IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. : HBC 480 of 2005

BETWEEN : **KAMINIELI VOLAU TUNISAU** self-employed and villager of Tamavua village, suing in his personal capacity as a member of the Mataqali Navurevure of the Yavusa Matanikutu of Tamavua village and as a member of the Mataqali Navurevure of the Yavusa Matanikutu of Tamavua village in the province of Naitasiri and for and on behalf of the Yavusa Matanikutu of Tamavua village and for and on behalf of the Yavusa Nayavumata of Suvavou village, Lami.

Plaintiff

AND : **THE MINISTER OF WORKS AND INFRASTRUCTURE** , Government Building, Suva.

1st Defendant

AND : **THE ATTORNEY GENERAL OF FIJI,** Attorney General's Chamber, Suvavou House, Victoria Parade, Suva.

2nd Defendant

AND : **THE NATIVE LAND TRUST BOARD** a body corporate of Victoria Parade, Suva.

3rd Defendant

COUNSEL	:	Mr. I. Fa for the Plaintiff Mr. A. Pratap for the 1st and 2nd Defendants Ms. L. Komaitai for the 3rd Defendant
Dates of Hearing	:	06th and 07thAugust, 2013
Date of Judgment	:	14th July, 2016.

JUDGMENT

[1] The plaintiff instituted this action against the defendant seeking the following reliefs;

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 has been in unlawful occupation of the same since in or about 1957.

ii) Damages against the 1st and 2nd defendants in the sum of $5,000,000.00 (Five Million Dollars) as rent for the occupation and use of the plaintiffs' native land since in 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 plaintiffs' native land for the plaintiffs' benefit.

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

v) Damages against the 3rd defendant.

vi) Costs of the action.

[2] The plaintiff's case is that the 3rd defendant has permitted the 1st and 2nd defendants to occupy the land in issue without a lease or license and without paying any rent. The plaintiff also avers in the statement of claim that the 3rd defendant has failed and/or neglected to inform the plaintiff of their financial entitlement.

[3] The 1st and 2nd defendants in their statement of defence while admitting that they are in occupation of the land in extent of 11 acres, 3 roods and 24 perches, denied the allegation of the plaintiff that they are in unlawful occupation and averred further this land was acquired under the provisions of the Crown Acquisition of Lands Ordinance (cap 140).

[4] This case came up for trial before Judge Kotigalage and after the conclusion of the trial he left the judiciary leaving a partly written judgment and the same was allocated to me. When the matter was mentioned on 03rd August 2015 the counsel moved that the matter be heard *de novo* and it was mentioned on 07th September 2015 to fix trial dates but on that day since the 3rd defendant was absent and unrepresented the matter was again mentioned on 4th November 2015 and the trial was fixed for 21st and 22nd April 2016.

[5] On 21st April 2016 counsel for both parties moved court to deliver the judgment on the evidence available on record without a further hearing and sought time to file written submissions. The court granted time for the parties to file their submissions and fixed the judgment for 14th July, 2016. The plaintiff's counsel wanted 21 days to file submissions and the court directed him to file his submissions on 16th May, 2016 which is more than the time he sought and the defendants' counsel were directed to file their submissions in reply on 06th June 2016. The plaintiff's counsel failed to file the submissions on or before the day nominated by the court. However, on behalf of the 1st and 2nd defendants their counsel had already filed written submissions on 09th October 2013. On 31st May, 2016 the learned counsel for the plaintiff tendered written submissions but court refused to accept it because it was tendered 15 days after the due date. On 08th June 2016 the learned counsel filed summons seeking an extension of time to file written submissions but the court refused to accept it on the ground that the affidavit filed in support of the summons did not contain any reason for the long delay in filing submissions.

[6] On behalf of the 1st and 2nd defendants the learned counsel in his submissions raised a preliminary objection to the maintainability of the action on the ground that the writ of summons has been filed out of the time period prescribed by section 8 of the Limitation Act (Cap 35). Section 8 has no application to this case for the reason that it deals with mortgage, foreclosure actions and related matters. The plaintiff came to

court to recover $5,000,000 as rent for occupying the plaintiff's land since 1957 without paying any rent.

[7] Section 7 of the Limitation Act (Cap 35) provides that no action shall be brought, or distress made, **to recover arrears of rent, or damages in respect thereof**, after the expiration of six years from the date on which the arrears became due. The provisions of the Limitation Act (Cap 35) applicable to this case is therefore, found in section 7 and not in section 8.

[8] The next issue is whether the defendants are entitled in law to successfully take this objection for the first time in their written submissions after the conclusion of the trial.

[9] Order 18 rule 7 of the High Court Rules provides;

> (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality-
>
> *(a)* which he alleges makes any claim or defence of the opposite party not maintainable; or
>
> *(b)* which, if not specifically pleaded, might take the opposite party by surprise; or
>
> *(c)* which raises issues of fact not arising out of the preceding pleadings.
>
> (2) Without prejudice to paragraph (1), a defendant to an action for the recovery of land must plead specifically every ground of defence he relies, and a plea that he is in possession of the land by himself or his tenant is not sufficient.
>
> (3) A claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading resides.

[10] Order 18 rule 7 specifically provides that if the defendant intends to take up the position that the action of the plaintiff is barred by the provisions of the statute of limitation it must be specifically pleaded. The 1st and 2nd defendants and the 3rd defendant filed two separate statements of defence but none of these statements contain the objection as to the maintainability of the plaintiff's action on the ground that it was barred by the provisions of the Limitation Act (Cap 35). If a defendant

intends to take up the objection to the maintainability of an action on the ground that the action is barred by the provisions of the Limitation Act, it is imperative that he pleads it in his statement of defence. If he inadvertently omits to plead it, he is entitled to cure the defect by amending his pleadings.

[11] In the case of **Renee Wurzel v Minika Tappen Management Limited** (2001) 1 FLR 275 it was held that notwithstanding that a defence of limitation is to be expressly pleaded, the failure to plead a defence is a curable error, a matter of procedure only. The issue of whether the claim is statute barred is fundamental to the efficacy of the action and late amendment of pleadings is allowed, so that all of the issues in the case are before the court, there being no prejudice to the Plaintiff.

[12] However, the defendants in this case have sought not to exercise their right to amend the pleadings. For the reasons aforementioned the preliminary objection taken by the defendants to the maintainability of the action on the ground that it is time barred must necessarily fail.

[13] At the pre-trial conference the parties admitted the following facts;

1. The plaintiff is a member of the Mataqali Navurevure of Yavusa Matanimutu of Tamavua village in the province of Naitasiri.
2. The plaintiff is registered in the Registrar of Native Lands - Vola ni Kava Bula as a member of the Yavusa Matanikutu of Tamavua village in the province of Naitasiri.
3. The 3rd defendant is by law vested with the powers of control and administration of all native lands in Fiji including native lands in Fiji including native land belonging to the plaintiff.
4. The 1st and 2nd defendants are in occupation of a particular portion of a native land amounting to 11 acres, 3 roods, and 24 perches situated on the corner of Wailoku Road and Niranji Street and built on the same substantial development, which included among other things a water treatment plant and related facilities.

[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 plaintiffs' statement of claim and the other averments it has neither denied nor admitted except paragraph 12 which the 3rd defendant has specifically denied.

[16] According to the minutes of the pre-trial conference following are the issues to be determined by the court at the hearing as agreed by the parties:

1. Whether the 1st and 2nd defendants have been in unlawful occupation of the plaintiff's native land since or about 1957 and continue to do so until today?
2. Whether the 3rd defendant has acted unlawfully and in breach of the Native Lands Trusts Act in failing to administer the plaintiffs' native land for its benefit?
3. If the answer to either 1 or 2 above is in the affirmative, then whether as a result of those act, the plaintiff has suffered damage?
4. Whether the 2nd defendant had acquired the land in issue through compulsory acquisition?

[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 read 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?

[18] Before considering the merits of the case, I must consider whether the plaintiff is entitled in law to bring in a new cause of action by amending the minutes of the pre-trial conference without amending the statement of claim, even with the consent of the other parties.

[19] In the statement of claim of the plaintiff nothing is stated about the acquisition of the 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.

[20] Apart from the prayers for damages against the 3rd defendant and certain other declarations, the plaintiff, in prayer (ii) of the statement of claim, has prayed for damages as follows;

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

[21] When the defendants filed their statements of defence the plaintiff filed his reply. The plaintiff's reply to the defendants' statements of defence contains only two paragraphs which read as follows;

1. The Plaintiff joins issue with the 1st and 2nd Defendant on its Statement of Defence (hereinafter 'the 1st and 2nd Defendant's Defence') except so far as it consists of admissions.
2. The Plaintiff joins issue with the 3rd Defendant on its Statement of Defence (hereinafter 'the 3rd Defendant's Defence') except so far as it consists of admissions.

[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 taking 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 plaintiffs are not entitled in law to challenge the legality of the acquisition of the land in these proceedings.

[24] Issues are based on the pleadings. Every party to an action must be made aware of the case of the opposite party he has to meet. Then and only then the opposite party can successfully meet the case of the other party.

[25] The issue for determination here is whether the 3rd defendant has acted to the detriment of the rights of the plaintiffs and others who are the members of the mataqali to which this land belonged before its acquisition.

[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 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.

[28] From the gazette notification No. 2 of 1960 (P4), it appears that this land has been acquired by the Governor acting under the powers conferred upon him by the Crown Acquisition of Lands Ordinance (Cap 140). When the authority to acquire lands is conferred upon by the statute the acquiring officer does not have to obtain the consent of any other institution or authority. Therefore, the 3rd defendant, in my view, had no authority to resent the official acts done by the Governor even if it wanted to. The documents tendered at the trial and the oral evidence adduced by the parties does not show that it was the 3rd defendant who placed the 1st defendant in possession of the land. Hence, the cause of action against the 3rd defendant must necessarily fail.

[29] It is also important to note that although in the gazette notification published by the Director of Lands on behalf of the Governor there was a requirement that the persons claiming to have any interest in the land to make their claim within three months from the date of the notice which was 24th December, 1959. There is no evidence that the predecessors in title of the plaintiff or any other person who claimed to have title in the land, made any such claim.

[30] It is relevant to mention that the plaintiff who brought this action in his personal capacity and also in representative capacity representing the other members of the relevant mataqali and the official witnesses were not able to tell court exactly what transpired at the time the land was acquired nor can the court expect the witnesses who had not been even born at the time of the acquisition, to have a personal knowledge on these matters. The plaintiff's evidence is that he came to know about the acquisition after he went to school. There evidence was mainly based on the contents of the documents which were tendered in evidence. The document marked 'P6' is a letter written to the Secretary, Natural Resources. This document does not have a date, name or the designation of the person or officer who sent it. However, on a careful reading of the said letter it appears that it is in respect of the surrounding land of the land acquired for the water purifying plant. The relevant part of the letter reads as follows;

> When construction of the water treatment plant was contemplated in 1957 opportunity was taken to excise various roads and pipe line reserves which had hitherto not been regularly acquired.

This letter, even if admitted in evidence, does not establish the plaintiff's claim pleaded in the statement of claim.

[31] Since the plaintiffs have failed to establish their claim the question of damages does not arise for consideration. However, it must be said that they have not been able to establish the amount of damages claimed. It is trite law that liquidated damages must be pleaded and proved by the party who claims such damages. In the instant case there is no evidence on the quantum of damages claimed.

[32] In these circumstances it cannot be held that the 1st and 2nd defendants are in illegal and/or unlawful occupation of the land in question as claimed in the statement of claim.

[33] For reasons aforementioned I make the following order.

ORDERS:

(1) The Writ of summons of the plaintiff dated 16th September, 2005 is struck out and the action is dismissed.

(2) The plaintiff shall pay $2000 to each of the defendants ($6000 in all) as costs (summarily assessed) of these proceedings.

Lyone Seneviratne,

JUDGE.

14th July, 2016.