IN THE COURT OF APPEAL, FIJI ISLANDS

CIVIL APPEAL NO. ABU 20 OF 2004

(High Court Suva Civil Action No: HBC 487 of 2003)

BETWEEN:

MATAQALI NAMATUA

Appellant

AND

NATIVE LAND AND FISHERIES COMMISSION

First Respondent

AND

MATAQALI VUNATIVI

Second Respondent

AND

NATIVE LAND TRUST BOARD

Third Respondent

AND

REYNELLA LIMITED

Fourth Respondent

S.C. Maharaj for the Appellant
S. Banuve for the First Respondent
K. Muaror for the Second and Fourth Respondent
T. Bukarau for the Third Respondent

DECISION

On 29 September 2003 the Appellant commenced proceedings against the first three Respondents by way of Originating Summons issued out of the High Court at Lautoka. The subject matter of the proceedings was a piece of land approximately one and half hectares in size on Tokoriki island.

The island is native land and it is owned by four mataqalis. Two of the mataqalis dispute ownership of the land in question.

The situation on the ground can most easily be understood by reference to a map of Tokoriki which is exhibited as appendix 2 to an affidavit of S.M. Leweniqila filed on 9 August 2004.

The Appellant mataqali owns a piece of land called Liku. It is to the north west of the island and on it there is already constructed a resort known as the Tokoriki Resort.

The second Respondent mataqali owns the land to the south west of the island known as Matanibeto. The area in dispute is a triangular piece of land which the appellant say is part of Liku and which the second Respondent says is part of Matanibeto. It is triangular in shape and has been marked with hatching on the map.

The dispute between the mataqalis is aggravated by the fact that the third Respondent has, with the consent of the second Respondent, entered into an agreement to lease part of Matanibeto, including the disputed piece of land, to the fourth Respondent for the purpose of constructing a second resort, to be known as Anuya Resort, on the island.

The affidavit sworn by William Frank Bennett on 9 August 2004 exhibits the agreement for a lease dated 13 April 2003. The affidavit also exhibits a detailed plan of the proposed resort. The disputed piece of land is in the bottom left hand corner of the plan. The site has been earmarked for the construction of at least two luxury villas. According to Mr. Bennet, planning permission for the resort has been received, stamp duties and the lease premium have been paid and substantial development works including two and half kilometres of roads have already begun. Unfortunately, when employees of the fourth Respondent attempted to enter on to the disputed land they were assaulted by members of the Appellant mataqali who are living on the disputed land and who are cultivating crops there.

On 15 October 2003 the High Court at Lautoka (Byrne J) granted an order by consent restraining the third Defendant from issuing or processing any lease over the disputed land until the final determination of the proceedings. It was not revealed to the Court at that time that in fact the agreement for the lease had already been entered into.

The interim injunction having been granted the proceedings were transferred to Suva.

On 17 December 2003, by which time the existence of the agreement for the lease had become known, the Appellant filed a second application for an interlocutory injunction, this time in Suva. It sought an order restraining the development or construction of the resort "on any part of" Matanibeto or alternatively Liku.

On 20 April 2004 Jitoko J refused the application. He noted that the first Defendant which has the statutory duty to resolve customary demarcation disputes had endorsed the second Respondent's claim. He found that the balance of convenience favoured the development of the resort. He, however, ordered that 50% of the monies received from the fourth Respondent should be retained in a special account for the benefit of the Appellant in case the originating summons were to be resolved in their favour.

On 21 April 2004 the appeal was filed. On 29 June the Appellant filed an application for a stay of the High Court's refusal pending the hearing of the appeal. Alternatively it sought an interim injunction pending the hearing of the appeal in essentially the same terms as that refused by the High Court.

The matter has, in my view, been somewhat unnecessarily complicated by the multiplicity of prolix and repetitive affidavits and confusion, principally by the Appellant, about the name of the land in dispute. Despite this however the issues seem to me to be straight forward.

The High Court at Suva refused to grant the interlocutory relief sought. The grant or refusal of an interlocutory injunction is discretionary and an appeal court will seldom interfere unless an error of principle is involved.

Three matters are of concern.

The first is that I am doubtful that damages could be an adequate remedy for the Appellant were it to prove to be the case that the Appellant had been wrongfully evicted from the disputed land which had by then been developed for the resort.

Secondly, the reasons given by the First Respondent for favouring the second Respondent seem to me to be far from clear. As is apparent from the "tour report" exhibited to the affidavit filed on 9 August on behalf of the first Respondent there are in fact two quite separate locations which have described as "Matuku". Therefore, to state that the boundary between the two mataqalis commences at

"Matuku" does nothing to solve the problem. What is required is cogent reasons for favouring one location as "Matuku" rather than the other. In these circumstances it is a pity that detailed reasons for favouring one site over another have still not been forthcoming from the first Respondent. With respect, I do not think that it is satisfactory for counsel for the second Respondent to do no more than to undertake that these detailed reasons would be available at the time of the trial.

Thirdly, the suggestion that the whole resort development project is threatened by the continuing litigation over the small part of the whole site which is its subject does not seem to me to be convincing. If the Respondents are indeed satisfied that the Appellants claim will turn out to be groundless then there seems to be no reason why development of the resort should not proceed on the bulk of the land which is not in dispute.

In my view, rather than waste valuable time on litigating interlocutory applications the parties should make every effort to bring the originating summons on for early trial. In particular, the first Respondent should, as soon as possible, set out in detail its reasons for favouring the second Respondent. Once these detailed reasons have been revealed and scrutinised it should be possible to resolve the matter amicably.

In Johnson v. Shrewsbury and Birmingham Ry Co. (1853) 3 De G.M. and G. 914 the High Court of Chancery stated:

> "When this court is called upon to interfere by way of injunction in such cases, it is upon the ground that its interference is necessary to preserve the property while the legal construction of the contract is being determined by a court of law. This court interferes upon the ground that irreparable injury may ensue to the property forming the subject of the contract pending the enquiry at law."

In my opinion those words are particularly apt to the circumstances of this case. There will be an injunction preserving the status quo of the disputed piece of land until the hearing of the appeal.

M.D. Scott
Justice of Appeal

3 September 2004