247

IN THE FIJI COURT OF APPEAL

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 75 OF 1991
(Civil Action No. 173 of 1990)

BETWEEN:

NATIVE LAND TRUST BOARD
RATU MELI NAEVO — APPELLANTS

-and-

MAIKELI NAGATA — RESPONDENT

Mr. N. Nawaikula for the 1st Appellant
Mr. E. Tavai for the 2nd Appellant
Mr. R. Matebalavu for the Respondent

Date of Hearing : 27th May, 1992
Date of Delivery of Judgment : 11th February, 1993

J U D G M E N T

This is an appeal against the decision and the declarations and orders given and made by Byrne J on 12th August 1991. The appellants are the Native Land Trust Board, a body corporate constituted under the provisions of the Native Land Trust Act 1940 Cap 134, and Ratu Meli Naevo who is the Tui Nawaka. The position of each will be explained later.

The respondent to the appeal is a person who brought the proceedings as plaintiff in a representative capacity. His position will also be explained later.

The dispute which resulted in the proceedings was one over the ownership of land. The land comprised some 2487 acres in the

Province of Ba (the land). The land is what is known as Native Lands. It is conveniently known as the Namulomulo Town Land, occupied by persons known as the Namulomulo villagers. It appears that the respondent (plaintiff) brought the proceedings as a representative of some of the villagers, but no question has been raised as to his authority to represent them all. The determination of ownership became desirable because the villagers had authorised the extraction of gravel from the land, and had received royalties as a result . They did so on the basis that they were the owners of the land. However, when this came to the notice of the second appellant, he claimed that the villagers were not the owners, and had no right to the royalties.

The Native Land Commission, consisting of one or more commissioners appointed by the Minister under the provisions of the Native Lands Act 1905 Cap 133, attempted to resolve the problem and held an inquiry for this purpose on 16th October 1989. It reached a conclusion that the villagers were not the owners of the land. That inquiry, on the material available to this Court, was clearly not an inquiry held pursuant to s.6 of the Native Lands Act. We say at once that it is doubtful whether the Commission had any power to hold the inquiry that it purported to hold. Perhaps that is why no objection was raised to Byrne J proceeding to determine the matter of ownership, and no objection to the jurisdiction of the High Court to do so, or of this Court to determine this appeal. The Native Lands Commission was named as a defendant to the proceedings. It is

doubtful whether any proceedings against the Commission as such are competent. Perhaps that is why there are only two appellants. In any event there was no submission that the decision of the Commission in 1989 had any legal force, and we are satisfied that it did not. No suggestion was made at any stage of the proceedings in the High Court or before this Court that s.100(4) of the Constitution applied, and for reasons just given we are satisfied that it did not.

Mr Justice Byrne directed that subject to qualifications which shall be mentioned later, the villagers were the owners of the land. It is from that decision that the appeal is brought.

For those unfamiliar with the arrangement of districts, the arrangement of the peoples who live there and their hierarchical structure, the following summary may be useful.

At all material times the Province was divided into a number of districts known as Vanua (or Tikina). The relevant Vanua in this case is the Vanua Nawaka. There may be a number of sub-divisions of each Vanua, each known as a Yavusa; in the case of Vanua Nawaka there were 12 Yavusas; a Yavusa is a tribe, but each Yavusa appears to occupy a defined area of land. Yavusa Saumata is one of the Yavusas of Vanua Nawaka; two others are Yavusa Leweinaqali and Yavusa Noi Vunatoto, which latter is the "chiefly" Yavusa of Vanua Nawaka.

Each Yavusa, or at any rate, the relevant ones here, have "components". They consist of Mataqali, or other divisions or sub-divisions of the Yavusa. As stated in 1880 (Ord. No. XXI, 1880) ".....lands in each province of the colony are the rightful and hereditary property of native owners whether of Mataqalis or in whatever manner of way and by whatever divisions or sub-divisions of the people the same may be held" (Cl. V). Native Lands are described in a basically similar way in the Native Lands Act and in the Native Land Trust Act.

The Yavusa Saumata consists of two Mataqali - the Mataqali Ketenatukani and the Mataqali Ketenaticini. They occupy and claim to own the land, viz the Namulomulo Town Land. That land was and perhaps still is, also occupied by two Mataqali of Yavusa Leweinaqali, but nothing turns on this. The Yavusa Noi Vunatoto is comprised of one Mataqali, the Mataqali Nalagi. Ratu Meli Naevo, the second appellant (3rd defendant) is the Turaga ni Mataqali Nalagi, or head man of the Mataqali comprising the Yavusa Noi Vunatoto, which is the "chiefly" Yavusa of the Vanua Nawaka, of which the Yavusas Saumata and Leweinaqali also form part. As such he is the Turaga-i-Taukei of the Vanua Nawaka, holding the title of Tui Nawaka. For reasons that will appear through this chain he represents the Mataqali Nalagi who claim to be the owners of the land comprising the Namulomulo Town Lands, also referred to as the Namulomulo village. No objection to his status or right to do so has been raised.

There is as a further "sub-division" of each Mataqali, the members of which comprise a Tokatoka, at least so far as concerns the two Mataqali who comprise the Yavusa Saumata. Of those two there were five of these Tokatoka; the plaintiff sues as representative of three or four of them.

A diagram of the various relationships is Appendix 1 to these reasons for judgment.

The argument presented on behalf of the appellants makes it necessary to look at the history of the occupation of the land and how the competing claims of ownership arise.

The history is recounted in the so called ruling of the Commissioner given on 16th October 1989, mentioned earlier. It is not in dispute. It seems that what occurred did so before 1874. The people or tribe, Yavusa Saumata, came to the Vanua Nawaka from another Vanua in the highlands.

> *"Upon their arrival in this Vanua, your ancestors brought with them their custom of chiefly respect of the highest standard. Although they were of an alien vanua, having left behind the Chief they owed allegiance to and the vanua they served, upon their arrival in this vanua they at once acknowledged the Tui Nawaka as their Chief. In doing so, they began to undertake service and other responsibilities to their new vanua and chief, knowing fully well of their position as aliens, and regarded as strangers in the Vanua of Nawaka.*
>
> *When we look to the other side, the Mataqali Nalagi, they were probably overwhelmed by the manner in which the Saumata people displayed chiefly respect and service. This was reciprocated by the Nalagi*

Mataqali, again in the chiefly manner known to us Fijians, acknowledged the service provided by the Saumata people. This resulted in the grant of this large area of land, 2487 acres of it, for the occupation and use of the Saumata until their return to their place of origin." (record p. 101-2)

It is said by the Commissioner that how the Yavusa Saumata came to be on the land is contained in its records as the official account. That account was apparently given to an inquiry in 1896. That was an inquiry by the Native Lands Commission set up under Ordinance XXI, 1880 or its successor Ordinance XXI, 1892. What appears to be the relevant records of that Commission are of vital importance in this case, and need to be referred to in some detail.

There is a report of the Native Lands Commission, described as a final report by the Chairman on the Provinces of Ba and others, dated 10th July 1958. It describes the "history of the Native Lands Commission and its subsequent investigations into the ownership of Native Lands in Fiji....." After describing the work of the first Commissioner appointed to investigate Native Land Tenure in Fiji, it proceeds (record p.36):-

"4. Mr. David Wilkinson was then appointed Native Lands Commissioner. He was an old resident of Fiji and had been the chief interpreter of the Deed of Cession in 1874. He commenced investigations in the Province of Ba and Yasawa in 1892. His work in that locality was confined to the recording of large tribal boundaries. In many cases the tribal boundaries were recorded as being owned in common by two or more tribes. All these large tribal boundaries were surveyed by Mr. T. Keaney, Government Surveyor, and the land titles were prepared and bound in two volumes which are kept by the Registrar of Titles as the Registers of Native Lands of the

Province of Ba and Yasawa. He did not compile an official Register of Native Landowners.

5. He did the same work in the Province of Serua in 1898. His Register of Native Lands for this Province is also kept by the Registrar of Titles. He also visited the Provinces of Naitasiri and Bua. His findings in those Provinces were bound into volumes which were sent to the Provincial Councils for confirmation and they are now called the Resolutions of the Provincial Councils of Naitasiri and Bua respectively. All his decisions have carefully been incorporated in the work of the present Commission.

6. I would point out that ownerships-in-common created by Mr. Wilkinson in the Province of Ba and Yasawa were of a complicated nature and the Maxwell Commission was unable to sub-divide them into mataqali holdings. Consequently the Wilkinson decisions in such cases still stand. Although the blocks were surveyed by the present Commission's surveyors, the latter did not rewrite the boundaries for re-registration....."

Ordinance XXI or its successor, under which Commissioner Wilkinson conducted his inquiry, had the following relevant provisions:

"WHEREAS it has been ascertained by careful enquiry that the lands of the Native Fijians are for the most part held by Mataqalis or family communities as the proprietary unit according to ancient customs and that it is expedient and desirable until the native race be ripe for a division of such community rights among individuals to provide for the sanction of such rights and the mode of their use and enjoyment in conformity with the present institutions of the colony.

Be it therefore enacted by the Governor with the advice and consent of the Legislative Council as follows:-

I. The tenure of the lands belonging to the native Fijians as derived from their ancestors and evidenced by tradition and usage shall be the legal tenure thereof.

> *II. In all questions of ownership trespass or other matters arising out of or connected with the land all Courts of justice shall give effect to native rights in as full and ample a manner as if the lands were held by such native owners in fee simple upon Grant from the Crown.*
>
> ...
>
> *V. The Governor shall nominate one or more Commissioners who shall be charged with the duty of ascertaining what lands in each province of the colony are the rightful and hereditary property of native owners whether of Mataqalis or in whatever manner of way and by whatever divisions or sub-divisions of the people the same may have been held.*
>
> ...
>
> *VIII. The Commissioners shall cause the lands so undisputed or settled in the manner above mentioned to be set forth according to the ascertained boundaries in a Register to be denominated the "Register of Native Lands"...."*

This Ordinance was repealed and replaced by Ordinance XXI of 1892, but it made no material alteration to the above provisions.

The Register of Native Lands contains the following entry as folio 133 (record p.33):

> *"Description of the Lands given by the NALAGI Mataqali to the several Mataqalis resident in the town of NAMULOMULO."*

Then follows the description by metes and bounds. The entry concludes:

> *"The above land has been given by the NALAGI Mataqali of the Town of Nawaka to the several Mataqalis resident in the Town of NAMULOMULO, for their use and*

occupation and are to be recorded as Owners-in-Common whilst they continue to reside thereon, but the land is subject to reversion to the NALAGI Mataqali should such occupation at any time cease.

Confirmed by the Special Provincial Council convened by the Governor to be held at NAVOCI Town, Buliship of NADI, on the 24th September 1896, and following days.

Resolution No 190. Evidence Book Volume No 2, page 243.

Registered 14th October 1896.

MELI NAUREU is Turaga i Taukei of the NALAGI Mataqali and their lands, and AVITMELEKI VIKILA is Turaga ni Mataqali.

Confirmed by the above named Special Provincial Council Resolution No 163. Evidence Book Volume No 2 page 240."

The document is signed by D. Wilkinson and witnessed by the Registrar of the Supreme Court.

So far as concerns the Province of Ba, the 1958 report continues:

"17. After survey, the plans were drawn and the boundary descriptions in English for each Lot were written. The books were later returned to the Commission for the preparation of the Register of Native Lands and the Register of Native Landowners, which were finally registered with the Registrar of Titles in 1941."

record p.38). The report contains a series of tables and has the following reference to the Province of Ba:

"Table 1 - Index to the Registers of Native Lands in respect of the Provinces of Ba, Colo West, Colo

North, Serua and Namosi, showing (i) areas, (ii) reference to plans, (iii) folios of the Registers of Native Lands, (iv) designation of owners, (v) distinguishing numbers of the proprietary units in the Register of Native Landowners and (vi) Native Lands Commission record numbers (Fijian boundary description book).

....

Table 4 - Statement showing tribal boundaries determined by Mr. D. Wilkinson in the Province of Ba which were not subdivided by the Maxwell Commission and were not included in the Registers of Native lands compiled by the present Commission, showing (i) reference to Mr. Wilkinson's Register of Native Lands, (ii) name of block, (iii) areas given in the Wilkinson Register of Native Lands, (iv) reference to the present plans, (v) areas as given in the plans and (vi) designation of owners."

(record p 42). It continues:-

"50. This table deals with the tribal boundaries determined by Mr. D. Wilkinson to be owned-in-common by two or more yavusa and are contained in his Register of Native Lands now in the custody of the Registrar of Titles. These tribal blocks were not dealt with by any of the later Commissions, so that no particulars are to be found in any table of this or earlier reports. The particulars contained in this table were taken from the Wilkinson Register of Native Lands and the present Native Lands Commission's plans."

(record p.43). Table No. 1 is headed:

"INDEX TO THE REGISTERS OF NATIVE LANDS OF THE PROVINCES OF (A) BA; (B) COLO WEST; (C) COLO NORTH; (D) SERUA AND (E) NAMOSI, SHOWING (I) AREA, (II) REFERENCE TO PLANS, (III) FOLIOS OF THE REGISTERS OF NATIVE LANDS, (IV) DESIGNATION OF OWNERS, (V) DISTINGUISHING NUMBERS OF THE PROPRIETARY UNITS ON THE REGISTERS OF NATIVE LANDOWNERS AND (VI) NATIVE LANDS COMMISSION RECORD NUMBERS."

Under the group shown as "Tikina of Nawaka (Nawaka)", and in a segment set out as hereunder, there appears:

	Owned by
Tokatoka	Mataqali
Nalosi	Ketenatukani
Nakesi	Ketenatukani
Nailesu	Ketenatacini
Naciovolili	Ketenatacini

The unit number in the Register of Native Landowners is recorded alongside each (record pp 44-5). Table No. 4 is headed

> *"STATEMENT SHOWING TRIBAL BOUNDARIES DETERMINED BY MR. D. WILKINSON AND NOT SUBDIVIDED BY THE MAXWELL COMMISSION, SHOWING (I) REFERENCE TO MR. WILKINSON'S REGISTER OF NATIVE LANDS, (II) NAME OF THE BLOCK, (III) AREA GIVEN IN THE WILKINSON'S REGISTER OF NATIVE LANDS, (IV) REFERENCE TO THE PLANS, (V) AREA SHOWN IN THE PLANS AND (VI) DESIGNATION OF OWNERS."*

The table has a number of columns, the first being headed *"Reference to Mr Wilkinson's Register of Native Lands"*, and the last being headed *"Designation of Owners"*. The lands are grouped by Tikinas, and there are 5 blocks under the heading "Tikina of Nawaka (Nawaka). The last under the heading "Name of Block" has "Namulomulo Town Land", the acreage is shown as 2487 and on the column "Designation of Owners" there appears "The Namulomulo villagers. Subject to reversion to the Mataqali Nalagi of the Yavusa Noi Vunatoto when occupation and use ceased."

It is interesting to note that the four other blocks have the owner designated in the same way, namely by a named Yavusa, followed by the additive. "Subject to reversion etc" to another Yavusa "when occupation and use ceased". In the same table there are 8 other instances, in other Tikinas, where the same or similar wording occurs. In one other instance, in the column "Designation of owners" appears:

> *"Toge villagers. It was given by the Yavusa Taubere as theirs truly and for ever."* (record pp 46-7)

The only other material to which it is desirable to make reference are the copies of the actual entries in the Register of Native Landowners kept by the Registrar of Titles folios 161-9 inclusive (record pp 24-32). Each page is devoted to recording the actual names and some other particulars of each Tokatoka of each Mataqali of each Yavusa of the Vanua Nawaka who make up the village Namulomulo. Each page records the Province (Ba), the District (Nawaka), the Vanua (Nawaka), the Yavusa (Saumata, Naciovolili and Leweinaqali), the Mataqali (Ketenatukani, Ketenatacini, Naqara and Emalu) members of Tokatoka (Nalosi, Nakese, Nailesu, Labasa, Naciovolili, Naqara Nakula, Emalu and Tore). All of the Yavusa, Mataqali and Tokatoka are shown as being of the village Namulomulo. The dates of both (approximate) are listed as occurring on or after 1841 up to 1914, so one assumes that the register was compiled about 1914.

It is quite clear what Commissioner Wilkinson set out and was commissioned to do. It was to ascertain what lands in each Province were the rightful and hereditary property of what native owners and to cause those lands to be registered in a Register of Native Lands. According to the 1989 Ruling he heard the history of how the land came into the possession of the several Mataqali resident in the area; it seems as though districts or areas were described as towns (see extract from folio 133 supra). His conclusion was that the lands were "given by the Nalagi Mataqali to the several Mataqalis resident in the Town of Namulomulo".

The resolution of the Special Provisional Council and the confirmation by the Turaga-i-Taukei of the Naqali Mataqali leave no doubt that the lands were "given". That seems inconsistant with the notion that they had no more than a right to reside there. One is further prompted to wonder why the Namulomulo villagers and the two of the Mataqali of the Yavusa Saumata are designated and recorded as owners in the Register of Native Lands, and why the actual names of all the Tokatoka of the various Mataqali of the two Yavusa that comprise the Namulomulo village, described as "village Namulomulo", are listed in the Register of Native Landowners. According to the 1958 final report of the then Chairman of the Native Lands and Fisheries Commission (record pp 36-47) the Register of Native Lands and the Register of Native Landowners were finally registered with the Register of Titles in 1941; according to him the diligent

work of his predecessors "gave birth to a principle which now determines the ownership of native lands namely, the compilation of the Registers of Native Lands and Registers of Native Landowners". It is a somewhat daunting challenge for this Court to hold, as it is asked to do, that those appearing as owners in those Registers are not the owners at all.

The argument that the Court should do just this is based on a premise that the several Mataqali resident in the town Namulomulo are not the owners of the land, but have only a right to occupy and use it. No one has attempted ot explain what "use" means in this context but apparently all parties considered that whatever it means, it would not permit the villagers to authorise the extraction of gravel and the receipt of the proceeds of its sale. So the matter has been argued on the basis of title - who "owns" the land?

Without more, on the material to which we have referred, particularly what might be called the document of title which records that the land "has been given by the NALAGI Mataqali.... to the several Mataqalis resident in the Town of NAMULOMULO for their use and occupation and are to be recorded as Owners-in-Common... subject to reversion to the NALAGI Mataqali (Folio 133 - see earlier herein), no Court could be expected to reach a decision different to the one that was reached here. After all, there is nothing strange in English law about the motion of an owner having a limited interest in land - a life estate is such

an interest. The notion of a "reversion" in such a case is not usually appropriate, because the title is not expected to "revert" to an existing owner, as it was intended to do here. But to express it in that manner here is a very simple and sensible way of achieving what was apparently intended, namely a gift to in effect for life but not then a gift over, instead a reverter - "the returning of an estate to the grantor or his heirs after the interest granted expires" (Law in Macquarie Dictionary). There is no magic in the use of the expression "owners-in-common"; it was simply to ensure that the ownership passed down through members of the relevant Mataqali.

The problem that has been raised is: Are the apparent findings, recordings and effect of Mr Wilkinson and the Native Lands Commission and the records subject to some qualification by reason of what is now put forward about the native custom of land holding?

It is easiest to look at this in the light of the submissions that have been put to us.

Firstly there is the 1989 ruling of the Commission. In it this was said (record p 103)

> *"The record of ownership as recorded by David Wilkinson is as nearest as possible to recording this custom of giving land to strangers and landless in return for allegiance and service.*

> *In the description of this land, it is recorded that this land was given to the Yavusa Saumata or the Mataqalis residing at Namulomulo for your occupation and use until such time as you no longer reside at Namulomulo. In Fijian custom, this means that so long as you continue to recognise and serve the Tui Nawaka and carry out your responsibilities as done by your ancestors, then you will be allowed to continue to occupy and use this land.*
>
> ...
>
> *Let me clarify once again the custom of giving land as in this case. Mataqali Nalagi remained the owner of this land. You the Yavusa Saumata only occupy and use it until such time you leave Namulomulo village, when it reverts to Mataqali Nalagi for their use."*

Several things may be said about this. First of all there is no evidence as to how the Commissioner came to form the views that he did about Fijian custom and the view that what was described as a gift of land was merely a right to occupy and use. Obviously the Namulomulo villagers do not share his views. Secondly, he suggests that the so called gift was even further qualified; the villagers did not get the right of use and occupation so long as they continued to reside on the land; as mentioned above they could only continue to reside there "so long as you continue to recognise and serve the Tui Nawaka and carry out your responsibilities" (whatever they might be) "as done by your ancestors". So that the so-called gift was not a gift at all; it was a conditional license. It is to be noted that the ruling of the Commissioner apparently concludes (record p 65)

> *"Later after delivering the decision, I invited questions from both members of Mataqali Nalagi and Yavusa Saumata. During one of my explanations I told them that I had asked for advice from the Solicitor General's office and my decision is based on the advice I had received from that office."*

What that advice was and whether anyone had any opportunity of challenging it we simply have no idea.

Further, and in this context, Mr Wilkinson and those others who were involved with the production of the 1958 report were engaged in the "work of determining land ownership in Fiji" (report p8, record p43). Ordinance No XXI was the Ordinance under which Mr Wilkinson was charged "with the duty of ascertaining what lands in each province of the Colony are the rightful and hereditary property of native owners..." (see earlier herein). One is prompted to wonder why he, and all the others involved, would list and record the villagers as owners when, as it is now said, according to customary law they were nothing of the sort.

We confess that in the light of the overwhelming evidence to the contrary we are quite unpersuaded by the views expressed by the Commissioner in the 1989 ruling.

A second main submission that the apparent record of title should be subject to some qualification was based on statutory considerations. Quoted in support are, firstly section 3 of the Native Lands Act:

> *"3. Native lands shall be held by native Fijians according to native custom and evidenced by usage and tradition. Subject to the provisions hereinafter contained such lands may be cultivated, allotted and dealt with by native Fijians as amongst themselves according to their native customs and subject to any regulations made by the Fijian Affairs Board, and in*

the event of any dispute arising for legal decision in which the question of the tenure of land amongst native Fijians is relevant all courts of law shall decide such disputes according to such regulations or native custom and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon."

and secondly, section 2 of the Native Land Trust Act:

"2. In this Act, unless the context otherwise requires-
"Board" means the Native Land Trust Board established under section 3, "native grant" means a grant of land by native owners;
"native land" means land which is neither Crown land nor the subject of a Crown or native grant bu includes land granted to a mataqali under section 18;
"native owners" means the mataqali or other division or subdivision of the natives having the customary right to occupy and use any native land;
"native reserve" means land set aside and proclaimed as such under the provisions of this Act;
"Secretary" means the Secretary of the Board appointed under section 30."

There is nothing in these sections that would indicate that, whenever it occurred, the Mataqali Nalagi were not able to make a grant of the land in the way which has been described. Indeed s.3 of the Native Lands Act, although enacted long after the events related here occurred, provides that "native lands may be... dealt with by native Fijians as among themselves according to their native customs..." There is nothing to suggest that this was not the case when this land was "dealt with", and nothing to suggest that the Mataqali Nalagi could not confer on the Namulomulo villagers the title that is recorded. Indeed it would seem from the records that it was very customary for land to be dealt with in this manner.

It does not matter. It is quite clear that the law as it applied before 1896 did not place any ban on alienation by native owners to other native Fijians; this is made clear by the 1880 Ordinance. According to David Wilkinson and his successors that is what happened in this case to the extent recorded in the documents and register.

Reliance is also placed upon s.18 of the Native Lands Act. It provides:

> *"18 - (1) Notwithstanding anything contained in this Act it shall be lawful for the Commission with the consent of the Fijian owners to allot at its discretion to any dependants either individually or collectively a sufficient portion of land for their use and occupation:*
>
> *Provided that any dependant to whom such portion of land has been allotted and who thereafter ceases to reside with the mataqali from whose lands the said portion was allotted shall thereupon lose his interest in the said portion.*
>
> *(2) Whenever through any cause such portion of land ceases to be used and occupied by the dependant or dependants to whom it was allotted it shall revert to Fijian owners from whose lands the allotment was made.*
>
> *(3) No allotment of land shall be made to any dependant who may be found to be already an owner of land by operation of any Fijian custom."*

"Dependants" is defined in section 3:

> *"dependants" mean native Fijians who at the time of the erection of the Fiji Islands into a British Colony had become separated from the tribes to which they respectively belonged by descent and had by native custom lost their rights in tribal lands and were living in a state of dependence with other tribes, and includes their legitimate issue...."*

This section appears to have its origin in the Native Lands (Dependants) Amendment Ordinance 1919. The recital to that Ordinance reads:

> *"WHEREAS it has been ascertained that at the time of the erection of the Fiji Islands into a British Colony certain native Fijians in various parts of the Colony had become separated from the tribes to which they respectively belonged by descent and had by native custom lost their rights in the tribal lands and were living in a state of dependence with other tribes:*
>
> *And whereas it is desirable to make provision whereby sufficient land may be allotted for the use and support of such natives and their legitimate issue hereinafter referred to as "dependants" as well as for natives of illegitimate birth born after the year one thousand eight hundred and seventy-four."*

Just what the social conditions were that rendered necessary or desirable the enactment of this legislation we do not know. But it does not affect the situation here. Whether the Mataqali who comprised the Namulomulo villagers would have qualified as dependants in 1919 or might have sought an allotment of land from the Native Lands Commission does not in our opinion bear upon the right or ability of the Mataqali Nalagi to make them a grant of land in the way that has been described nor upon the villagers to be regarded and recorded as owners in the manner that they were. It seems to us that the report, documents and register show what that was.

Nor does it affect that position that the 1919 Ordinance and the later Act use the word "revert to the native owners" when dealing with the situation when dependants cease to reside

with Mataqali from whose lands their portion has been allotted by the Native Lands Commission. What rights "dependants" might have, and whether they have the same rights as owners during their occupancy and why the word "revert" was thought to be appropriate is not of concern here. The High Court had to decide what happened prior to 1896, possibly before 1874, and what rights resulted from that. We are of the view that what it decided was correct.

Before the learned trial Judge a further section of the Native Land Trust Act was relied upon, viz section 9. Section 8 provides that the Native Land Trust Board is empowered to grant leases or licences over native land. This section is made subject to s.9, which provides:

> *"No native land shall be dealt with by way of lease or licence under the provisions of this Act unless the Board is satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the Fijian owners, and is not likely during the currency of such lease or licence to be required by the Fijian owners for their use maintenance or support."*

The appellants claim that the Mataqali Nalagi are the Fijian owners notwithstanding what has previously been discussed. The land is certainly being beneficially occupied by the Namulomulo villagers, with only a right of reversion reserved to the Mataqali Nalagi. The lands are certainly not being beneficially occupied by them, nor is it required for their use, maintenance and support; they have no right to it for

this purpose. This means, if the appellants are correct, that the Board can grant leases or licences of this land pursuant to s.9. That does not seem to us to be what was intended by this legislation. If the land were not being beneficially occupied by the villagers then there might be some justification for the Board stepping in to make sure that the land was being used by the grant of some right to occupy it to someone else. But this would mean that the Namulomulo villagers would have to be the Fijian owners. Which, in our view, is exactly what they are. Rather than assist the appellants, we believe that s.9 if anything, supports the case of the respondents.

This merely adds to the conclusion that we have reached that subsequent statutory or other legislative provisions do not aid the appellants in their attempts to qualify the meaning of the words used by Commissioner Wilkinson and adopted by the authorities. The findings and effect remain unqualified.

In the High Court it was argued that jurisdiction to determine ownership rests with the Native Lands Commission. It was not suggested that the Court had no jurisdiction, but that it had a mere supervisory role, to ensure that the Commission had gone about its business correctly. The same submission was made in the written submissions to this Court. This submission seems to overlook or ignore the fact that Commissioner Wilkinson was charged by the law then in force to ascertain the native owners of land, including this land, and the Commission was

charged with the duty of having the ownership registered. All this happened, and the legality of what was done has never been challenged. The only question that could have been open to debate was what was meant by the ownership decision of David Wilkinson as embodied in the documents, report and register. Boundaries and ownership had been determined. The fact that a dispute had arisen did not give the Commission any power to determine ownership as if that had never been done. As said earlier herein, we doubt if the Commission had any power to hold the enquiry that it purported to do. Certainly its decision did not have to be accepted in the High Court nor were the High Court proceedings an appeal from, a review of or otherwise proceedings in relation to the purported ruling of the Commission.

It was also attempted to place some meaning on expressions "owners-in-common" and "reversion" to qualify the apparent determination of ownership made by Mr Wilkinson. We have earlier dealt with the word reversion. Subject to one matter, we have no greater difficulty with the use of the words "owners-in-common". If indefinite multiple ownership were to be achieved, for example by a number of persons who could be adequately described as villagers, or residents of a defined area of land and having a certain tribal relationship, then of course to confer joint ownership on those falling within the group at any particular time (e.g. date of entry in the register) would be totally unsuitable; according to established

principles of British law this would confer a right of survivorship - a concept totally inimical to what was intended. This need not be elaborated upon. Ownership-in-common, although perhaps not completely apt to deal with tribal relationships, is as close as one could hope to get to ensure indefinite multiple ownership among a number of occupiers who were residents of certain a defined area of land. The concept of ownership-in-common as established in British law would be apt to do this. That concept is what David Wilkinson adopted.

It will be recalled that the document of title, as it might be called, (Folio 133 supra) was dated September 1896 and registered in October 1896. Whether it was the intention of David Wilkinson or of anyone else, to identify and name the actual persons who comprised the Namulomulo villagers at that or any other time does not matter. It was probably not necessary and not intended to confer title on the individuals who comprised the villagers at that time; rather it was the group that was to have the benefit. However, sometime in or after 1914 there appears to have been compiled what was headed "Register of Native Landowners" in which the names of the Namulomulo villagers were listed (record pp 24-32). We do not believe that the absence or presence of names is significant.

In our opinion David Wilkinson was concerned to establish and record the title to land. He did so by the use of principles and concepts known to British law adapted to suit the position that presented itself in Fiji.

It might be convenient to note at this point that if the nature of the occupation by the villagers of the land had been found by Commissioner Wilkinson to warrant the recording of some right of occupancy and use less than proprietorship, it would have been very simple to make this quite clear. In the register, under the heading "Designation of Owner" it would have been very simple to record "The Mataqali Yavusa subject to use and occupation by the Namulomulo villagers". In the description of the land to form part of the register (folio 133) the ownership could very simply have been "The Nalagi Mataqali subject to exclusive use and occupation by the several Mataqali resident in the Town of Namulomulo so long as they continue to reside thereon". Quite clearly that is what the appellants claim is the legal position. Equally clearly it is <u>not</u> what David Wilkinson found when he and others performed "the duty of ascertaining what lands in each provision of the colony are the rightful and hereditary property of native owners..." (Ord XXI).

We mentioned one matter arising out of the words used by David Wilkinson that caused us to examine very carefully the conclusions we have reached. It was a submission that the use of the words "owners-in-common" was an attempt to describe the rights of the various occupiers among themselves, and not to designate proprietorship. This submission would have carried greater weight if there had been some evidence of or pointer to the need to so define the rights of the members of one or more

Mataqali or other divisions or sub-divisions, inter se. We know from Ordinance XXI and other sources that "lands of the native Fijians are for the most part held by Mataqalis or family communities as the propriety unit". We know that in the register the owners are for the most part designated as "The Yavusa (name)". But there are a number of instances where the owners are designated as "The (name) villagers" - eight all told. Incidentally, in all eight cases, except one, the designation goes on to subject to land to a reversion as in the case of the Namulomulo villagers. Except in the latter case, we are not aware how the title of the various villagers is described in the actual document which forms part of the register - although we are prepared to hazard a guess that it is "as owners-in-common". One can infer that in the other cases the same situation applied as applied in this case, namely that there were members of several Mataqalis resident in the villages in question, and it was easier to do it this way. But it seems to us that if the intention was not to designate them all as "owners", it would have been necessary to do no more than describe them as "the several Mataqalis resident in the town of (name) for their use and occupation (or exclusive use and occupation) whilst they continue to reside thereon". In our opinion the additive "and are to be regarded as Owners-in-Common" was intended to describe their status or title, and not merely their relationship inter se.

We propose to decide this appeal accordingly. To make that more explicit we propose to dismiss the appeal so far as it sought to set aside the first two orders made by Byrne J namely:

> *"(i) That the legal ownership of the Namulomulo Town Land vests fully and exclusively in the several Mataqalis of the Namulomulo Village as "owners-in-common" for as long as they and their heirs, successors and assigns of the Mataqalis of the Namulomulo Village use and occupy the land.*
>
> *(ii) That the legal ownership of the Namulomulo Town Land vests fully and exclusively in the Namulomulo Villagers as "owners-in-common" for as long as they and their heirs, successors and assigns of the Mataqalis of the Namulomulo Villagers continue to use and occupy the land."*

Two things remain to be said

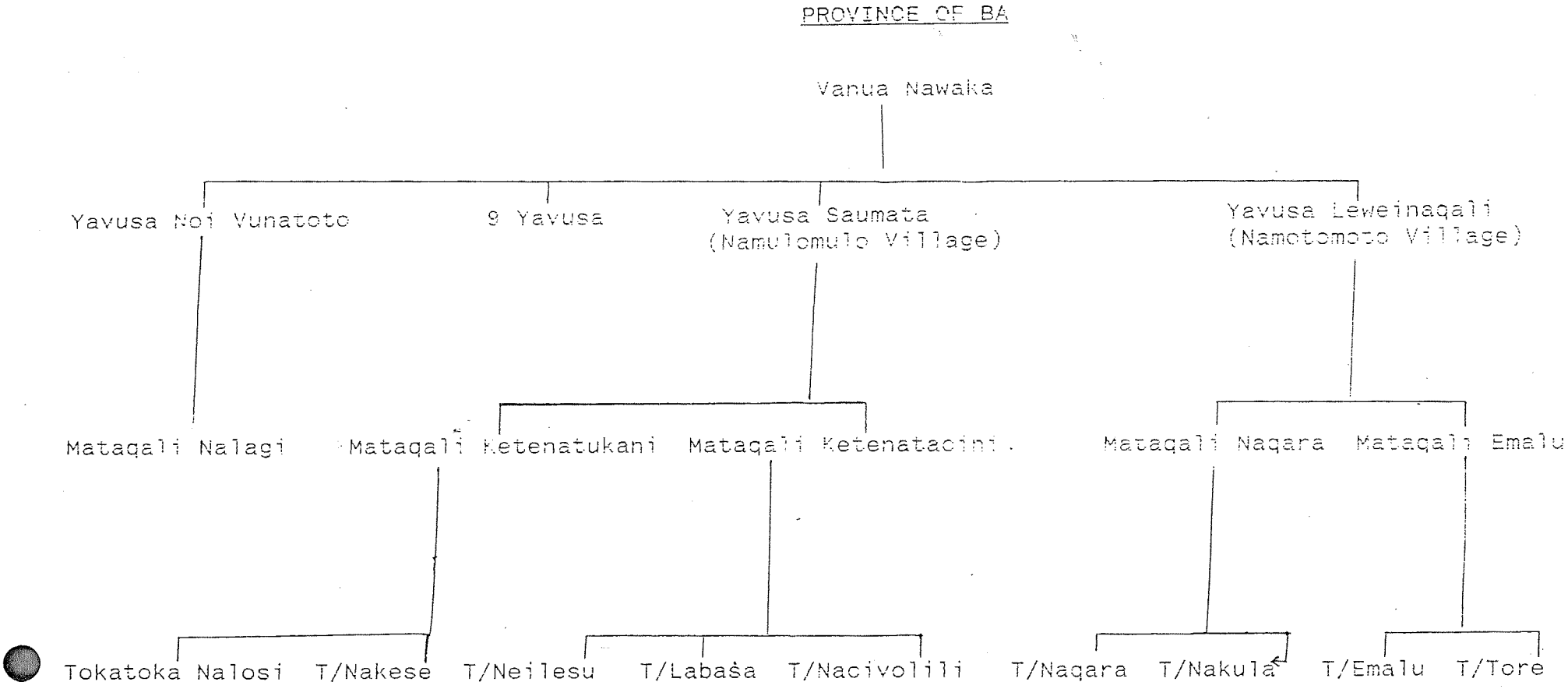
Firstly, we should add that the delay in delivering this judgment was partly due to the fact that after reserving its decision, the Court felt it was possible that some qualification on the extent of the title of the villagers akin to the doctrine of waste might exist and be appropriate to apply. After all, the dispute here arose out of who was entitled to the royalties resulting from the extraction and sale of gravel from the land. The Court therefore decided to give the parties (really the appellants) an opportunity to make any submissions that they might wish to make on this aspect. Eventually the Court was informed that no such submissions would be made. We have proceeded to give judgment accordingly.

The second is that we feel we should not make final orders until the parties have had an opportunity to consider these reasons for judgment. We are not suggesting that the remaining orders made by the learned trial Judge were not appropriate, but the parties may wish to debate one or more or to reach some agreement upon the appropriate orders. This is what we referred to as "qualifications" when referring to the decision of Byrne J towards the commencement of these reasons for judgment.

.....
Mr Justice Michael M Helsham
President, Fiji Court of Appeal

.....
Sir Moti Tikaram
Resident Judge of Appeal

.....
Mr Justice Michael Scott
Judge of Appeal


PROVINCE OF BA
Vanua Nawaka
Yavusa Noi Vunatoto
9 Yavusa
Yavusa Saumata (Namulomulo Village)
Yavusa Leweinaqali (Namotomoto Village)
Mataqali Nalagi
Mataqali Ketenatukani
Mataqali Ketenatacini
Mataqali Naqara
Mataqali Emalu
Tokatoka Nalosi
T/Nakese
T/Neilesu
T/Labasa
T/Nacivolili
T/Naqara
T/Nakula
T/Emalu
T/Tore