NIMA RASEWAI v ATTORNEY-GENERAL and 3 Ors (HBC0166A of 2003S)

HIGH COURT — CIVIL JURISDICTION

PATHIK J

15 July 2005

Administrative law — administrative tribunals — native land dispute between two communities — registered proprietor versus common knowledge — whether proper inquiries conducted to determine true owner of land — application dismissed — directed the Native Lands Commission to conduct inquiry — High Court Rules O 41 r 5(1) — Land Transfer Act (Cap 131) s 6 — Native Lands Act (Cap 133) ss 4, 6(1), 6(5), 16.

Adi Arieta Kabukeivuya (Arieta) was given the land of Nabouwalu as a gift with the condition that it will revert back to the original owners upon her death. The second Defendant (D2) reverted the land to Yavusa Daviko. Yavusa Daviko (Daviko) was the registered proprietor under the Register of Native Lands and Daviko includes Mataqali Natukuta (Natukuta). The Plaintiff submitted sworn affidavits of various heads of Mataqalis and claimed that Natukuta was the original owner based on common knowledge among members of Daviko. The Defendants, on the other hand, alleged that the affidavits presented by the Plaintiff were hearsay and inadmissible. The Defendants also alleged that the Wilkinson inquiry conducted in 1900 and Sukuna commission in 1927 stated that the disputed land was gifted by Daviko.

The Plaintiff applied for writ and originating summons in the High Court and sought declaration, mandamus and general damages and other orders and challenged whether: (1) the decision of D2 to revert ownership of land to Daviko was justified and lawful; and (2) D2 conducted proper inquiries to determine Nabouwalu's legal owner.

Held — (1) The decision of D2 to revert ownership of land to Daviko was unjustified and unlawful. Sections 4, 6 and 16 of the Native Lands Act (Cap 133) (the Act) make it mandatory for D2 to make inquiries on land matters and disputes claimed by the aggrieved parties and failure to do so would be a breach of their duties and functions. For D2 to accept the findings of the Wilkinson and Sukuna commission without any other investigation was not sufficient to refuse proper inquiry into the matter. D2 should have inquired further.

The affidavits submitted, though hearsay and would be inadmissible without concrete proof, suggested that the majority of the people of Daviko agreed that Natukuta owned Nabouwalu prior to the giving of the subject land to Ratu Tevita Suraki (father of Arieta). The only person who disagreed was Tui Vuya. This contention was sufficient reason to make inquiries into the rightful ownership of the subject land.

(2) The subject land should not be reverted back to Natukuta without inquiry. D2 should be directed to make the necessary inquiries to determine the rightful owners of Nabouwalu and also to determine the interests of Natukuta. A representative action can be maintained. D2 is the proper body to decide the issue. D2 will have to comply with the provisions of the Act notwithstanding what the Wilkinson and Ratu Sukuna inquiries may have decided.

Application dismissed.

Cases referred to

Mesulame Narawa v NLTB [2002] FJCA 9; *Serupepeli v NLDC* Civ App 0030/1982, cited.

Meli Kaliavu v NLTB [1955–57] 5 FLR 17; *Waisake Ratu (No 2) v Native Land Development Corporation* [1991] 37 FLR 146, considered.

R. Matebalavu for the Plaintiff

S. Banuve for the Defendants

Pathik J. By *writ of summons* dated 24 September 1998 and *originating summons* of even date the Plaintiff instituted proceedings in the High Court of Fiji, Labasa seeking declaration, mandamus, general damages and certain other orders as more particularly set out in the summons.

In particular, the Plaintiff's claim is against the *second* Defendant's decision to revert the land of *Nabouwalu* to *Yavusa Daviko* instead of *Mataqali Natukuta* upon the death of *Adi Arieta Kabukeivuya*.

The matter initially came before Fatiaki J (now Chief Justice). On 27 October 1998, his Lordship referred it to the Deputy Registrar to allow Plaintiff to consider which process he wishes to pursue ie by writ or by originating summons.

On 25 January 1999 the parties agreed before Scott J (now Justice of Appeal) to *proceed by way of originating summons* whereupon affidavits were filed.

From then on settlement talks were taking place until 22 April 2003. The case was transferred to High Court at Suva and on 20 August 2003 the case was called before me.

On 31 October 2003 it was ordered that Mr Rabo Matebalavu file and serve his written submission by 4 November 2003 and Mr Banuve to file his within 14 days thereafter and reply, if any, thereto 7 days thereafter. The decision was to be on notice.

The *first Defendant* (the D1) is the *Attorney-General of Fiji* who is being sued as the legal representative of government.

The *second Defendant* (the D2) is the *Native Lands & Fisheries Commission* (the *commission*) which is being sued under s 4 of the Native Lands Act (Cap 133), which is charged with the responsibilities of ascertaining rights of ownership and occupation of native land.

The *third Defendant* (the D3) is the *Registrar of Titles* who is being sued under s 6 of the Land Transfer Act (Cap 131) as one charged with duties such as registration and preservation of Registers of Native Lands and also, in carrying out any correction or amendment of such registers upon receipt of proper direction from the D2.

The *fourth Defendant* (the D4) is *Ratu Amenatave Rabona* who is being sued as the Head of Yavusa Daviko and representing its members.

Issues

The *issues* to be addressed are as follows as contained in the submission of the Plaintiff:

(1) Whether the decision of the Native Lands Commission in directing reversion of ownership of Nabouwalu to Yavusa Daviko justified.

(2) Whether the decision of the Native Lands Commission in directing reversion of ownership of Nabouwalu to Yavusa Daviko lawful.

(3) Should the ownership of Nabouwalu revert to Mataqali Natukuta of the Yavusa Daviko upon the death of Adi Arieta Kabukeivuya, without the necessity for a further inquiry by the Native Lands Commission?

(4) Is an inquiry under the Native Lands Act (Cap 133) warranted to determine the proper and lawful owner of Nabouwalu?

Background facts:

Adi Arieta Kabukeivuya was given (as gift) the land of Nabouwalu by Ratu Tevita Suraki, which was given to him by the Tikina of Vuya (including Vuya and Navave). This was on the condition that the land revert back to original owners.

Under the Register of Native Lands, Yavusa Daviko is the registered proprietor of Nabouwalu (Vol 4 Folio 425). Yavusa Daviko includes Mataqali Natukuta.

The Plaintiff contests that Nabouwalu belongs to Mataqali Natukuta and not the Yavusa Daviko as registered based on "common knowledge" among members of Yavusa Daviko.

The Plaintiff wants a proper inquiry to determine the proper legal ownership of the land of Nabouwalu. Tui Vuya opposes the claim by Mataqali Natukuta.

Claims by the Plaintiff and his evidence

In support of their claims, the Plaintiff submitted sworn affidavits of various heads of Mataqalis. Their primary evidence relied upon throughout their submission is that of one *Susana Cabealawa* who is a member of Tokatoka Nadali of Tavulomo Village, Mataqali Nadali, Yavusa Muaniacake (Tavulomo) Tikina Dama, Bua.

The assertion of the Plaintiff, in using the affidavit of Susana Cabealawa is that she had overheard Adi Arieta Kabukeivuya asking permission from her (Susana) father to possession and occupation of Nabouwalu on the condition that it revert back to the Mataqali (Natukuta) upon her death.

The affidavits submitted by the Plaintiff also claim that Mataqali Natukuta is the original owner of Nabouwalu, based on common knowledge on which are located government station offices, commercial centres and the Nabouwalu village itself; and not Yavusa Daviko as registered in the Native Lands Register.

Furthermore, that Ratu Tevita Suraki (Roko Tui Bua) was given the subject land by Mataqali Natukuta prior to the giving of the said land to Adi Arieta Kabukeivuya for the purpose of utilisation of the land as site for government station and offices to accommodate various government needs. As a condition to the gifting of the said land, the land was to revert back to the Mataqali upon her death.

Following the death of Adi Arieta Kabukeivuya in 1985, D2 substituted Yavusa Daviko for Adi Arieta as registered proprietor of the land, instead of Mataqali Natukuta.

In doing so, D2 breached its functions and duties under s 4 of the Native Lands Act, in failing to carry out proper investigation to determine original ownership of Nabouwalu. Consequently, it directed D3, the Registrar of Titles, to amend the Certificate of Title (Vol 4 Folio 25) to reflect Yavusa Daviko as the proprietor of the subject land.

In addition, the D2 failed to heed the numerous representations made by and on behalf of the members of Mataqali Natukuta as to their claims. As a result, the Mataqali Natukuta have been deprived of legal ownership of the land, and further denied entitlement to customary right of use and occupation of the said land and denied the right to the rent and proceeds and use thereof.

The claims against the D3 are the same as against D2, however, it is claimed that the D3 breached its function and duties in carrying out the amendment as directed by D2.

Response by the defendants

It is the submission of the Defendants that the manner in which these proceedings are brought is inappropriate as the Plaintiff relies heavily on *affidavit evidence* that there was widespread support from the vanua that Mataqali Natukuta owned Nabouwalu.

Also, that the affidavit evidence adduced in support of the Plaintiff's claim is hearsay and inadmissible as O 41 r 5(1) of the High Court Rules states that:

Subject to O 14 rr 2(2) and 4(2), to O 86 r 2(1), to para (2) of this rule and to any rule made under O 38 r 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

Thus, the evidence that the Plaintiff seeks to rely on is inadmissible and unreliable. All the affidavits establish one common idea and that is that it was *common knowledge* within the vanua that the Plaintiffs's Mataqali owned Nabouwalu. Furthermore, there is no proper basis in which the Plaintiff makes its claims.

The Defendants also submit that there is no evidence that the deponents of the affidavits are authorised by their respective Mataqalis to depose as they have done in this case. Also, that the courts have to be cautious of claims of Mataqali endorsement in the absence of concrete evidence: *Meli Kaliavu v NLTB* [1955–57] 5 FLR 17. In Meli's case the Plaintiffs sued in their personal capacity as members of the mataqali and not in a representative capacity on behalf of the Mataqali. There is was held:

> If any damage has been suffered by the mataqali as a result of any action by the Native Land Trust Board for which the Board is liable in law to pay damages, the mataqali could undoubtedly recover them. It was <u>not</u> however open to individual members to sue and recover damages in their own personal capacity. Nor could the plaintiffs succeed in their personal claim to the equitable remedy of an injunction.

The Defendants submit that the statement of Susana Cabealawa is inherently unreliable being nothing more than an attempt to recollect a discussion in the remote past with which she had no part of. It is therefore hearsay and inadmissible.

In fact, recorded evidence suggests that this assertion is clearly wrong. Both the Wilkinson enquiry conducted in 1900 and the Sukuna commission in 1927 made clear that Nabouwalu belonged to Adi Arieta Kabukeivuya without qualification. There is simply no evidence to suggest that Nabouwalu was owned by Mataqali Natukuta.

It is submitted that in fact, the only record that D2 has custody of and is bound to implement is that compiled by the Wilkinson (1900) and Sukuna enquiries (1927). It is now conclusive determination of native land ownership in the Vuya District as contained in the Native Lands Register. Neither of these enquiries record that Nabouwalu belonged originally to Mataqali Natukuta. It records that it was given by Yavusa Daviko. The Register is conclusive proof for this court on the final determination by the body authorised to determine ownership of native land: *Serupepeli v NLDC* Civ App 0030/1982.

In response to the Plaintiff's assertion that the D2 ought to have determined whether Mataqali Natukuta owned Nabouwalu, D2 submits that it does not have any power under the Native Lands Act (Cap 133) to do so. The findings of the Wilkinson and Sukuna commission are binding according to law on both the D2 and the Plaintiff.

Given that D2 is bound by the findings of the Wilkinson and Sukuna commissions it cannot possibly have agreed to the Plaintiff's request, as to do so would go beyond any powers it has under the Act and reopen an enquiry into ownership of land which by law has been completed and whose findings are now binding on all parties.

The bulk of the evidence the Plaintiff seeks to adduce through its affidavits are inadmissible and unreliable because all it seeks to do is challenge the recorded findings of the 1900 and 1927 commissions when clearly this is now binding. Nowhere in the Native Lands Register is there any indication that the Plaintiff's Mataqali was the original owner of Nabouwalu.

Consideration of the issues

The issues raised in this case involve the application of the provisions of the Native Lands Act (Cap 133) (the Act).

The sections of the Act which come into play are as follows:

Section 4 provides:

> *The Minister shall appoint a Native Lands Commission consisting of one or more commissioners, each of whom shall have the powers of the Commission, who shall be charged with the duty of ascertaining what lands in each province of Fiji are the rightful and hereditary property of native owners, whether of Mataqali or in whatever manner or way or by whatever divisions or subdivision of the people the same may be held.*

Furthermore, s 6 of the Act goes on to define what the commission is to do in cases of dispute as to ownership of land. It states:

> 6(1) The Commission shall institute inquiries into the title to all lands claimed by mataqali or other divisions or subdivisions of the people and shall describe in writing the boundaries and situation of such lands together with the names of the members of the respective communities claiming to be owners thereof.

And in:

> 6(5) *If there is a dispute as to the ownership of any lands marked out and defined as aforesaid the Commission shall inquire into it and, after hearing evidence and the parties to the dispute, decide the question of ownership and record its decision:*
>
> *Provided if the parties to the dispute agree in writing in the presence of the Chairman of the Commission to a compromise the Commission shall record the boundaries of the lands and names of the owners in accordance with such compromise.*

And s 16 of the Act goes further to state:

> 16(1) In the event of any dispute arising the parties to which are Fijians in connection with land in a province or tikina in which the proprietorship of the Fijian owners has been ascertained by the Commission or in a province or tikina which it may be inconvenient or inexpedient for the Commission to visit without delay or in any other case when he may deem it expedient, the Minister may delegate a member of the Commission or some other proper person to inquire into the same.

The evidence before me points in the direction that Nabouwalu belongs to the Plaintiff and not to Yavusa Daviko as registered. It is deemed from the provisions of the Native Lands Act that where such claims as these are made, then a commission shall be set up to inquire into the matter and make proper investigations. It is the claims of the Defendants that such a commission (Wilkinson and Sukuna enquiry) has already conducted the investigation and ascertained who the rightful owners are and that it is Yavusa Daviko.

However, if the Winkinson and the Sukuna commission was the final determination of land ownership in Fiji, then there would be no need for ss 4 and 6 to operate as there would be no more need for another commission to make inquiries. I hold that the purpose of ss 4 and 6 is to address claims such as those made by the Plaintiff.

The question then is whether the Native Lands Commission conducted proper investigation into the claims by the Plaintiff. The Plaintiff claims that several representations were made to the commission on the matter and that the Native Lands Commission failed to take note of these representations. The D2 claims that the Wilkinson and Sukuna commission have already determined the matter and that the decision is binding on them.

There is nowhere in the Register of Titles to suggest that Mataqali Natukuta nor Yavusa Daviko is the rightful reversioner upon the death of Adi Arieta Kabukeivuya. Rather, what the Defendants have is that the gifting of the subject land was "conducted at the yavusa and tikina (district) level to attach to and maintain customary chiefly air to the land gift". The Defendants assert that since the gifting was done at the "yavusa and tikina level" then the land should revert back to that level, which was the reason that the NLC directed the Registrar of Titles (D3) to amend the Register of Native Lands to recognise Yavusa Daviko as proprietor of the subject land.

In fact, it is submitted by the Plaintiff that the subject land was gifted through Fijian custom and protocol. Thus, Mataqali Natukuta could only formally give the land through the Yavusa Daviko head Ratu Silivenusi. The NLC inquiry before Wilkinson does not state the actual landowning unit that owned Nabouwalu rather that it was given by the "people of Navave". Therefore, neither of the Wilkinson and Sukuna commission properly identified the landowning unit or proprietor of Nabouwalu.

In relation to the actions of the NLC in accepting the findings of the Wilkinson and Sukuna commission without any other consideration for the claims by the Plaintiff nor any other inquiries, I find that the NLC failed in their function and duty to ascertain the true ownership of Nabouwalu, let alone the rights and interests of the Plaintiff's Mataqali.

Conclusion

Before I consider the issues, I refer to the affidavits filed by the Plaintiff in support of his claim. The affidavits adduced are from various heads of Mataqali in the Yavusa Daviko, deposing that it was "common knowledge" that the subject land belonged to Mataqali Natukuta. The Defendants submit that the affidavits are inadmissible as they are hearsay and there is no concrete proof of what the deponents deposed to.

On this aspect, I agree with the contention of the Defendants that the rules of hearsay are strict, especially where there is no proof of claims.

Issue 1:

Whether the decision of the Native Lands Commission in directing reversion of ownership of Nabouwalu to Yavusa Daviko justified?

It is my view that it is not justified. The reason is that ss 4, 6 and 16 of the Native Lands Act, make it mandatory for the commission to look into land matters and disputes claimed by aggrieved parties. For the commission to accept the findings of the Wilkinson and Sukuna commission without any other investigation is not sufficient to refuse "proper inquiry" into the matter. The Native Lands Commission should have inquired further.

The affidavits submitted, though they are hearsay and would be inadmissible without concrete proof, do suggest that the majority of the people of Yavusa Daviko agree with the contention that Mataqali Natukuta owned Nabouwalu prior to the giving of the subject land to Ratu Tevita Suraki (father of Adi Arieta Kabukeivuya). The only other person to disagree is the Tui Vuya himself. This contention would in my mind be sufficient reason to make inquiries into the rightful ownership of the subject land.

Issue 2:

Whether the decision of the Native Lands Commission in directing reversion of ownership of Nabouwalu to Yavusa Daviko lawful?

Sections 4, 6 and 16 of the Native Lands Act make it compulsory for the NLC to make inquiries of all lands claimed by Mataqali and failure to do so would be a breach of their duties and functions under the Native Lands Act.

In this case, the failure to make proper inquiries into the claims by Mataqali Natukuta has resulted in the actions of the NLC in directing the ownership of Nabouwalu to Yavusa Daviko. Therefore, it is unlawful to the extent that the NLC has breached its duties under s 6 of the Native Lands Act.

Issue 3:

Should the ownership of Nabouwalu revert to Mataqali Natukuta of the Yavusa Daviko upon the death of Adi Arieta Kabukeivuya, without the necessity for a further inquiry by the Native Lands Commission?

On this issue, it is my view that the subject land should not revert back to Mataqali Natukuta. The NLC should be directed to make the necessary inquiries to determine the rightful owners of Nabouwalu and also to determine the interests of Mataqali Natukuta in the said land.

A proper inquiry is necessary for this case.

Issue 4:

Is an inquiry under the Native Lands Act (Cap 133) warranted to determine the proper and lawful owner of Nabouwalu?

For this issue, I agree that an inquiry is warranted to put to finality the issue of ownership of Nabouwalu.

This is a representative action and an action such as this can be maintained.

In this regard in 1987 *Cullinan J* in delivering judgment (1987) in *Waisake Ratu (No 2) v Native Land Development Corporation* [1991] 37 FLR 146 at 187 on access to court for native owners in this way said:

> I would be slow to interpret the section as meaning thereby that the Legislature intended that the native owners, comprising 50% of the population, holding 8.5% of the lands of Fiji should be excluded in person from the Courts of Fiji.

And on 31 May 2002 in *Mesulame Narawa v NLTB* [2002] FJCA 9 the Court of Appeal sealed any doubts in maintaining an action of a representative action in the present form. In other words, access to courts is not denied the native owners.

Order/direction

In the outcome, for the above reasons the Plaintiff as an aggrieved party is justified in bringing this action against the Defendants to decide once and for all the ownership of the land in question.

It is my considered view, that the proper body to decide on the issue is the Native Lands Commission and to do this, needless to say, the commission will no doubt have to comply with the provisions of the Native Lands Act notwithstanding what the Wilkinson and Ratu Sukuna inquiries may have decided.

It is therefore directed, that the Native Lands Commission conduct an inquiry in accordance with the provisions of the Native Lands Act. *Liberty is reserved* generally to the parties to apply. Each party bear his own costs.

Application dismissed.