee members of the Nasomo Landowners Trust, 7 (Seven) have passed away including the named Applicant/Defendant, Mr. Nacanieli Ramalasou.*

30. If I may say so that it is most improper and illegal to use someone else's name in any court proceeding.

31. Madam Justice Gwendolyn Phillips in **BA Provincial Holdings Company Ltd v BA Provincial Council** [2006] FJHC 71; HBC237.2006 (8 September 2006), said:

> In regard the submission that the action has been instituted without proper authority, I adopt the principle applied in **Danish Mercantile Co. Ltd & Others –v- Beaumont and Another [1951] 1 All ER 925 at 930** where Jenkins L. J. expressed the principle to the applied as follows:
>
> > *"I think the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so, or under an erroneous assumption as to the authority, does so at his own peril, and, so long as the matter rests there, the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, providing the aggrieved defendant does not unduly delay his application, but it is open at any time to any purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings, and to say: "I approve of all that has been done in the past and I instruct you to continue the action." When that has been done, then, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority."*

32. I think the same applies here, even though in this instance, there is no "name of a company" involved. In saying this, I am mindful of the embarrassment this would have caused Ramalasou who was being sued in a representative capacity and also considering that the Orders which are being challenged in this instance, for all

intents and purposes, would not have been made had Ramalasou not endorsed the affidavit of Dakuni.

33. Accordingly, I find that the proceedings are defective in this regard alone, not to mention that it should have begun by way of a fresh writ action.

CONCLUSIONS

34. As I have said above, the power conferred on this Court by section 73 is a discretionary power[i].

35. Is it expedient for the thirteen substitute trustees to be appointed and is the assistance of the court necessary at this time? While it is now redundant to address this question in light of my conclusions above, I think it best to attempt it anyway to bring some closure between the parties.

36. As I had noted in **Nizam v Shah** [2014] FJHC 218; HBC47.2009 (28 March 2014), section 51 of the New Zealand Trustee Act 1956 is an exact replica of Fiji's section 73[ii].

37. In **Harsant v Menzies** [2012] NZHC 3390 (13 December 2012), Ellis J's said as follows in his reserved judgment:

> *[55] ..... Expedience is a lower threshold than necessity and imports considerations of suitability, practicality and efficiency. Misconduct, breach of trust, dishonesty, or unfitness is not required to be established* ***R v Leitch*** *[1998] 1 NZLR 420 (CA) at 428-429.*
>
> *[56] There is, as well, the Court's parallel inherent, equitable, jurisdiction to remove and substitute trustees. The leading cases are well known and I need only refer to* ***Letterstedt v Broers***[iii] *and* ***Hunter v Hunter***[iv]*. And it is trite that these authorities are regarded as informing the circumstances in which removal is expedient under both s 21 of the Administration Act 1969 or under s 51 of the Trustee Act 1956.*

38. The litmus test is the welfare of the beneficiaries[v]. This applies whether the court is exercising its statutory jurisdiction under section 73 or its inherent jurisdiction[vi]. The essential point to take into account when considering the welfare of the beneficiaries is the safety of the trust estate[vii].

39. Scott J said in **Chellaram v. Chellaram** (1985) 1 Ch.D 409 at p.428:

The jurisdiction of the court to administer trusts to which the jurisdiction to remove trustees and appoint new ones is ancillary, is an in personam jurisdiction. In the exercise of it, the court will inquire what personal obligations are binding upon the trustees and will enforce those obligations... The trustees can be ordered to pay, to sell, to buy, to invest, whatever may be necessary to give effect to the rights of the beneficiaries, which are binding on them. If the court is satisfied that in order to give effect to or to protect the rights of the beneficiaries, trustees ought to be replaced by others, I can see no reason in principle why the court should not make in personam orders against the trustees requiring them to resign and to vest the trust assets in the new trustees .

40. I note that the current sitting trustees were appointed amidst swirling allegations of breach of trust on the part of their predecessors. The particulars of these are set out in the Statement of Claim filed on 12 July 2005.

41. Also, as I have noted, Viliame Molikula has made sweeping allegations in his affidavit that the court-appointed trustees *"have not done anything in accordance with their roles as Trustees"*, but does not care to give any particulars.

42. Accordingly, it is hard for me to find that the interests of the beneficiaries are being threatened or compromised, without any substantive evidence, and, had I been asked to address this question, I would have found that it is not expedient for the court at this time to make any order in the circumstances to appoint the thirteen persons named in the summons as substituting trustees.

43. The beneficiaries are however at liberty to file a fresh originating process to remove the current sitting trustees.

ORDERS

(i) Application dismissed.

(ii) Costs to the plaintiff against all the deponents which I summarily assess at $2000-00 (two thousand dollars).

HIGH COURT OF FIJI LAUTOKA

.....

Anare Tuilevuka

JUDGE

Lautoka

[i] Section 73 gives the Court a wide discretion to appoint a new trustee "whenever it is expedient". The High Court of Australia (as per Dixon J) echoes the same sentiments in **Miller v Cameron** (1936) 54 CLR 372 (my emphasis):

> *The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary.*

Smith J of the New Zealand High Court, in **Hunter v Hunter** [1937] NZLR 794, when dealing with section 21 of the New Zealand Administration Act 1969 and section 51 of the New Zealand Trustee Act 1956, which both provide for an "expedient test" (see footnotes), said at page 796:
In determining whether the trustees should be removed, the Court has a discretion. The leading case is Letterstedt v Broers (1884) 9 App Cas 371. The Privy Council there held that there is a jurisdiction in Courts of Equity to remove old trustees and substitute new ones in cases requiring such a remedy, and that the main principle upon which the jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate.

[ii] Section 51 of the New Zealand Act states as follows:

51 Power of Court to appoint new trustees

(1) The Court may, *whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court,* make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

(2) In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who—

(a) Has been held by the Court to have misconducted himself in the administration of the trust; or

(b) Is convicted, whether summarily or on indictment, of a crime involving dishonesty as defined by section 2 of the Crimes Act 1961; or

(c) Is a mentally disordered person within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992, or whose estate or any part thereof is subject to a property order made under the Protection of Personal and Property Rights Act 1988; or

(d) Is a bankrupt; or

(e) Is a corporation which has ceased to carry on business, or is in liquidation, or has been dissolved

(3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section shall give power to appoint an executor or administrator.

(5) Every trustee appointed by the Court shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

[iii] *Letterstedt v Broers (1884) 9 App Cas 371 (PC).*

[iv] *Hunter v Hunter (1938) NZLR 520 (CA)*

[v] *In **Letterstedt**, Blackburn LJ said as follows at page 386:*

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

At page 387:

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependant on details often of great variety. But they proceed to look carefully into the circumstances of the case.

[vi] *In **Snell's Principles of Equity (28th ed)** at pages 210 to 211 - that the welfare of the beneficiaries must be the court's guide in exercising both its inherent and statutory jurisdiction to remove a trustee (or executor):*

Apart from statute, the court has an inherent jurisdiction to remove a trustee and to appoint a new one in his place. As the interests of the trust are of paramount importance to the court, this jurisdiction will be exercised whenever the welfare of the beneficiaries requires it, even if the trustees have been guilty of no misconduct. The welfare of the beneficiaries is also the court's guide in exercising its statutory powers of removal.

[vii] Latham CJ, in the same case, follows suit, by saying that the principal element, when considering the welfare of the beneficiaries, is the safety of the trust estate:

It has long been settled that, in determining whether or not it is proper to remove a trustee, the Court will regard the welfare of the beneficiaries as the dominant consideration (**Letterstedt v. Broers**[1]). Perhaps the principal element in the welfare of the beneficiaries is to be found in the safety of the trust estate. Accordingly, even though he has been guilty of no misconduct, if a trustee is in a position so impecunious that he would be subject to a particularly strong temptation to misapply the trust funds, the Court may properly remove him from his office as trustee. No distinction in this connection can be drawn between a bankruptcy and an assignment for the benefit of creditors. A trustee who becomes bankrupt is removed almost as of course (**Bainbrigge v. Blair**[2]). There may be exceptions under special circumstances to this rule, but the rule is generally applied (**In re Barker's Trusts**[3]). If the bankruptcy is explained by financial misfortune without moral fault and the trustee has recovered from pecuniary distress he may be allowed to retain his office (**In re Adams' Trust**[4]).