IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU 104 of 2016
(On appeal from the High Court of Fiji at Suva
Civil Action No: 480/2005)

BETWEEN : **KAMINIELI VOLAU TUNISAU**
Appellant

AND : **THE MINISTER OF WORKS AND INFRASTRUCTURE**
1st Respondent

AND : **THE ATTORNEY GENERAL OF FIJI**
2nd Respondent

AND : **THE NATIVE LAND TRUST BOARD**
3rd Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Guneratne JA

Counsel : **Mr. I. Fa for the Appellant**
Ms. M. Motofaga with Mr. A. Ali for the 1st and 2nd Respondents
Ms. L. Komaitai for the 3rd Respondent

Date of Hearing : **15 May 2018**

Date of Judgment : **1 June 2018**

JUDGMENT

Basnayake JA

[1] The appellant is seeking in this appeal to have the judgment of the learned High Court Judge dated 15 July 2016 (pgs. 7 to 16 of the Record of the High Court (RHC)) set aside. The learned Judge in his judgment has ordered that the writ of summons (pgs. 17 to 23 of RHC) dated 16 September 2005 be struck out with costs.

[2] The appellant has filed this action in his personal capacity and as a member of the Mataqali Navurevure of the Yavusa Matanikutu of Tamavua village of the province of Naitasiri and on behalf of the Yavusa Matanikutu of Tamavua village and for and on behalf of Suvavou village, Lami. The appellant is seeking the following reliefs, namely;

i) A declaration that the 1st and 2nd defendants are in illegal occupation of its native land amounting to 11 acres, 3 roods and 24 perches upon which is constructed the Suva Water Treatment Plant and related facilities and has been in unlawful occupation of the same since on or about 1957.

ii) Damages against the 1st and 2nd defendants in the sum of $5,000,000.00 (Five million dollars) for rent for the occupation and use of the plaintiff's native land since on or about 1957 till to date together.

iii) A declaration that the 3rd defendant has acted in breach of its duties under the Native Land Trust Act to administer the plaintiff's native land for the plaintiff's benefit.

iv) A declaration that the 1st and the 2nd defendants are trespassers on the plaintiff's native land and the said trespass continues till to date.

v) Damages against the 3rd defendant.

vi) Costs of this action.

vii) Any other relief this Honorable court deems just.

[3] The appellant's case is that the appellant together with Mataqalis whom the appellant represents owned the native land of 805 acres situated in Tamavua, Wailoku and Suvavou areas in the province of Naitasiri. The appellant states that of this 805 acres, the 1st and the 2nd respondents took possession of 11 acres, 3 roods and 24 perches sometime in the year 1957 and built a water treatment plant and related facilities. The appellant claims

that the 1st and the 2nd respondents do not possess a lease or license and have not paid any lease rentals to the appellant for their occupation which the appellant claims as unlawful.

[4] The appellant avers that the 3rd respondent who has the power and control and administration of all native land has failed to administer the appellant's native land for its benefit. Furthermore the appellant avers that the 3rd respondent has permitted the 1st and the 2nd respondents to occupy this land since 1957 till today without a lease or license and without a payment due to which the appellant has suffered loss.

[5] The 1st and the 2nd respondents in their statement of defence (pgs. 29-30 of RHC) admitted the following, namely;

i. The extent of the land.
ii. The said land was owned by the Yavusa Matanikutu of Tamavua and Nayavumata of Suvavou.
iii. The 1st and the 2nd respondents are in occupation of this land.
iv. Their occupation is not unlawful.
v. This land was compulsorily acquired under the Crown Acquisition of Lands Ordinance (Cap 140).

[6] The 3rd respondent's statement is at pages 26-27 (RHC). The 3rd respondent denied the appellant's claim and moved for a dismissal of the appellant's action.

Grounds of Appeal

[7] *"1. That the Learned Judge had erred in law and in fact in failing to find that the onus of proof was on the 1st and 2nd Defendants to prove that the land in question had been compulsorily acquired by the State pursuant to section 4(1) of the Crown Acquisition of Lands Ordinance (Cap 140) and that the 1st and 2nd Defendants had at the trial and on the evidence failed to prove this to be the case.*

2. That the Learned Judge had erred in Law and in fact in dismissing the Plaintiff's case when it failed to acknowledge at the outset that the Land in

question upon which the water treatment plant is built is OWNED by the Yavusa Matanikutu of Tamavua Village and the Yavusa Nayavumata of Suvavou Village Lami under Fijian customary title pursuant to section 3 of the Native Lands Act and represented by the Plaintiff in these proceedings and not by the 1st Defendant or their authorized representative.

3. That the Learned Judge had erred in law and in fact in failing to find that the 1st and 2nd Respondents do not have a certificate of title or a lease or licence over the land in question that entitles them in law to occupy the land in question.

4. That the Learned judge had erred in law and in fact in finding that the land in question had been compulsorily acquired by the State pursuant to section 4(1) of the Crown Lands Acquisition Ordinance (Cap 140) when the evidence at the trial establishes that there was no such compulsory acquisition by the State of the Land in question as the land to date remains native land registered in the name of the Yavusa Matanikutu of Tamavua village and the Yavusa Nayavumata of Suvavou in Lami as owners of the said land under customary native title and tenure pursuant to section 3 of the Native Lands Act.

5. That the Learned Judge had erred in Law and in fact by holding that the Appellant intended to raise a new cause of action by amending the minutes of the pre-trial conference to introduce the following issues:

- *(i) Whether the 2nd Defendant had purportedly acquired the Land in issue through compulsory acquisition?*
- *(ii) Whether the 2nd Defendant had acquired the Land in issue purported compulsory acquisition of the land in issue was carried out in accordance with the law?*

without amending the Statement of Claim, when such was not the case. That the two issues abovementioned arise directly out of item no.4 of the original pre-trial conference minutes and was included for the benefit of the Defendants to amplify the allegation in their Statement of Defence that the Land in question had been compulsorily acquired by law.

6. That the Learned Judge had erred in Law and in fact in holding that the Appellant is not entitled to challenge the legality of the acquisition of the land in these, when in fact the onus was always on the Defendant to establish that the Land in question was compulsorily acquired pursuant to section 4(1) of the Crown Lands Acquisition Ordinance (Cap 140) as the land in question to this day is registered in the names of the Yavusa Matanikutu of Tamavua Village and the Yavusa Nayavumata of Suvavou Village, Lami as the owners of the land.

7. That the Learned Judge had erred in law and in fact by finding that the Land had been compulsorily acquired by the State pursuant to section 4(1) of the Crown Lands Acquisition Ordinance (Cap 140), when in fact the 1st Defendant does not have a title to the land registered in the name of the State or its authorized representative but rather the title to the land in question is to this date registered in the name of the Yavusa Matanikutu of Tamavua and the Yavusa Nayavumata of Suvavou as the owners of the land.

8. That the Learned Judge had erred in law and in fact in failing to award the Plaintiff damages as the Plaintiff had established at the trial that they are the owners of the land in question as the land to this date is registered in the names of the Yavusa Matanikutu of Tamavua Village and the Yavusa Nayavumata of Suvavou Lami and they have not given consent or permission to any of the Defendants to build a water treatment plant on their land and they have not been compensated for the unlawful use of their land since about 1957.

9. That the Learned Judge erred in law and in fact in failing to find that the 1st and 2nd Respondents had failed to establish that the land in question was compulsorily acquired by the 1st and 2nd Respondents pursuant to Section 4(1) of the Crown Land Acquisition Act.

10. That the Learned Judge erred in law and in fact in holding in the judgment that the land in question was acquired by the Government under Section 4 of the Crown Acquisition of Land Ordinance (Cap 140) when in fact Section of the said Act was not applicable for compulsory acquisition off the land in question.

11. That the Learned Judge erred in law and in fact in failing to determine that Section 4(1) of the Crown Acquisition of Land Ordinance Cap 140 does not apply to the compulsory acquisition of Native Land without compensation for the purposes of a water treatment plant as is the case for the land in question.

12. That the Learned Judge erred in law and in fact in failing to note that there is no title over the land in question that is registered under the Land Transfer Act, as would be the case if a land was acquired by compulsory requisition.

13. That the Learned Judge erred in law and in fact in failing to find, it is illegal and unlawful for the 1st Respondent to occupy any Native Land held under customary land tenure by its Fijian owners without a lease or licence as in the present case.

14. That the Learned Judge erred in law and in fact in failing to find that the land for which the Plaintiff seeks a determination on by this court is vested by the Native Land Trust Act under the control and administration of the 3rd Respondent and it was the 3rd Respondent's legal duty to ensure that the Appellant's land was alienated in accordance with the law and not the Appellants.

15. That the Learned Judge erred in law and in fact in failing to find that the 3rd Respondent had a conflict of interest with regard to the proper administration of the Appellant's native land as it is an extension of the 1st Respondent and by its conduct in this matter, it had favoured the intentions of the 1st Respondent over that of the Appellant.

16. That the Learned Judge had acted unlawfully in rejecting to accept the Appellant's submissions which had ventilated the issues raised in this appeal."

Judgment

[8] The learned Judge observed that the plaintiff was admittedly a member of the Mataqali Navurevure of Yavusa Matanikutu of Tamavua village in the province of Naitasiri. The plaintiff is registered in the Register of Native Lands-Vola ni Kawa Bula as a member of the Yavusa Matanikutu of Tamavua village in the province of Naitasiri. The 1st and the 2nd respondents are in occupation of the land referred to in the writ of summons.

[9] I shall quote from the judgment the following paragraphs by which one could grasp the gist of the case, namely, 14, 16, 17, 19, 22, 23, 26 and 27 as follows:-

> *"[14] The plaintiff came to court alleging that the 1st and 2nd defendants have been in unlawful occupation of the plaintiff's land since 1957 without leave or license and they have not paid any lease or rental to the plaintiff or to the others who are the members of the relevant mataqali. The cause of action disclosed against the 3rd defendant in the statement of claim is that they have acted in breach of the provisions of the Native Lands Trusts Act by allowing the 1st and 2nd defendants to be in occupation of the plaintiff's native land since 1957 without paying any rent or monies, the 3rd defendant has failed and/or neglected to inform the plaintiff of their financial entitlement and the 3rd defendant has abandoned and betrayed the rights and interests of the plaintiff by permitting the 1st and 2nd defendants to be in unlawful occupation of the land.*

[15] The 1st and 2nd defendants in their statement of defence admitted that they are in occupation of 11 acres, 3 roods and 24 perches of the land in dispute and while denying that they are in unlawful occupation of the land averred that the said land was compulsorily acquired under the Crown Acquisition of Lands Ordinance (Cap 140). The 3rd defendant has admitted paragraphs 1, 2 and 10 of the plaintiff's statement of claim and the other averments it has neither denied nor admitted except paragraph 12 which the 3rd defendant has specifically denied.

[17] The plaintiff for the first time sought to challenge the legality of the acquisition of the land in question in the amended pre-trial conference tendered on 7th March 2009 where he amended issue No. 4 and added a new issue which reads as follows;

4. ***Whether the 2nd defendant had purportedly acquired the land in issue through compulsory acquisition?***
5 ***Whether the 2nd defendant had acquired the land in issue purported compulsory acquisition of the land in issue was carried out in accordance with the law*** (emphasis added)?

[19] In the statement of claim of the plaintiff nothing is stated about the acquisition of land by the Governor under and in term of the Crown Acquisition of Lands (Cap 140). This is precisely how the plaintiffs have disclosed their cause of action against the 1st and 2nd defendants;

i. The 3rd defendant has permitted the 1st and 2nd defendants to occupy and use the plaintiff's native land since about 1957 till to date without a lease or license.

ii. The 3rd defendant has permitted the 1st and 2nd defendants to occupy the plaintiff's native land since about 1957 till to date without the payment of any rent or monies.

[22] It appears from the pleadings that the plaintiff has not included any averment in the statement of claim or in his reply to the defendants' statements of defence challenging the legality of the acquisition although he was aware of the acquisition. The law applies equally to both parties. In this case both parties have made the same mistake in that the defendants objected to the maintainability of the plaintiff's action on the ground that it was time barred without having taken it up in the pleadings. The court overruled the objection earlier in this judgment on the ground that a party cannot raise a new cause of action unless it is specifically pleaded in his pleadings. Minutes of the pre-trial conference are not pleadings.

[23] The plaintiff having ample opportunity to amend the pleadings by including an averment challenging the legality of the acquisition, sought to raise it for the first time in the amended minutes of the pre-trial conference which is not

permitted by law. Since I have already discussed Order 18 and Order 20 of the High Court Rules 1988, I do not wish to reproduce those rules over again. For these reasons the court is of the opinion that the plaintiff is not entitled in law to challenge the legality of the acquisition of the land in these proceedings.

[26] Although the plaintiff did not come to court seeking compensation for the land acquired by the Crown it is well established that the land in issue was acquired by the Crown under the Crown Acquisition of Lands Ordinance (Cap 140). The question then arises for determination whether the 3rd defendant has neglected its duties in permitting the 1st and 2nd defendants to takeover this land, as alleged by the plaintiff.

[27] Section 4 of the Crown Acquisition of Lands Ordinance (Cap 140) provides that it shall be lawful for the Governor to acquire any lands without compensation any native land which is the property of a mataqali or a division of a mataqali and which it may be deemed necessary to acquire for any of the purposes mentioned therein. The section also provides that the land to be so acquired shall not exceed one twentieth part of the whole of the land belonging to the mataqali or division of a mataqali to whom the land acquired belongs."

[10] It is apparent from the judgment that the learned Judge did not allow the appellant to attack the legality of the acquisition in the pre-trial issues without first amending the pleadings. I do not seek to delve into the validity of the judgment with regard to what the learned Judge had said in that regard. One factor is clearly seen. That is that the appellant was prevented from attacking the validity of the acquisition.

[11] In paragraph 17 of the judgment the learned Judge had reproduced the two new issues the appellant had raised as issues No. 4 & 5. The issue raised is whether the acquisition was carried out in accordance with the law. This issue could be raised only on admitting the acquisition. It is only after admitting the acquisition that the appellant could attack the validity. What the appellant says is that, although he admits that there was an acquisition the appellant cannot accept it as it is not lawful. For whatever the reason the appellant was not allowed to attack the validity of the acquisition.

Land acquisition through Crown Acquisition of Land Act of 1940

[12] The appellant states in the written submissions filed on 20 April 2018 as follows: (a) of paragraph 19, "***The evidence before this court is quite clear that the land in question was acquired by the 1st defendant (1st respondent) through the Crown Acquisition Act 1940***" (emphasis added). In paragraph (c) the appellant states, "*The public purpose defined above (referring to section 4 (1)) does not include a "Water Treatment Plant". This being the case the acquisition of the plaintiff's land could not have taken place under the above section, namely for a public purpose*".

[13] The learned Judge held that (paragraph 23) the appellants are not entitled in law to challenge the legality of the acquisition of the land in these proceedings. While accepting that the land was acquired by the 1st respondent, what the appellant seeks now is to challenge the legality of the acquisition. In **Kilowen Fiji Ltd v Director Lands** [2017] FJCA 101 (14 September 2017) the Court of Appeal cited the case of **O'Reilly v Mackman** [1983] 2 AC 237 (HL) as to what constitute public law issue. The House of Lords held that, "***Since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the Court for a plaintiff complaining of public authority's infringement of his public law rights to seek redress by ordinary action***" (emphasis added). In **O'Reilly**'s (supra) there had been an infringement of prisoners' rights protected by public law (by application of prison rules). Accordingly judicial review was held to be the correct procedure (**Cocks v Thanet District Council** [1983] AC 286, **Ram Prasad v AG** [1997] FJCA 52, **Digicel Fiji Ltd v Pacific Connex Investments Ltd**. (ABU 0049 of 2008 (8 April 2009), **Lakshman v Estate Management Services Ltd** [2015] FJCA 26 (27 February 2015)).

[14] The submissions by the learned counsel for the appellant revolve around the legality of the acquisition. There is no dispute as to the ownership of this land as far as the Register of Lands is concerned. As shown to date as far as the Register of lands is concerned, the appellant might be shown as the owner. However once the acquisition was admitted the

failure to register the land in question, the 1st and the 2nd respondents could not have invested a right in the appellant to maintain that he was still the owner. Further the validity of the acquisition cannot be challenged by way of writ of summons. It could be attacked only through judicial review. The procedure to follow is different.

[15] Thus with the acquisition, what is material is, the appellant's ownership stood wiped out. There is no dispute with regard to the publication of the acquisition in the gazette. The fact of publication through the gazette stood as primary proof of the legality of the acquisition by reason of section 4 of the Interpretation Act 1967, which states, "*Every Act shall be published in the Gazette, shall be a public Act and shall be judicially noticed*". Furthermore the 1st and the 2nd respondents had been placed in occupation by, presumably by State authorities from, as way back in the year 1957.

[16] Once published in the gazette the land in question ceased to be a native land. Moreover, the Crown Lands Act on which learned counsel for the appellant relied stands on a different footing to the Crown Lands Acquisition Ordinance under which the land in question had been acquired. In any event the learned counsel for the appellant, though seeking to take refuge under the Crown Lands Act which envisages "a grant" given under the said Ordinance, learned counsel for the respondents pointed out that, while it was not under the Crown Lands Act that the land in question had been acquired but under the Crown Lands Acquisition Ordinance and in any event there was no evidence of "a grant" given to the appellant under the Crown Lands Act. That submission of the respondents, learned counsel for the appellant was not able to counter.

[[17] For the aforesaid reasons I am of the view that the learned Judge was correct in ordering to strike out and dismissing the appellant's writ of summons with costs.

Lecamwasam JA

[18] I agree with the reasons, conclusion and the proposed orders of Basnayake JA.

Guneratne JA

[19] I too agree with the reasons, conclusion and the proposed orders of Basnayake JA.

Orders of the Court are:

1. *Appeal dismissed.*
2. *The respondents are entitled to costs in a sum $7500 (each respondent entitled to $2500.00 from the appellant.*

Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Mr. Justice A. Guneratne
JUSTICE OF APPEAL