

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 110 of 2017

BETWEEN : **ILAMI LUTUMAILAGI, JOPE NABUIWAI** and
MERELANI DRUMA all of Moala Village, Nadi bring this
action in their capacity as the representatives of Mataqali and
also in their capacity as their Trustees of Mataqali Nalubati.

Plaintiffs

AND : **MILIANA NEIVALU** of Moala Village, Nadi, Domestic Duties
for and on behalf of herself and the members of Rororo Family.

Defendant

R U L I N G

1. The Mataqali Nalubati is the traditional *i-taukei* owner of Nukuvatu Island. The plaintiff in this case, as well as the defendants, are all members of the said mataqali. It is common ground between the parties that the defendants, by virtue of her being a member of the said *mataqali*, has “*danudanu*” and “*kanakana*” rights on the said island.
2. The issue however is whether or not these rights extend to a right to remove and sell sand on the island.
3. That this has to be a legal issue at all may surprise many. I say that because it would seem a foregone conclusion to many that “*danudanu*” and “*kanakana*” rights do not extend to a right to remove and sell sand. Suffice it to say that it is an issue only because the defendant, in a separate civil action which she had filed some years earlier (HBC 99 of 2013), had sought *inter-alia* (I paraphrase) a “*declaration that she was entitled to remove and sell sand on Nukuvatu Island as part of her danuadanu right*”. In that same action, she

had also sought a declaration that she was entitled to use the island as her “danudanu and eating place” as well as an injunction to restrain the plaintiffs from preventing her from removing and selling sand from the island”.

4. On 28 November 2013, Mr. Justice Weeratne granted the above orders. Weeratne J also ordered that the defendant was to deposit 10% of all sale proceeds in Court on an ongoing basis. This Order was only made upon an undertaking to the same effect by the defendant.
5. In 2016, the plaintiff discovered that the defendant had not complied with Weeratne J’s orders. The plaintiff then filed an application to discharge the injunctive orders.
6. The said application was heard by Mr. Justice Mohammed Ajmeer on 01 September 2016 who discharged the injunctive orders on the basis of the defendant’s non-compliance with Weeratne J’s condition, which condition was in fact, based on the defendant’s undertaking as to damages.
7. The main substantive action was eventually heard before Ajmeer J who delivered a judgement on 02 May 2017.
8. In his judgement, Ajmeer J said *inter-alia* as follows:

[23] The plaintiff’s claim hinges on her ‘kanakana’ or ‘danudanu’ rights. According to native custom of the Tokatoka members, the land once cleared and planted is known as “danudanu”.

[24] The plaintiff is a member of Tokatoka Nalubati of Moala Village in Nadi. The first defendants are Trustees of Mataqali Nalubati of Moala Village. The second defendant is a member of Mataqali Nalubati and Tokatoka Nalubati of Moala Village.

[25] It has been common ground that Nukuvatu Island is owned by Mataqali Nalubati and Tokatoka Nalubati of Moala Village in Nadi. It is also common ground that there are three houses or families in the Tokatoka of Nalubati namely Rororo, Nalubati and Nakulubokola. The plaintiff belongs to Rororo family.

[26] According to the plaintiff, Nukuvatu Island was allotted to her grandfather to clear out and to plant for the Rororo family and it was passed down through their family generation. The plaintiff said her father planted and after her father, his brother did and she did not cultivate after her brother passed away.

[27] The defendants did not seriously challenge the plaintiff’s ‘danudanu’ right on the Nukuvatu Island. What the defendants challenge is the plaintiff’s right to extract sand from that island.

[28] Both parties place reliance on the Commissioner Maxwell's definition of 'danudanu'. Commissioner Maxwell printed by Government Printer in 1915, which defines 'danudanu' as:

*"Land once cleared and planted is known as **"danudanu"** and the sole right of planting of any **"danudanu"** is vested in the person who first planted it and his descendants."* (Emphasis provided)

[29] No evidence was led to contradict the above definition of 'danudanu'. The plaintiff and the defendants admit the definition given in the Commissioner Maxwell.

[30] I would, therefore, find that the Commissioner Maxwell's definition of 'danudanu' that the sole right of planting of any 'danudanu' is vested in the person who first planted it and his descendants.

[31] The plaintiff derives 'danudanu' right from her descendants. This is not disputed by the defendants. I accordingly hold that the Nukuvatu Island is the 'danudanu' of Rororo house.

Whether 'danudanu' right includes any rights other than planting and eating?

[32] On the strength of the 'danudanu' right on the Nukuvatu Island, the plaintiff entered into an agreement with the Ministry of Primary Industries to dump river sand on the Nukuvatu Island for their (plaintiff's) benefit.

[33] In evidence, the plaintiff states that Mr Jolame Navoyo who is the Turaga in Yavusa/Head of Tribe of Nacaqaru, Turaga ni Mataqali/Head of Clan of Nalubati and Turaga ni Tokatoka/Head of sub-clan of Nalubati gave his full consent to the Rororo family to remove the river sand dumped on Nalubati Island.

[34] The plaintiff should not have entered into an agreement with the Ministry of Primary Industries exercising her 'danudanu' right in the first place to dump river sand on the Nukuvatu Island, over which she has her 'danudanu' right. Judging from the accepted definition of 'danudanu', 'danudanu' right includes only planting and eating and nothing else. By entering into an agreement to dump river sand on the Nukuvatu Island, the plaintiff has acted against her 'danudanu' right. The plaintiff has made the Nukuvatu Island infertile because the huge heap of river sand covers the entire Nukuvatu Island. In order to regain her 'danudanu' right, the plaintiff needs to remove the sand therefrom. Currently, she has no license to do so. However, this can be done with the consent of and in consultation with the land owners who can obtain license to remove the sand from the Nukuvatu Island and make it fertile.

Whether the plaintiff is entitled to general, aggravated and penal damage?

[35] The plaintiff has sole right to plant and eat on Nukuvatu Island. She did not plant after her brother. She has left the village. It is not clear when her brother last planted on the island in question. The plaintiff by her own action has made her 'danudanu' right impossible to exercise. There is no evidence in court showing that the defendants trespassed and disturbed or prevented the plaintiff from exercising her 'danudanu' right on the Nukuvatu Island. I, therefore, find that the plaintiff is not entitled to claim any damages from the defendants.

Conclusion

[36] I conclude, for the foregoing reasons, and make a declaratory order that the plaintiffs are entitled to use Nukuvatu Island as their 'danudanu' and eating place. I would make no order as to costs. Each party will bear their own costs.

9. It is alleged by the plaintiff that in spite of Ajmeer J's declaration, the defendant has continued to extract gravel and sand and dump these on the island for her own benefit.
10. Based on this, the plaintiff has then filed a fresh writ action to claim for special and general damages based on the above allegation.
11. I must say at the outset that the cause of action pleaded appears to be rather confused.
12. It is not clear whether the plaintiff is aggrieved about the adverse effect that the extraction and the dumping of gravel and sand has on the land over which he and his mataqali has *danudanu* rights. It appears that he and his mataqali members are just concerned about not having received their fair share of the proceeds from the defendant's commercial operation.
13. I observe nonetheless that the facts are largely not in dispute. These facts, in my view, would *prima facie* support either cause of action.
14. On 12 June 2017, I granted the following Orders in terms of an *ex-parte* Notice of Motion filed by the plaintiff:
 - (i) That the Defendant and/or her servant and/or her agent and/or the contractors be restrained from extracting and/or removing and/or selling river sand and/or gravel from the Island of Nukuvatu situated at Moala, Nadi.
 - (ii) That the Defendant and/or her agent and/or her servant and/or any of the members of Rororo Family be restrained from interfering with the Plaintiff and/or their agents and/or the Land Valuer/Assessor from inspecting and/or conducting any kind of survey and/or test in order to ascertain the market value of the river sand and/or gravel extracted and/or removed from the island of Nukuvatu situated at Moala, Nadi.
 - (iii) That the Defendant to provide all records, accounts, statements and/or any other relevant documents in respect to extraction and/or removal of the river sand and gravel dumped on the island of Nukuvatu situated at Moala, Nadi.
 - (iv) That these orders to be in force until further orders.
 - (v) That the Plaintiff to serve all documents to the Defendant in 2 days.
 - (vi) That the matter is adjourned to 14th June 2017 for mention at 10.30am.

15. When the matter was first called before me *inter-partes* on 14 June 2017, Ms Mataika for the defendant advised that she had filed a Summons seeking the following orders:

- (1) That the Plaintiff's claim against the Defendant be struck out.
- (2) Such further or other orders as the Honourable Court may determine.
- (3) That cost of this application be in the cause.

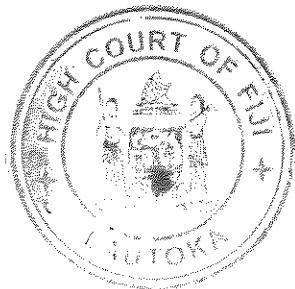
16. I do not think agree that the plaintiff's claim is frivolous or vexatious or is an abuse of process. It is ultimately based on an allegation that the defendants are deliberately flouting the law in total disregard of the Orders of Ajmeer J. Admittedly, the pleadings and the remedies sought may need to be revisited, but the factual matrix is relatively strong.


17. I also do not agree with Ms Mataika's submission that Ajmeer J had ruled that the defendant was entitled to extract gravel and sand and dump this on the island for commercial sale. On the contrary, the Learned Judge's observation was that the *danudanu* rights that the defendant had did not extend to a right to extract gravel and sand and to dump these on the island.

18. Accordingly, I dismiss the defendant's Summons.

19. 21 days to defendant to file and serve Acknowledgement of Service and Statement of Defence. 14 days thereafter to Plaintiff to file and serve Reply.

20. Adjourned to 28 July for mention.




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Anare Tuilevuka
JUDGE

19 July 2017.