

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 11 of 2022

BETWEEN

WAISILIURA DEVELOPMENT TRUST LIMITED a limited liability company
incorporated under the Companies Act having its registered office at lot 31, Latui Road,
Wailada, Lami.

PLAINTIFF

AND

TUILEA USA of Naimataga, Suva.

1st DEFENDANT

AND

MARICA TUBERI SALABOGI of Naimataga, Suva.

2nd DEFENDANT

AND

ITAUKEI LAND TRUST BOARD a statutory body corporate duly incorporated under the iTaukei Land Trust Act 1940 of 431, Victoria Parade, Suva.

3rd DEFENDANT

Counsel : Mr. D. Toganivalu for the Plaintiff
Mr. N. Tuifagalele for the 1st & 2nd Defendants
Mr. J. Cati for the 3rd Defendant

Date of Hearing : 20th October 2022

Date of Judgment : 10th February 2023

JUDGMENT

- [1] The Plaintiff filed this Originating Summons seeking following orders,
- I. An order that the first and second Defendants give immediate vacant possession to the Plaintiff of the property being and/ or comprised in Agreement for Lease TLTB reference No. 4/16/40850 described as Naimataga (Part of), in the Tikina of Suva, In the Province of Rewa, comprising an area of 93.6041 hectares of which the Plaintiff has an Agreement for Lease to occupy and utilize the said property for development purposes.
 - II. An order that the first and second Defendants herein and/or any other occupants within 7 days dismantle and remove encroaching structures that they occupy or have erected on the property being and/ or comprised in Agreement for Lease TLTB reference No. 4/16/40850 described as Naimataga (Part of), in the Tikina of Suva, In the Province of Rewa, comprising an area of 93.6041 hectares and that all costs associated with the dismantling and removal

of the same be borne by the Defendants herein and/or any other occupants bear all costs associated with the same.

- [2] The Originating Summons was supported by an affidavit of Plaintiff Company Director Tuimavela Emo also known as Tuima Hemo. He states that on or about 27th June 2018 the Plaintiff company entered into an agreement for Lease with the 3rd Defendant for the property being named as Naimataga (Part of), in the Tikina of Suva, In the Province of Rewa, comprising an area of 93.6041 hectares. On 1st July 2018 the said agreement for lease commenced for a term of 10 years. The company was granted possession and use of all the property as described in the Agreement for Lease by the 3rd Defendant for development purposes. The company has begun the process of obtaining the requisite approvals from the Department of Environment to develop the said property.
- [3] The Plaintiff states that the 1st and 2nd Defendants did not seek permission from them to occupy the land and that they have begun constructing homes in the said property. On 15th April 2021 the Suva City Council has issued a notice to the company alleging the company for carrying out illegal excavation works. In fact that was for the construction works of the 1st and 2nd Defendants. On 21st April 2021 a second notice has been issued by the Engineering Services Department of Suva City Council to remove the structures that has been built on the property.
- [4] On 9th July 2021 the Plaintiff Company's Solicitors caused a Notice to Quit and Vacate the Area and served on the 1st Defendant. The 1st Defendant refused to acknowledge the service of this notice. Another notice was issued on 1st October 2021 and they failed to serve the same on the 2nd Defendant due to her refusal to acknowledge service. The 30 day period to vacate the property lapsed and the first two Defendants continued to occupy the property. Hence the Plaintiff filed this action seeking orders aforementioned.
- [5] The first Defendant filed an Affidavit in Reply for both him and the second named Defendant. He states that he is a registered member of Mataqali Laselase of Nabaka village of Rewa Province. The second Defendant is the spouse of 1st Defendant's uncle. The Defendants state that they have been residing on the land way before the 3rd Defendant issued the Agreement to Lease. He states that the 3rd Defendant cannot issue a Lease over the said land as it breaches section 9 of the **iTaukei Lands Trust Act 1940**. He further states that the said land has been used by land owners and licensed occupants allowed by members of Mataqali Laselase to occupy and use the land since 1988. The said land has around 40 houses with 250 total occupants. During the last Mataqali meeting held in 2021 former Deputy General Manager of 3rd Defendant has informed the Mataqali members that the development lease will not include the land

portion of Defendant's residing as it will be an expensive exercise to dismantle all permanent fixtures on the land.

- [6] The affidavit of Sairusi Ketenilagi Acting Team Leader-Estate of iTaukei Land Trust Board for the 3rd Defendant states that the 3rd Defendant has issued a Development Lease to the Plaintiff for the said land. The Lease has been issued subsequent to consultations held with the members of the Mataqali as majority supported the idea of their own Mataqali leasing and developing their own land through a commercial arm. The 3rd Defendant notes that few landowning unit members have been allowing other illegal occupants to squatter on their land without any formal process. The illegal occupants have been consulted and agreed that they will be given first priority of owning development residential leases on the leased land after its development. There were 16 sitting occupants on the demarcated lease land when the 3rd Defendant carried out their due process and no member of landowning unit occupying the leased land.
- [7] The 3rd Defendant states that the 1st and 2nd Defendants started constructing their house on the Plaintiff's leased land after the issuance of the lease. Despite many consultations and warnings the two Defendants continued to construct the house. The 3rd Defendant states therefore they support the application made by the Plaintiff.

The Law and Determination

- [8] This application is made pursuant to Order 113 Rule 1 of the **High Court Rules, 1988**. Order 113 Rule I reads as follows:
"where a person claims possession of the land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceeding may be brought by originating summons in accordance with the provisions of this Order".
- [9] In **Baiju v Jai Kumar** [1999] 45 FLR 74 His Lordship Pathik J stated that "the Court has to consider the scope of the Order. This aspect is covered in detail in The Supreme Court Practice, 1993 Vol I, O.113/1-8/1 at page 1602 and I state hereunder the relevant portions in this regard:
'This Order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers.'
As to the application of this Order it is further stated thus:
The application of this Order is narrowly confined to the particular circumstances described in r.1. i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional

machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee holds over after the determination of the licence (**Bristol Corp. v. Persons Unknown**) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593.

This Order is narrowly confined to the particular remedy stated in r.1. It is also to be noted, as the White Book says at p.1603:

‘this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation on the land without licence or consent and without any right, title or interest thereto’.

- [10] Section 4(1) of the **iTaukei Lands Trust Act 1940** states that the control of all iTaukei land shall be vested in the iTaukei Land Trust Board and all such land shall be administered by the Board for the benefit of the iTaukei owners or for the benefit of the iTaukei.
- [11] The affidavit of the 3rd Defendant states that they have observed some landowning unit members have allowed other illegal occupants to squatter on their land without any formal process. According to iTaukei Land Trust Board there were 16 sitting occupants on the land in question and none of them were landowning unit members.
- [12] The 1st Defendant has participated in several consultations carried out by the 3rd Defendant with the Mataqali Laselase. The 1st Defendant has always been the dissenting member of the landowning unit and did not support the development plans that would economically benefit the Mataqali. From the evidence of the 3rd Defendant the Court notes that both Defendants started constructing their house on the land after the issuance of the Development Lease to the Plaintiff.
- [13] The 1st Defendant has been a registered member of Mataqali Laselase. The 2nd Defendant is married into the same Mataqali. Their argument is that 3rd Defendant cannot issue a lease over any native land that is been beneficially occupied. The basis for this argument is in section 9 of the **iTaukei Land Trust Act 1940**. The Board's power to grant a lease or licence is clearly expressed under section 8 to be "subject to the provisions of section 9". That section has two limbs thereto, namely the Board must be satisfied that,

- (i) the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the iTaukei owners; and
- (ii) is not likely during the currency of such lease or licence to be required by the iTaukei owners for their use, maintenance or support.

[14] In **Waisake Ratu & another v Native Land Development Corporation & Native Land Trust Board** [1991] 37 FLR 146 His Lordship Cullinan J stated "Here I wish to stress the use by the Legislature of the word "owners", as the statement of claim alleges, inter alia, as earlier indicated, (at paragraph 22(a)) that the Board failed to comply with section 9, and did not ascertain whether the particular parcels of land were being "beneficially occupied and cultivated by the Plaintiffs". But a native Fijian holding land under native custom cannot be described as an "owner", or indeed a number of them as "owners", that is, unless they together constitute the particular proprietary unit, say, a Matabaki. It would be an odd state of affairs if, say, it could be said that where the particular land was beneficially occupied by one member of the three Yavusa, it was then "beneficially occupied by the Fijian owners". I cannot imagine that Parliament ever intended that result.

Instead, I consider that Parliament intended that where there was any occupation of the land the Board must approach the native owners, conscientiously placing all the advantages and disadvantages of the proposed lease or licence before them, and pointing out to the native owners the current occupation of the land by some members of the proprietary unit. Thereafter it seems to me that is a matter for the proprietary unit to decide whether their members in occupation of the particular lands could be accommodated elsewhere, perhaps seeking the assistance of the Board in the matter, should the proprietary unit decide to so accommodate their members. If the proprietary unit however decides that it does not wish to disturb any member of the unit on the particular land, then it seems to me that its wishes in the matter must be final. I wish to stress again as I did earlier, that the tenure of the lands is vested in the native owners, and not in the Board. Where the proprietary unit has indicated that it does not wish to move its people from the subject lands, then I do not see how it could be said that the Board was, objectively speaking, "satisfied that the land ... is not being beneficially occupied by the Fijian owners". It seems that inherent in this situation is the aspect of agreement by the native owners".

[15] The 3rd Defendant states that they had numerous consultations with the members of the Matabaki including the Defendants prior to the issuance of the Development Lease. The 1st & 2nd Defendants demands to provide meeting minutes or consent signatures. I do not think there is any merit in this demand. Section 9 only requires the Board's satisfaction as to the land proposed to be leased is not being beneficially occupied or

that it be required during the lease for the use by the iTaukei owners. The section doesn't speak of any 'consent' by the iTaukei owners. The 3rd Defendant in his affidavit states that they have carried out due process in issuing this Lease to the Plaintiff. Further the Court can safely have the presumption that the Agreement to Lease dated 27th June 2018 has been issued after having proper consultations with the Mataqali Laselase averred by the 3rd Defendant. Therefore I am of the view that Mataqali Laselase as the proprietary unit has decided to allow the 3rd Defendant to issue the Development Lease under section 8(1) of the **iTaukei Land Trust Act 1940**. If there had been any irregularity the 1st Defendant had ample opportunity and time to challenge the decision making process of the 3rd Defendant.

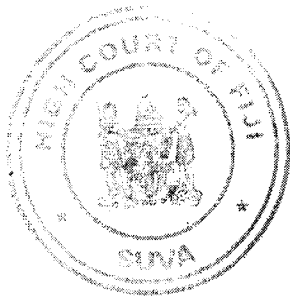
- [16] Another point of argument brought by the 1st and 2nd Defendants in their affidavit in opposition is that the 3rd Defendant cannot issue leases over reserved lands. The Defendants have not provided any supporting material on this point. The law relates the iTaukei reserves is in Part 3 of the **iTaukei Land Trust Act 1940**. Section 15(1) states 'it shall be lawful for the Board, by notice in the Gazette, to set aside any portion of iTaukei land as an iTaukei reserve'. As earlier stated the Board has control over all iTaukei land and this includes iTaukei reserves as well. The 3rd Defendant has never stated that the subject land or any part of it have the status of 'reserved land'. Even in the event if it was a reserve, section 17 of the Act allows the Board the discretion to exclude a land from a reserve for permanently or for a specific period of time. Therefore this argument by the 1st and 2nd Defendants lacks merit.

Conclusion

- [17] The Court notes that the 1st and 2nd Defendants started the construction work after the issuance of the lease to the Plaintiff in 2018. The Suva City Council has issued a notice on 15th April 2021 for illegal excavation work on the property and on 21st April 2021 another notice for building an unauthorized concrete foundation on the land. In fact both these notices were issued for the work carried out by the 1st and 2nd Defendants. Therefore as stated in the cases of *Baiju and Bristol Corp* it is clear that the 1st and 2nd Defendants are in occupation of the land without a licence or consent from the Plaintiff or the 3rd Defendant.
- [18] For the reasons above mentioned the Court makes following orders. I would also like to thank the counsel for the Plaintiff and the Defendants for their assistance in resolving this matter.

ORDERS

1. The 1st and 2nd named Defendants to vacate from the land subjected to iTaukei Land Trust Board lease No. 4/16/40850 on or before 10th May 2023.
2. The 1st and 2nd named Defendants to remove any structures built by them on the land mentioned in Order no.1 before 10th May 2023.
3. Any costs incurred in the removal of structures shall be borne by 1st and 2nd Defendants.
4. Cost of \$ 1000 (one thousand dollars) be paid by 1st and 2nd Defendants (total cost of \$2000) to the Plaintiff within 14 days of this judgment.



A handwritten signature in black ink, appearing to be "Yohan Liyanage". The signature is stylized and includes a horizontal line that extends to the right, ending in a small flourish.

Yohan Liyanage

JUDGE

At Suva on 10th February 2023