

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 193 of 2014

BETWEEN: **MATAQALI NAWAVATU** a body corporate duly constituted under the
iTaukei Lands Act, Cap 133 of Kalabu Village, Naitasiri.

PLAINTIFF

AND: **PITA NAVE** aka **PITA NAVE NO. 2** of Tacirua, Naitasiri.

DEFENDANT

Counsel: **Ms. S. Karavaki** for the Plaintiff
 Ms. S. Chandra for the Defendant

Before: **Master Vishwa Datt Sharma**

Date of Ruling: **06th March, 2018**

RULING

*(Originating Summons seeking possession and removal of the Defendant pursuant to
Order 113 of the High Court Rule, 1988)*

INTRODUCTION

1. The Plaintiff by its *Originating Summons* dated 14th July, 2014 is seeking an order that the Defendant do give up *Vacant Possession* and be removed from the land in accordance with the decision of the Plaintiff, withdrawing its consent and approval for the Defendant continuing occupation and possession now being in occupation without consent or licence.
2. This application is made in terms of *Order 113 of the High Court Rules, 1988*.
3. There are 3 (Three affidavits) filed before the Court:
 - a) Affidavit in Support of Suliasi Nacolai Raibevu filed on 14th July, 2014 ("Plaintiff's Affidavit");
 - b) Affidavit in Response /Opposition of Pita Qeni Nave filed on 05th November, 2014 ("Defendant's Affidavit In Response"); and
 - c) Affidavit in Reply/Response of Suliasi Nacolai Raibevu filed on 26th November, 2014 ("Plaintiff's Answering Affidavit").

PRACTICE AND PROCEDURE

4. *Order 113 of the High Court Rules, 1988* provides a summary procedure for possession of Land, whereby it states as follows-
 1. 'Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.'
5. Pursuant to *Order 113*, a person who has a legal right to claim the possession of a land could institute an action, claiming the possession of land against a person who has entered into or remains in occupation without his licence or consent or that of any predecessor in title.
6. The main purpose of *Order 113* is to provide a speedy and effect procedure for the owners of the lands to evict persons who have entered into and taken the occupation of the land without the owner's licence or consent.

7. The proceedings under *Order 113* encompass *two (2) main limbs*. The *First limb* places the burden on the Plaintiff. The Plaintiff is first required to satisfy that he has a legal right to claim the possession of the Land. Once the Plaintiff satisfies the first limb, the onus will shift towards the Defendant, where the Defendant has the burden to satisfy the Court that he has a licence or consent of the owner to occupy the land.

PLAINTIFF'S CASE

8. The Plaintiff is the native owner of the land at Tacirua where the Defendant is residing.
9. The Defendant is the descendant of the Solomon Islanders who came to Fiji to work in the cotton field and road constructions.
10. His descendants approached the landowners in the traditional manner in order to request for their approval to leave on their land at Tacirua.
11. They were given the approval to do so with the usual condition that they were to continue to leave on the land, be direct descendant of the original grantees and must continue to perform their customary obligation.
12. The Defendant is a direct descendant of the Solomon Islanders who first sought approval from the members of Mataqali Nawavatu to leave on the land belonging to the landowners.
13. Since the date of their settlement, about 1936, the settlers would observe their customary obligation towards the landowners (Mataqali Nawavatu) and would perform the duties delegated to them by the Plaintiff demonstrating their landlord and tenant relationship.
14. It was in and about 2008, the Defendant started to claim outright ownership of the land given to them to settle on. This is indicated in a number of letters he wrote claiming outright ownership of the land and also ridiculed the Plaintiff in his claim.
15. The Police later charged a member of the Mataqali who was delegated to visit him on this issue when he was reported by the Defendant.
16. The Defendant also encouraged others living on the Mataqali land not to perform their customary obligation to the landowners.

17. A number of meetings were held to address the problem: first by the Mataqali, then by the Yavusa and finally meetings convened by the Roko Tui Naitasiri of the Naitasiri Provincial Office.
18. The meetings were attended by Government Officials from the: Police Department, iTLTB, NLC and Naitasiri Provincial Office.
19. Notice of these meetings were sent and received by the Defendant. He did not attend any of these meetings, or sent any apology.
20. Other descendants of Solomon Islands were present except the Defendant. The meetings finally resolved that to maintain unity and peace between the settlers and the landowners, an order must be obtain from the Court with the effect of removing the Defendant from the land at Tacirua. This is to avoid any physical harm on the Defendant.

Locus Standi

21. The Plaintiff, Mataqali Nawavatu, is a land owning unit that is incorporated under the Native Lands Act. Under section 2 of the Native Lands Act, Cap 133, the owners of native lands are referred to as "native owners". It is defined as:

"means the Matagali or other division or sub-division of the natives having customary rights to occupy and use any native land."
22. Section 3 of the Native Lands Act, Cap 133 states as follows:

"Tenure of native Lands by Fijians (I Taukei)"
23. Native lands shall be held by Native Fijians (iTaukei) according to native customs as evidence by usage and tradition.
24. The above provision rule out any claim by the Defendant the he being not a Native Fijian could be the owner of a Native Land.
25. Section 28 (1) of the Constitution of the Republic of Fiji states as follows:

"The ownership of all iTaukei land shall remain with the customary owners of that land and iTaukei land shall not be permanently alienated, whether by sale, grand, transfer or exchange, except to the state in accordance with section 27."

DEFENDANT'S CASE

26. The land in question is I Taukei land of which iTaukei Land Trust Board is the Trustee under Section 4 of the iTaukei Land Trust Board Act.
27. The Defendant is one of the Solomon Island descendant's whose father and grandfather resided on the said land before 1936.
28. The land in question is referred to as being Lot 156A which is currently known as "Tacirua Village".
29. This area of land Lot 156A was first allocated to Solomon Island Descendants in 1936 and is now mostly resided by the Descendants of the Solomon Islands.
30. The Plaintiff does not have "locus standi" to bring an action for eviction. The Plaintiff is "Mataqali Nawavatu" which is not a legal entity and the Plaintiff is not bringing this action in as representative action. The Defendant does not have any legal status since all the iTaukei land is controlled and administered by iTaukei Land Trust Act.
31. The Defendant's contention is that it is a real misconception on the part of the iTLTB to permit an eviction to be taken by the landowning unit as an entity it could have joined as party to the action which it chose not to do so. Section 12 of iTLTA only provides restrictions to those Lessees of iTLTB not to alienate or deal with the land comprised in his lease.
32. That iTLTB cannot delegate/abdicate its statutory trustee's duties.
33. The instrument of 1936 was sealed, signed and endorsed by the Native Lands Commission (NLC) and this document was signed and sealed before iTaukei Lands Trust Act (iTTLTA) came into effect. By virtue of 1936 instrument or any instrument prior to iTLTA, the iTaukei Land was not restricted to be alienated. About 5% of the Fijian land is now fee simple which were alienated before the coming into effect of iTLTA.
34. The 1983 instrument dated 2nd August, 1983 reconfirmed that all Solomon Island Descendants at Tacirua had been given transfer of the land at Tacirua to the Solomon Island Descendants.
35. Defence of Proprietary/Promissory Estoppel has been raised.
36. It is apparent from the summary application that actions like this ought not to be commenced by Originating Summons.
37. There are various serious disputed matters of facts and law which could be resolved by proceedings commenced by Writ of Summons.

38. The Defendant seeks dismissal of the Originating Summons with costs.

DETERMINATION and ANALYSIS

39. The substantive question or issue for this court to determine is :-
- (a) Whether the Plaintiff is entitled to recover the possession of the land pursuant to Order 113 of the High Court Rules, 1988?
40. The Plaintiff has filed an Affidavit deposed by *Suliasi Nacolai Raibevu* in support of its application and sought the orders as enumerated in the Originating Summons filed herein.
41. *Order 113 Rule 1 of the High Court Rules, 1988* is reproduced herein which reads as follows:

"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

42. The *Supreme Court Practice, 1993 Vol 1, O.113/1-8/1* at page 1602 outlines the scope of the above *Order 113* as follows-

"This Order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers."

*"The application of this Order is narrowly confined to the particular circumstances described in r.1. i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee holds over after the determination of the licence (*Bristol Corp. v. Persons Unknown*) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593." (Reference is also made in terms of the scope of the*

application of Order 113 with the case of Baiju -v- Kumar (1999) FJHC 20; HBC 298j.98.

43. The Plaintiff must establish the first limb of *Order 113* in terms of the legal right to claim the possession of the said land in Question from the Defendant.
44. According to the Plaintiff's Affidavit in Support deposed by Suliasi Nacolai Raibevu in his capacity as a member of Mataqali Nawavatu, Mataqali Nawavatu is a land owning unit constituted under the iTaukei Landa Act, Cap 133 and it owns the land known as Lot 156A located at Tacirua, Naitasiri.
45. The Question that comes to mind here is whether Suliasi Nacolai Raibevu's has been properly authorised and that the Affidavit in Support has been filed in conformity with the provisions of *Order 41 Rule 9 of the High Court Rules, 1988* where the requirement is that the affidavit must be indorsed with a note showing on whose behalf it is filed. Further, whether there is evidence of any authority annexed within the Deponent's affidavit that the entire or majority members of Mataqali Nawavatu have signed any document giving him the authority to depose the affidavit on behalf of the Mataqali Nawavatu?
46. The answer to this is that the Affidavit has not been filed in conformity with *Order 41 Rule 9 of the High Court Rules 1988* since there is an absence of the Authority from the members of the Mataqali Nawavatu which is not a legal entity and therefore the Plaintiff is not bringing this action in as representative action.
47. Apart from above, this court notes that the Originating Summons does not mention or gives the description of the land from which the order for possession and removal is sought against the Defendant. However, this court takes the notation from the Affidavit in Support that the Land is known and described as Lot 156A located at Tacirua, Naitasiri.
48. According to the Plaintiff, in or about 1936, the forefathers allowed some people of Solomon descent to occupy their land identified as Lot 156A and the descendants of these first Solomon settlers are still living on this same land as of today and throughout the years contributed to Plaintiff's traditional commitments and would perform any duty and function delegated to them by the Mataqali.
49. To this, the Defendant replied that in 1936 the Solomon Island descendants were transferred the land being Lot 156A to settle permanently which now days is known as Tacirua Village. This subject land was allocated to the occupants to occupy the land as theirs after the Native Lands Commission executed an instrument to that effect. The

said land in the province of Naitasiri was given to all the Solomon Islanders descendants by the Province of Naitasiri which included Qaranivalu, Turaga ni Koro and Turaga in Yavusa.

50. The Defendant further stated that every one of the Solomon Island as Mataqali Uru respected the tradition and culture of the iTaukei members in the area and when the Defendant's father came and settled in Tacirua Village in early 1952, he was reassured with other Solomon Island descendants that the area 156A was specially for the settlement of his people in the area. They were reassured by the Mataqali and the Turaga -ni-Koro at the time that it was a permanent place for the people.
51. The Plaintiff in his Reply to the above stated that the Defendant and all other Solomon descendants that are living at Tacirua are occupying the said land under tenancy at will and therefore cannot be the owners of a native land reserve because they are not native Fijians, or iTaukei. Explaining the reason for not transferring the land at Tacirua to those Solomon Island descendants, the Chairman of the Native Lands and Fisheries Commission states that the reserving of native land can only be done when the beneficiaries are iTaukei and are confirmed as such because they are registered in the Vola Ni Kawa Bula (Register of Natives or iTaukei).
52. The Defendant has also raised further issues as follows-
- **Locus standi**- The Mataqali as the Plaintiff does not have any legal status as such since all the iTaukei Land is controlled and administered by iTaukei Land Trust Act.
 - **Consent Letter**- That it is a real misconception on the part of the ITLTB to permit an eviction to be taken by the landowning unit as an entity it could have joined as party to the action.
 - **iTLTB** cannot delegate/abdicate its statutory trustees duties.
 - **1936 Instrument**- The Defendant has legitimate right to be on the land and entitled to even ownership.
 - **1983 Instrument**- This further confirms that the letters as set out there authorises reconfirmation of the transfer of the land at Tacirua to the Solomon Island descendants.
 - **Defence of Proprietary/Promissory Estoppel raised.**
 - **Case of National interest**- What is the status of all the Solomon Island descendants on the subject land?
53. The current action before this Court was commenced by the Plaintiff by an Originating Summons.

54. I have perused and taken into consideration all the affidavit evidence together with the oral and written submissions dealt with herein.
55. I find that the substantive issue to determine is very delicate, important and of a national interest since it deal with a question of Land describes as Lot 156A located at Tacirua, Naitasiri that definitely needs to be determined for once and for all.
56. Further, various **serious triable** and **legal issues** have been raised by the Defence that prompts this court to investigate, hear and test out the available evidence of both parties to this proceedings at a full hearing. This is only possible once the Originating Summons is converted to a Writ action.
57. Therefore, it is only appropriate in the above circumstance of this current case that I invoke the provisions of *Order 28 Rule 9(1) of the High Court Rules, 1988* and order that for the aforesaid reasons, this action be now continued as if the cause or matter had been begun by a **writ action**.
58. I further order that any **affidavits** filed herein shall stand as pleadings, with **liberty** to both parties to add thereto or to **apply for particulars** thereof.
59. In terms of Cost issue in this proceeding, the Plaintiff would have known better how the proceedings of this nature should have been commenced wherein it will give rise to disputed facts, triable issues and legal issues. In the circumstances I am inclined to order costs against the Plaintiff summarily assessed at \$650 to be paid to the Defendant within 14 days.
60. In light of above, the file will be transferred to the Senior Court Officer to allocate a Judge and take necessary action once the Master of the High Court has dealt with and completed the pleadings in terms of the Writ Action accordingly.

FINAL ORDERS

- (i) The Originating Summons in the proceedings is now converted to a Writ Action in terms of Order 28 Rule 9(1) of the High Court Rules, 1988.

- (ii) The matter is adjourned for finalisation of pleadings in terms of the converted Writ Action.
- (iii) The Plaintiff to pay the Defendant summarily assessed costs of \$650 within 14 days.
- (iv) Orders accordingly.

DATED AT SUVA ON 06TH MARCH, 2018



VISHWA DATT SHARMA
Master of the High Court
Suva

Cc. Jarvas Law, Suva.
MC Lawyers, Suva.