IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION

HBC 263of 2008

BETWEEN : **JOSUA NAIMILA** of Vatusekiyasawa Village, Rakiraki, Turaga ni Mataqali and **EPELI BUKADOGO** of Vatusekiyasawa Village in their personal capacities and as Trustees of the Mataqali Draqara Yavusa Wailevu, Tokatoka Draqara and Tokatoka Nalibuvatu Yavusa Wailevu.

PLAINTIFFS

A N D : **NATIVE LAND TRUST BOARD** a body incorporated under the provisions of the Native Land Trust Act Cap. 134.

1ST DEFENDANT

A N D : **CHIEF EXECUTIVE OFFICER, PUBLIC WORKS DEPARTMENT**, Nasilivata House, Ratu Mara Road, Samabula, Suva.

2ND DEFENDANT

A N D : **THE ATTORNEY GENERAL OF FIJI** Suvavou House, Suva.

3RD DEFENDANT

Solicitors : H.A. Shah for the Plaintiff
NLTB Legal Department for 1st Defendant
A.G's for the 2nd & 3rd Defendant

RULING

1. On 06 July 2010, I struck out the plaintiff's claim against the 2nd and 3rd defendants under Order 18 Rule 18(1)(a) (see **Naimila v Native Land Trust Board** [2010] FJHC 233; Civil Action 268.2008 (6 July 2010). Below I reproduce in full the ruling. The same reasoning I apply to strike out the plaintiff's claim against the 1st defendant.

BACKGROUND

[1] I gather from the pleadings and from the submissions of both counsels during the hearing of this application that the Public Works Department has been in occupation of a certain piece of land which belongs to the *tokatokas* of Draqara and Nabulivatu of the *mataqali* Draqara, *yavusa* Wailevu, Rakiraki.

[2] Fresh water is in abundant supply on the land in question and through the Public Works Department, government has been sourcing water from various water catchments on the land for public supply.

[3] Government has also built on the land a depot which includes a hospital, a police station and also housing facilities for civil servants.

[4] In the statement of claim, the plaintiffs plead that rental payment for government use of the land is always delayed. On many occasions, they have requested the defendants to provide an account of payments made but to no avail. They allege they have suffered loss and damages and seek the following relief:

- (a) a declaration that the plaintiffs are entitled to a full and proper account.
- (b) a declaration that the plaintiffs are entitled to be forthwith paid all the monies currently held with the defendants jointly and severally.
- (c) a declaration that the plaintiff is entitled to copies of all lease documents over the said water catchment area and other utilities.
- (d) interest at the bank rate on all monies held with the defendants and not paid within twelve months of receipt.
- (e) costs on a solicitor-client indemnity basis.

APPLICATION TO STRIKE OUT

[5] Before me is a summons to strike out dated 27th of October, 2009 by the Office the Attorney General in Lautoka on behalf of the 2nd and 3rd defendants. The application is made under **Order 18 r 18 (1) (a) of the High Court Rules** on the ground that the claim discloses no reasonable cause of action.

[6] The application was heard on the 7th of June 2010.

SUBMISSIONS OF BOTH COUNSELS

[7] Mr. Green started by highlighting the protective scheme of the **Native Lands Trust Act (Cap 134)** and referred to **sections 3, 4, 5, 7, 8, 9** and **12**. He also referred to **regulations 3** and **4** of the **Native Land Trust (Leases and Licenses) Regulations**.

[8] In short, Mr. Green submits that, whereas the plaintiffs may indeed be the registered native owners of the land in question, the protective scheme of the Act prevents native owners such as the plaintiffs from entering into any agreement directly with any other party with a view to alienating or disposing of native land in favour of that other party. This is because the control of native lands is vested absolutely in the Native Lands Trust Board.

[9] Having said that, Mr. Green then submits that the plaintiffs claim would only be sustainable if, **firstly**, the Act allowed the plaintiffs to enter directly into an agreement with the 2nd and 3rd defendants concerning the occupation of the land in question and, **secondly**, even so, if the plaintiffs did in fact enter into an agreement directly with the 2nd and 3rd defendants about the latter's occupation and use of the land in question.

[10] Mr. Green then submits that neither of the above is allowed under the Act, and nor are they pleaded in the statement of claim. As such, there is no basis for any of the relief sought by the plaintiffs.

[11] He cites the following comments of Master Udit in the case of **Kaliova Masau v A-G & Ors – Civil Action No. HBC 120 of 2007.** In that case, the 4th, 5th and 6th defendants were foreign investors who had entered into a tourism lease with NLTB on terms which the plaintiff (who had brought proceedings in his own right and on behalf of members of his *mataqali*) were not happy with. The 4th, 5th and 6th defendants then filed a striking out claim also under **Order 18 Rule 18 (1)(a).** Master Udit had these to say:
"....there is no direct agreement between the plaintiff and either the 4th, 5th, or 6th defendants jointly and/or severally. In fact there cannot be one. The law prohibits it. On that premise alone, even any constructive agreement cannot be presumed"

[12] In other words, argues Mr. Green, before the plaintiffs can be entitled to any of the reliefs sought in the claim, they must first prove that there was an agreement between the plaintiffs on the one hand and the 2nd and 3rd defendants on the other.

[13] Mr. Green submits that the pleadings do not plead such an agreement. In fact, an agreement entered directly between the plaintiffs and the 2nd and 3rd defendants, if pleaded and assumed to be factually true, would also have to be struck out as it would be prohibited by the scheme of the Act and therefore, not a firm ground on which to base a cause of action.

[14] Frankly, therefore, the plaintiffs have no cause of action.

[15] Mr. Green read the Fiji Court of Appeal case of **Serupepeli Dakai No. 1 & Ors –v- NLDC & Ors 29 FLR 92** at page 99 regarding the function of the Board.
"No argument was advanced in support of this ground but we take it to mean that individuals are entitled to be consulted by the Board before it exercises its statutory powers of control, particularly in granting leases of native land. This is clearly not so – the Board alone has the power and any consultations prior to authorizing leases may have been merely a public relations exercise and have lead, as Kermode J believes, to a mistaken belief by individual members that they are entitled to be consulted"

[16] Mr. Green also cites an extract from **Serupepeli Dakai No. 1** which was cited in the Supreme Court case of **Waisake Ratu No. 2 & Anor v NLDC & NLTB [Supreme Court, 1987 (Cullinan J) 27 February]** as follows:
"No member of a land owning mataqali can legally object to any other person coming onto his mataqali land with the authority or permission of the Native Lands Trust Board. He cannot personally bring an action for trespass to the land or claim damages for a trespass which does not directly infringe his personal rights"

[17] Relying on sentiments expressed by the Court in **Serupepeli Dakai No. 1**, Mr. Green submits that the plaintiffs may have a cause of action against the NLTB, but they have no locus as against the 2nd and 3rd defendants.

[18] Mr. Shah argues that the alienation of the native land is not at issue in his pleadings, nor is any contract or lease agreement at issue therefrom. He further submits that the pleadings raise no issue about any right or title to *mataqali* land. He argues that **Kaliova Masau** is not applicable.

[19] Mr. Shah submits that the 2nd and 3rd defendants are in occupation of mataqali land and this is not denied. He submits that the defendants are trespassing and *meisne profit* is a remedy available to his clients at common law. He submits that his clients

require information and documents disclosed to them as to how much money the 2nd and 3rd defendants have paid.

[20] He says that all their pleadings impact on Public Works Department as they are in

occupation. He says that NLTB has been paying but the Board is not giving any account of payments received from the 2nd and 3rd defendants. He asks **"why should the mataqali be kept in the dark? NLTB is in a fiduciary position and must account to the mataqali"**.

[21] As against the 3rd and 4th defendants, Mr. Shah submits that from his clients point of view:
"Its our land. You use it. Please pay us rightful due".

[22] He says that if the 3rd and 4th defendants are in occupation, then their occupation would either be by virtue of an agreement or as a trespasser. He says either way his clients are entitled to *meisne profit*.

[23] When asked whether the 2nd and 3rd defendants are trespassing or occupying the land legally, Mr. Shah says he does not know. He concedes that the 3rd and the 4th defendants are on the land pursuant to some agreement between them and the NLTB. He says his cause of action is simply that his client needs to be paid for the use of the land, whatever ground it is that the 2nd and 3rd defendants justify their occupation and use of the land.

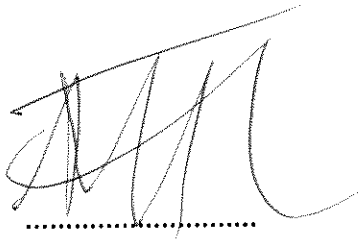
ANALYSIS

[24] The authorities that Mr. Green relies on are crystal clear that the plaintiffs have no cause of action. In **Kaliova Masau**, which is applicable in this case, Master Udit dismissed the claim against the 4th, 5th and 6th defendants on the ground that it disclosed no reasonable cause of action. The plaintiff in that case was seeking to set aside the agreement on the ground that it was an unconscionable bargain. But to succeed on that argument, they had to first and foremost establish that there was an agreement between him/them on the one hand and the 4th, 5th and 6th defendants respectively on the other. As discussed above (see paragraph 11), the plaintiff in **Kaliova Masau** could not overcome that hurdle. This was principally because the agreement in question was concluded between NLTB as the plaintiffs trustees on the one hand, and - on the other - the 4th, 5th and 6th defendants respectively in their own right as free agents who were free to bargain on a commercial deal. Hence, **Serupepeli Dakai No. 1** precluded the plaintiff in **Kaliova Masau** from legally objecting to any person coming onto his mataqali land with the authority or permission of the Native Lands Trust Board.

CONCLUSION

[25] In this case before me, I too must reach the same conclusion. Accordingly, I dismiss the statement of claim as disclosing no reasonable cause of action. The plaintiffs are to pay costs to the 2nd and 3rd defendants in the sum of **$350-00 (three hundred and fifty dollars) within 21 days of the date of this ruling.**

2. I strike out the plaintiff's claim against the 1st defendant. Costs to the 1st defendant which I summarily assess at $350 only.



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Anare Tuilevuka
JUDGE
Lautoka
28 June 2016