IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 124 of 2016

BETWEEN: **AISAKE RAVUTUBANANITU**, for and on behalf of himself and on behalf of the majority members of the Mataqali Navusabalavu of Tagitaginatua, Tavua, Self-employed.

Plaintiff

AND: **OVINI BOKINI**, of Tavualevu, Tavua.

1st Defendant

AND: **ANJALI DEVI PRAKASH**, of 28 Kavika Street, Tavua.

2nd Defendant

AND: **iTAUKEI LAND TRUST BOARD**, a statutory body established under the iTaukei Land Trust Act of Victoria Parade, Suva.

3rd Defendant

AND: **REGISTRAR OF DEEDS**, an officer established under the Registration Act.

4th Defendant

Before : Acting Master U.L. Mohamed Azhar

Counsels: Mr. Nawaikula Esquire for the Plaintiff
Ms. Patricia Mataika with Mr. Tikoca for the 1st Defendant

Date of Ruling: 06th December 2017

RULING

(Trustee's claim over trust property and striking out under Or.18, r.18)

01. The plaintiff filed this action against all the above named defendants on the alleged unlawful attempt by the 1st defendant to transfer the property, which he has been occupying and cultivating, to the 2nd defendant. The plaintiff claims in his statement of claim that, he is the member of Mataqali Navusabalavu and has been in occupation and

cultivation of a property being a Native Lease No. 4/4/183. IT No. 6409 which belongs to the Trustees of Navusabalavu Housing Scheme and comprising of the extent of 17 Acres and 1 Roods known as *Saunakavika*. The 1st defendant who is also a member of the said Mataqali together with Manasa Naiceru and Setareki Tinalevu attempted to transfer the same property to the 2nd defendant. The plaintiff, therefore, prayed for the following reliefs from the court;

a. *A declaration that the 1st defendant has no power, authority or mandate to transfer the subject land and his purported action is null and void and of no effect,*

b. *A declaration that, the 1st defendant knew he had no power, authority or mandate to deal with the subject land but continued to do so in a manner that was clearly criminal and fraudulent,*

c. *An order directing the 1st defendant to reinstate the plaintiff's interest in the Native Lease No. 4/4/183. IT No. 6409 comprising 17 Acres and 1 Roods and known as Saunakavika,*

d. *Such further order and other relief as the court may deem equitable and*

e. *Costs.*

02. The defendants did not file their statement of defence. The 1st and 2nd defendants filed the acknowledgment and filed the summons under Order 18 rule 18 (1) (a), (b), (c) and (d) of the High Court Rules and the inherent jurisdiction of this court. However, summons filed by the 2nd defendant was struck out. The 1st defendant's summons is supported by his affidavit and moved the court to strike out plaintiff's action against the 1st defendant on the grounds that, (a) the plaintiff claims on a transferred instrument of Tenancy when in fact such was surrendered by the Trustees and 3rd defendant issued new instrument of Tenancy to the 2nd defendant, (b) the 1st defendant is sued personally and has no authority to reinstate the surrendered instrument of Tenancy, (c) the plaintiff therefore has no reasonable cause of action and vexes the defendant after losing an application to Agricultural Tribunal and (d) the plaintiff does not have majority support of Mataqali members who had dismissed him from his position of Trustee.

03. The law on striking out the pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

*18 (1) The Court **may** at any stage of the proceedings **order to be struck out or amend** any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*

(a) It discloses no reasonable cause of action or defence, as the case may be; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading (emphasis added)

04. At a glance, this rule gives two basic messages and both are salutary for the interest of justice and encourage the access to justice which should not be denied by the glib use of summery procedure of pre-emptory striking out. Firstly, the power given under this rule is *permissive* which is indicated in the word *"may"* used at the beginning of this rule as opposed to *mandatory*. It is a *"may do"* provision contrary to *"must do"* provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not ***necessarily*** be struck out as the court can, still, order for amendment. In ***Carl Zeiss Stiftung v Rayner & Keeler Ltd*** *(No 3) [1970] Ch. 506*, it was held that the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea. **MARSACK J.A.** giving concurring judgment of the Court of Appeal in ***Attorney General v Halka*** ***[1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972)*** held that:

> *"Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".*

05. The first ground of the said rule is the absence of reasonable cause of action or defence as the case may be. No evidence is admissible for this ground for the obvious reason that, the court can come to a conclusion of absence of a reasonable cause of action or defence merely on the pleadings itself, without any extraneous evidence. His Lordship the Chief Justice A.H.C.T. GATES (as His Lordship then was) in ***Razak v Fiji Sugar Corporation Ltd*** ***[2005] FJHC 720; HBC208.1998L (23 February 2005)*** held that:

> *"To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18(2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498".*

06. Citing several authorities, Halsbury's Laws of England (4th Edition) in volume 37 at para 18 and page 24, defines the reasonable cause of action as follows:

> *"A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered" Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd [1899] 1 QB 86 at 90,91, CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.*

07. Given the discretionary power the court possesses to strike out under this rule, it cannot strike out an action for the reasons it is weak or the plaintiff is unlikely to succeed, rather it should obviously be unsustainable. His Lordship the Chief Justice A.H.C.T. GATES in ***Razak v Fiji Sugar Corporation Ltd*** (supra) held that:

> *"The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."*

08. It was held in ***Ratumaiyale v Native Land Trust Board [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000)*** that:

> *"It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95. The principles applicable were succinctly dealt by Justice Kirby in **London v Commonwealth [No 2]** 70 ALJR 541 at 544 - 545. These are worth repeating in full:*
>
> *1. It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided (**General Street Industries Inc v Commissioner for Railways (NSW)** [1964] HCA 69; (1964) 112 CLR 125 at 128f; **Dyson v Attorney-General** [1911] 1 KB 410 at 418).*
>
> *2. To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action (**Munnings v Australian Government Solicitor** (1994) 68 ALJR 169 at 171f, per Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (**Dey v. Victorian Railways Commissioners** [1949] HCA 1; (1949) 78 CLR 62 at 91).*

3. *An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone, sufficient to warrant summary termination. (**Coe v The Commonwealth** (1979) 53 ALJR 403; (1992) 30 NSWLR 1 at 5-7). Even a weak case is entitled to the time of a court. Experience reaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

4. *Summary relief of the kind provided for by O 26, r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer. (**Coe v The Commonwealth**(1979) 53 ALJR 403 at 409). If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

5. *If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleadings. (**Church of Scientology v Woodward** [1982] HCA 78; (1980) 154 CLR 25 at 79). A question has arisen as to whether O 26 r 18 applies only part of a pleading. (**Northern Land Council v The Commonwealth** (1986) 161 CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and*

6. *The guiding principle is, as stated in O 26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit".*

09. There is no much cases which deals with the other part of first ground that is the absence of the defence, as the said sub rule states '*It discloses no reasonable cause of action or **defence**, as the case may be*'. The reasons being that, if there is no defence, generally the plaintiffs will seek to enter the summary judgement under Oder 14, rather than seeking relief under Oder 18 rule 18 to strike out the defence. In any event, if there is any such application to strike out any pleading for not disclosing a *defence*, the courts can adopt the meaning given by Sir Roger Ormond in ***Alpine Bulk Transport Co. Saudi Shipping Co. Inc*** *(1986) 2 Lloyd's Rep, 221* for the *'defence'* which is *"a real prospect of success"* and " *carry some degree of conviction*". Thus, the court must from a provisional view of the probable outcome of the action.

10. The rule also empowers the court to exercise its discretion to strike out any pleadings or claim if the same is scandalous, frivolous or vexatious. If the pleadings contain the

degrading charges which are totally irrelevant or if there are unnecessary details included in the pleading in relation to the charge which is otherwise relevant to the claim, then such pleadings and claim are scandalous. The White Book Volume 1 (1987 Edition) at para 18/19/14 states that:

> *"Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P. 663)".*

11. On the other hand if the action is filed without serious purpose and having no use, but intended to annoy or harass the other party, it is frivolous and vexatious. Roden J in ***Attorney General v Wentworth*** *(1988) 14 NSWLR 481*, said at 491 that:

> *"1. Proceedings are vexatious if they instituted with the intention of annoying or embarrassing the person against whom they are brought.*
>
> *2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
>
> *3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless."*

12. The fair trial is fundamental to the rule of law and to democracy itself. The right to fair trial applies to both criminal and civil cases and it is absolute and cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Thus the courts are vested with the power to strike out any such proceeding or claim which is detrimental to or delays the fair trial. Likewise, the rule of law and the natural justice require that, every person has access to the justice and has fundamental right to have their disputes determined by an independent and impartial court or tribunal. However, this access should be used with the good faith and the motive untainted with the malice. If any action is prosecuted with the ulterior purposes or the machinery of the court is used as a mean of vexatious or oppression, it is abuse of process. Likewise the subsequent action after dismissal of previous action to is abuse of process. The courts have inherent power to combat any form of such abuse.

13. Halsbury's Laws of England (4th Ed) Vol. 37 explains the abuse of process in para 434 which reads:

> *"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such*

a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

14. His Lordship the Chief Justice A.H.C.T. GATES in ***Razak v Fiji Sugar Corporation Ltd*** (supra) held that:

> *"It would be an abuse of process for the plaintiff to bring a second action for the same cause of action after disobedience of peremptory orders had resulted in the dismissal of the first action: Janov v Morris [1981] 3 All ER 780. It is said the process is misused thereby. Re-litigating a question, even though the matter is not strictly res judicata has been held to be an abuse of process: Stephenson v Garnett [1898] 1 QB 677 CA. In that case the suitor was the same person and he sought to re-open a matter already decided against him".*

15. In the case of **Goldsmith v Sperrings Ltd [1977] 2 All ER 566**, Lord Denning said as follows at 574:

> *"In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer".*

16. As discussed above, the rule provides for the permissive discretion to the courts to strike out the claim or proceedings for the above grounds as opposed to the mandatory power. It should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised. It would always be preferable to allow the amendment instead of striking out, unless the interest of justice requires the striking out. Bearing the above position of law in mind, I now turn to discuss the instant case to decide whether to strike out the action of the plaintiff or to dismiss the summons filed by the 1st defendant.

17. The fundamental question is whether the plaintiff has any cause of action to bring this action. This question to be discussed in two aspects, one is on the locus standi of the plaintiff and other is on the nature of the claim of the plaintiff. The caption of the statement of claim filed by the plaintiff states that ***"AISAKE RAVUTUBANITU, for and***

on behalf of himself and on behalf of the majority members of the Mataqali Navusabalavu" of Tagitaginatua, Tavua. The plaintiff therefore, indicates that, he instituted this action for the benefit of the Mataqali and himself. In addition, he states in his statement of claim that, in year 1998 Mataqali Navusabalavu created a Trust known as Navusabalavu Housing Scheme Trust and appointed him (plaintiff) and Viliame Batidegei as trustees. Thus, it is the contention of the plaintiff that, he sues as the trustee of Navusabalavu Housing Scheme Trust, on behalf of the majority members of Mataqali Navusabalavu. However, the 1st defendant, in his affidavit, states that, the plaintiff does not have the support majority members of Mataqali. The 1st defendant, whilst admitting that the plaintiff was a joint trustee with one Viliame Batidegei, states that, they continued to be the trustees until the majority of adult members of the Mataqali resolved on 14th January 2016 to terminate their trusteeship. According to 1st defendant the Mataqali terminated the trusteeship of plaintiff and Viliame Batidegei and appointed the 1st defendant, Manasa Maiceru and Setareki Tinalevu by Deed of Trust No. 29971 which was registered on 8th March 2006. The plaintiff marked the true copy of the said Deed of Trust as ***OB 1*** and attached with his affidavit. The 1st defendant also attached a true copy of a letter issued by the 3rd defendant marked as ***OB 2***. The said ***OB 2*** is a letter addressed to the Director of Land Resources, Planning and Development which confirms the revocation of trusteeship of the plaintiff and Viliame Batidegei by the ***OB 1***.

18. The plaintiff denies both the ***OB 1*** and ***OB 2*** and states that, the 1st defendant attempted to organize a new Deed of Trust and filed an action in High Court to declare the termination of his trusteeship, but the court struck out the said action. For the proof of the same, the plaintiff attached the 'Judge's note' of that case, marked as ***AR 1*** with his affidavit. In order to rebut the ***OB 1***, the plaintiff further submitted a document marked as ***AR 5*** which is a letter signed by several people, who claim to be members of Mataqali Navusabalavu. The said ***AR 5*** is written in iTaukei language; however the headline, which is written in English, states that, it is a withdrawal of signatories who signed the ***OB 1***. The questions that arise out of this document (***AR 5***) are; (a) whether the signatories are the real members of Mataqali Navusabalavu or not, (b) even the withdrawal was done by some members, the said Deed of Trust (***OB1***) will not lose its validity unless and until it is cancelled by the court of law or withdrawn by another valid Deed executed in accordance with the relevant laws, and (c) if the said ***AR 5*** is admitted as a valid withdrawal, it will further support that, the ***OB 1*** was duly executed though the plaintiff disputes the same. On the other hand the ***OB 1*** was duly executed and registered by the Registrar of Deeds under the Registration Act. It is further supported by ***OB 2*** - the letter which is issued by the 3rd defendant, confirming the revocation of trusteeship of the plaintiff and appointing the 1st defendant and others as the new trustees. If the plaintiff still claims that, he is the trustee of the said Mataqali, he should have asserted his position and got the said Deed of Trust (***OB 1***) cancelled through an appropriate action. The Judge's Note marked as ***AR 1*** is the proof for the fact that the action, filed by the 1st defendant for declaration of trusteeship of the plaintiff, was struck out for want of prosecution. However, it does not mean that, the ***OB1*** - the said Deed of Trust was declared null and void.

19. The plaintiff in paragraph 7 of his affidavit states that, the trusteeship of the 1st defendant and others which was created by the said ***OB 1*** expired after 3 years as the said ***OB 1*** limits the term of trusteeship to 2009. At this point, the plaintiff admits the ***OB 1***, which

he denied in the preceding paragraphs of his affidavit. Thus, he is taking double stands in respect of ***OB 1***. On one hand, he denies the same, when it comes to terminate his trusteeship and on the other hand he admits the same, when it limits the term of trusteeship of the 1st defendant and others. For the above reasons, I am of the view that, though the plaintiff was initially appointed as the trustee with Viliame Batidegei, their trusteeship had already been cancelled by the said Deed of Trust marked as ***OB 1*** and the plaintiff and his co-trustee ceased to be the trustees from the date on which the Mataqali declared and executed ***OB 1***.

20. The plaintiff further states in paragraph 6 of his affidavit that, the Agricultural Tribunal in Action No. WD/08/15 made finding of the fact that, the he is still the trustee of Mataqali. He annexed the true copy of the decision of the Tribunal marked as ***AR 2***. A careful reading of the said finding reveals that, the plaintiff, before filling this action, filed the said application, seeking a declaration of tenancy under Agricultural Landlord and Tenant Act Cap 270. The 2nd and 3rd defendants of this case were the respondents in that application before the Agricultural Tribunal. The real issue before the Tribunal was, as correctly pointed out by the Learned Magistrate in paragraph 8 of his findings, whether the applicant (plaintiff in this case) was entitled under the said Act (ALTA) to seek a declaration of tenancy? The Learned Magistrate has correctly found that, the applicant, having entered the land as the trustee of Navusabalavu Trust, was not entitled to seek a declaration of tenancy and dismissed the application. The Learned Magistrate never decided the issue of trusteeship of the plaintiff in that case as mistakenly claimed by the plaintiff and Agricultural Tribunal has no jurisdiction to decide the trusteeship of any person. Therefore, the argument of the plaintiff, that the Agricultural Tribunal made a finding that he is still a trustee, is misconceived and misleading.

21. It follows from the above analysis that, the contention of the plaintiff, that he brought this action as the trustee of Navusabalavu Trust, cannot be accepted. Though he was originally appointed as the trustee, his trusteeship ceased following the declaration by the majority members of Mataqali and signing the Deed of Trust marked ***OB 1***. He was, therefore, not the trustee at the time of filling this action. The next question is whether the plaintiff's action could be considered as a 'representative action' as he stated in his caption that, he is suing on behalf of himself and the Mataqali of Navusabalavu Trust. The representative actions are governed by O.15 r.14 of the High Court Rules which reads:

> *14.(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 15, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.*

22. The requirement under this rule, therefore, is that the persons, intended to be represented, must have the same interest in the proceedings. However, cases decided under the comparable rule in England have discussed other criteria. Sir Raymond Evershed M.R. (with whom Jenkins and Morris L.JJ agreed) enunciated the test in ***Smith v Cardiff Corporation [1954] 1 QB 210*** for the representative action. This has been frequently followed by the courts. It was held in that case that;

To bring a representative action under R.S.C., Ord. 16, r. 9, it must be shown: first, that all the members of the class had a common interest; secondly, that they all had a common grievance; and thirdly, that the relief was in its nature beneficial to them all.

23. The main reliefs sought by the plaintiff in this case are reproduced below;

a. *A declaration that the 1st defendant has no power, authority or mandate to transfer the subject land and his purported action is null and void and of no effect,*

b. *A declaration that, the 1st defendant knew he had no power, authority or mandate to deal with the subject land but continued to do so in a manner that was clearly criminal and fraudulent,*

c. *An order directing the 1st defendant to reinstate the plaintiff's interest in the Native Lease No. 4/4/183. IT No. 6409 comprising 17 Acres and 1 Roods and known as Saunakavika,*

24. The first two are the declarations concerning transfer of the subject land and the third is an order for restoration of plaintiff's interest to the entire land comprising 17 Acres and 1 Roods knows as *Saunakavika*. The final relief sought by the plaintiff is for his own interest. The affidavit of the plaintiff is, notably, silent on the common interest and benefit that Mataqali member will have, if his interest is restored to Native Lease No. 4/4/183. IT No. 6409, as he prayed in his final relief. The final relief sought by him is purely for his benefit and surely not for the benefit of the members of Mataqali. Therefore, the plaintiff fails to pass the test for the *representative action*. Furthermore, the said Native Lease No. 4/4/183. IT No. 6409 does not exist now, as it had already been surrendered to the 3rd defendant and it had issued a new lease to the 2nd defendant. In fact, the plaintiff tries to get personal benefit out a Native Lease which was granted to Navusabalavu Trust and was surrendered to the 3rd defendant. Thus, he loses the locus standi to bring this action as the representative action on behalf of the majority members of Mataqali. He is suing the defendants to establish a tenancy for himself under the guise of common interest of Mataqali. Even in the application he filed before the Agricultural Tribunal, which was finally struck out by the Tribunal, he sought the tenancy for his benefit and not for the benefit of Navusabalave Housing Scheme Trust. It follows that, the plaintiff was neither the trustee; nor he passed the test for representative action when he filed this case against the defendants. As a result, he lacks the locus standi to bring this action in the way and the manner it has been instituted.

25. Now I turn to examine whether the plaintiff has any cause of action in terms the claim he made against the defendants through his statement of claim. As mentioned above, the plaintiff claims the tenancy of the subject land for himself personally. In paragraph 13 of the his statement of clam, he stated that, since 1998 he built his house, connected the

electricity and water; has been in continuous occupation and cultivation to the date of filling the action. He further stated that, the property was not transferred to his name due to the iTLTB's assurance that, no one will remove him as he has been cultivating and occupying as a member of Mataqali and invested money on the land. This averment obviously indicates that, the claim of the plaintiff is for his personal benefit. It is admitted that, plaintiff entered the said Native Lease, when it was originally granted, as the trustee of Navusabalavu Housing Scheme. The vital question, therefore, is whether a trustee can claim benefit out of the trust property?

26. The trustee is the person who holds property or a position of trust or responsibility for the benefit of another or for the benefit of a class of people for whose benefit the trust was created. The term *Trustee* encompasses the person who holds a property on behalf of a beneficiary, persons who serve on the board of trustees of an institution or body that operates for a charity, for the benefit of the general public, or certain class of people mentioned in the trust. He or she is allowed to do certain tasks and generally not able to gain income or benefit unless the trust specifically provides for any payment for his work. However, he must not abuse his position by making it a means of profit or benefit to himself or any third party. This was the rule that was articulated long time ago in an English case of ***Keech v Sandford 25 ER Page 223***. In that case, Lease of a market devised to a trustee for the benefit of an infant. The lessor, before expiration of the lease, refused to renew to the infant and the trustee took it himself. Lord Chancellor held that;

> *"I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to cestui que use; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use. So decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal"* (Emphasis added).

27. High Court of Australia in ***The Commonwealth and The Central Wool Committee v. The Colonial Combing, Spinning and Weaving Company Limited [1922-23]31 C.L.R421*** at pages 470 and 471 outlined several kind of trustees and said;

> *"If a trustee or other person entrusted with such a power were to exercise it in such a fashion, the Courts would not hesitate to treat such a bargain as an abuse of the power- what is called a "fraud on the power". An executor having power to dispose of a church preferment cannot bargain for an advantage to himself (Richardson v Chapman)(1); a municipal*

corporation trustee for a school cannot grant a lease containing a covenant that the lessee shall grind his corn at the corporation mill (Attorney General v Stamford (2)); trustees for a school cannot lease to one of the trustees (Attorney General v Dixie (3); governors of a school cannot lease to one of the governors (Attorney General v Earl of Clarendon (4)); a parent with a power to appoint among children cannot bargain with a child for purchase of a share appointed (Cuninghame v Anstruther (5); a parent with such a power cannot appoint money to a daughter to meet his burial expenses (Hay v Watkins (6)); a tenant for life having statutory power to lease cannot lease to a trustee for himself (Boyce v Edbrooke (7)). The same principle applies to all discretionary powers, such as consents. As Farwell puts it (Farwell on Powers, 3rd ed., p. 463): "Trustees must exercise any discretionary power they may have (e.g to consent) bona fide for the benefit of the persons for whom they are trustees" (Eland v Baker (8)); and see Strange v Smith (9); Clarke v Parker (1); Mesgrett v Mesgrett (2)). Most of these cases related to trustees; but the principle is not confined to trusts".

28. The High Court of Australia in ***Hospital Products Limited v. United States Surgical Corporation and Others*** *[1984-1985] 156 CLR 41* explained the nature of the fiduciary relationship between the trustee and the beneficiary and held at pages 96 and 97 as follows;

"The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. Phipps v Boardman(25)), viz, trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power of discretion which will affect the interest of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position".

29. ***Jacobs Law of Trusts in Australia,*** 4th Edition by RP Meagher & WMC Gummow – 1977 having considered the authorities on the relationship between the trustee and the beneficiary, has stated that, the trustees who benefit out of the trust property commit breach of trust. The relevant paragraph of the above book with footnotes therewith reads at page 339 as follows:

*11. **Not to deal with the trust property for his own benefit, or otherwise to profit by the trust.***

[1732] A trustee must not abuse his position by making it a means of profit or benefit to himself or any third party [194]. This rule – the rule in Keech v Sandford [195] – is of very wide application, and is illustrated by numerous

cases on the subject. In Molyneux v Fletcher [196] trustees had a power of advancement in favour of the testator's children and, after the share of a married daughter had vested, they advanced a sum to her, knowing that the advance would be used to pay a debt which her husband owed to one of the trustees. It was held that the trustees in making the advance had committed a breach of trust. Peyton v Robinson [197] was a somewhat similar case in which the trustees had to repay to the trust estate moneys advanced by way of loan to beneficiary to enable the beneficiary to pay off a debt due to one of the trustees.

A trustee cannot hold for his own benefit a lease of premises obtained by his on the expiration of a lease held by him on behalf of the trust. [198] A trustee cannot take up on his own behalf new shares issued as a result of holding trust shares. [199] Nor can a trustee of lands held on conditional purchase under the Crown Lands Consolidation Act 1913, of New South Wales take up an additional holding for his own benefit where the latter land only became available to him as trustee of the original holding.

194 – Stuart v Kingston (1924) 34 CLR 394, at 401; Commonwealth v Colonial Combing Co (1922) 31 CLR 421, at 470
195 – (1726) 2 Eq Cas Abr 741, 25 ER 223
196- (1898) 1 QB 648
197 -(1823) 1 LJ ch (OS) 191; see however, Chillingworth v Chambers, [1896] 1 Ch 685 (CA)
198- Re Biss, [1903] 2 Ch 40; [1900 – 3] ALL ER Rep 406, where, however, it was held that an employee of a trustee could so renew
199- Re Bromley (1886), 55 LT 145

30. The above authorities and the opinion of the jurist clearly establish that, the trustee must not abuse his or her position so as to make the trust property as a means of profit for him or herself. The trustee or the other person entrusted with such a power is required to exercise such a fashion and style. If a trustee fails to exercise in such a way, the court will not hesitate to treat such a bargain as an abuse of the power or fraud on the power and combat the same for the interest of the beneficiaries. As per the admission of the plaintiff and the defendants in this case, this is the trust property acquired by the trust for the benefit of the members of the Mataqali. However, the plaintiff built a house and obtained the public utility connections to his house and now claims that his interest to the said land be restored. The plaintiff having entered the said property as the trustee had tried to abuse his position to make it means of profit for himself. What he claims is purely for his personal benefit. His abuse of power started from the day he started to build his own house on the trust property. In ***Keech v Sandford(supra)*** the court did not allow the trustee to take the lease on his name, even though the lessor refused to renew to the beneficiary. In ***The Commonwealth and The Central Wool Committee v. The Colonial Combing, Spinning and Weaving Company Limited(supra)*** the court did not even hesitate to call such an abuse as the fraud on the power. The courts have, without any reservation, rejected this abuse by the trustees for the interest of the beneficiaries and to safeguard the sacred duty of the fiduciary over the beneficiary. Therefore, the plaintiff's

attempt to unjustly enrich out of the trust property does not give him any cause of action in this case.

31. Thus, he has no cause of action firstly, this is a clear breach of trust and fiduciary duty by him and secondly, he is claiming the Lease which had, already been surrendered to the 3rd defendant and in return, the 3rd defendant has now issued a new Lease to the 2nd defendant. In fact, the 2nd defendant has no control personally on the lease issued by the 3rd defendant to the 2nd defendant. In both ways, the plaintiff lacks the cause of action against the defendants.

32. The next issue raised by the 1st defendant is that, the plaintiff sued the 1st defendant in his personal capacity. The documents submitted by the 2nd defendant clearly show that, he was the trustee of Navusabalavu Housing Scheme after removal of plaintiff and other co-trustee with him. If the 2nd defendant had acted in detriment to the benefit of the Mataqali members, the plaintiff, as a member of said Mataqali, should have applied to the court as required by the Section 90(1) of the Trustee Act (Cap. 65) which provides;

> *"Any person who has, directly or indirectly, an interest whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee in the exercise of any power conferred by this Act, ... may apply to the Court to review the act, omission or decision; and the Court may require the trustee to appear before it and to substantiate and uphold the grounds of the act, omission or decision that is being reviewed, and may make such order in the premises as the circumstances of the case may require."*

33. In the alternative, if the plaintiff was of the view that, the 2nd defendant was not a trustee of Navusabalavu Housing Scheme and he is the trustee to date, then he should have filed the action to, first declare his trusteeship and then to annul the act of the 2nd defendant of surrendering the said lease to the 3rd defendant. Instead, the plaintiff tried to abuse his position and make the trust property as a means of profit to himself, in breach of the fiduciary duty he owed towards the beneficiaries of Navusabalavu Mataqali. Therefore, he lacks the cause of action again, as he has no right whatsoever to claim such an interest on the trust property against the 1st defendant in his personal capacity.

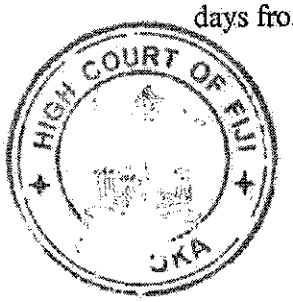
34. The above analysis clearly indicates that, the plaintiff has neither the locus standi nor the cause of action against any of the defendants in this case. In addition it is an abuse of process of the court for a trustee to seek an unjust interest and benefit over the trust property entrusted with him. Thus, I am of the view that, this is an exceptional case where this court can exercise its discretionary power to strike out the claim under the Order 18 rule 18 of High Court Rules. Though the 1st defendant only filed the summons for striking out under this rule, the court's power is very wide in the plain meaning of the rule to strike out any pleading or claim. Therefore, I decide that, it is will be of interest of

justice to strike out the action of the plaintiff against all the defendants with the suitable cost to them as the amendment will not be a cure in this case.

35. Accordingly, I make the following orders,

a. The plaintiff's claim and the action is struck out,

b. The plaintiff to pay a summarily assessed cost of $ 300 to 1st defendant within 14 days from today.



U.L Mohamed Azhar
Acting Master

At Lautoka
06/12/2017