IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 144 of 2010

BETWEEN	:	I-TAUKEI LAND TRUST BOARD
		Plaintiff
AND	:	JIMAIMA LEDUA. SULIASI VOSABECI, LIVAI DELAILOA, LAISA DURI, SULUETI ADIBERA, TOMASI DALITUICAMA, MEREONI RANOKO , MOSESE BAVORO, TOMASI KEVU, SOVA RAMULUSE, TALEI KOTOBALAVU, EMA & FILIPE, JOSAIA COKATIONO, USA TUINACEVA, NAIBUKA VAKALAWA LATILETA RACAVA, LUISA BARAVI, JONE RAIKABULA, VILIAME JITOKO, ATUNAISA MUDUNAVOSA, ESETA VOSATATA, FILIMONI LEDUA, TOMASI KEPU, TAOBA, TAKILAI, VOLAU TAROGI, WATI ROGO
		First Defendants
AND	:	MINISTRY OF LOCAL GOVERNMENT, HOUSING, SQUATTERS SETTLEMENT AND ENVIRONMENT
		Second Defendant
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Ms Q. Vokanavanua for the Plaintiff Mr S. Vananalagi for the First Defendants Mr A. Prakash for the Second Defendant
Dates of Hearing	:	5 & 6 February 2018
Date of Judgment	:	14 February 2018

JUDGMENT

1. (1) This is the Plaintiff's Claim against the First Defendants. By its Statement of Claim, the Plaintiff contends that all the First Defendants are illegal occupants of the land known as the Veikoba Settlement (the land).

(2) The Second Defendant was a major party to the Veikoba Development Project and in particular the Veikoba Residential Subdivision carried out by the Plaintiff, landowning unit and the Second Defendant (the Project).

(3) The land in question is a native reserve owned by the Mataqali Naulukaroa, (Mataqali) which was vacant until circa the 1950s when some of the descendants (sic) of the First Defendants approached the landowning unit requesting to occupy and reside on the land. The understanding to this arrangement was for the First Defendants to live temporarily until they found a proper and permanent residence for themselves.

(4) To date, however they remain on the land and refuse to vacate despite the Plaintiff's notices served individually to them. The First Defendants have not been issued any lease over the land and thus have no right or legal title to remain on the same.

(5) In serving the best interest of the landowning unit, the Plaintiff and the Second Defendant in conjunction with the landowning unit, made development plans to take place on the land. The main purpose of the said development was to generate income for the landowning unit.

(6) This refusal is not benefiting the landowners as the land is left idle and the First Defendants are living on the land for free. Further to the notices, the landowning unit had agreed to relocate the First Defendants to other parcels of land which had still been refused by the First Defendants.

(7) Wherefore the Plaintiff claims that as the First Defendants do not have any legal right or title to remain on the land, that they immediately vacate the land forthwith to allow development and for general damages to be assessed by the Court.

2. The First Defendants in their Defence say :

(1) That the arrangement was not temporary as alleged but on a permanent basis in accordance with custom and tradition;

(2) That they admit they refuse to leave and say the notice to the Plaintiff (sic) was never sanctioned by the landowning unit;

(3) That they admit they have no lease but they say their right is derived from custom and tradition and equity;

(4) That they admit they refuse to leave and deny they are holding up development and say their right to be on the land must be considered with the need to develop;

(5) That the reason they refuse to vacate is because they have a legal right to be on the land but the Plaintiff is wrongly treating them as trespassers;

(6) That they admit they have been offered to relocate but have refused because they are not trespassers and have the right to be on the land;

(7) That they admit they do not agree to relocate because they have a legal right to remain on the land.

3. The First Defendants in their Counter Claim state they have a legal right to occupy as they have occupied the land for over 70 years under custom and tradition. They have presented gifts to the landowners who have agreed that they occupy on condition they discharge customary obligations to them. These have taken the form of participating in all customary gatherings of the landowning unit and the monthly payment of cash. Thus on the basis of custom and tradition they are not trespassers but have a legal right to continue in occupation. The First Defendants also say they have an equitable right over the land they occupy upon a promise by the landowning unit to grant them that right in consideration of their receiving customary gifts and the First Defendants discharging their customary obligation, which they have done. Wherefore the First Defendants pray for declarations they have a legal right and an equitable right to be on the land.

4. The Plaintiff in its Reply to the Defence and Counter-Claim say :

(1) The First Defendants are illegally occupying the land;

(2) The initial arrangement was always a temporary one;

(3) The option for relocation was always there for the First Defendants which to date they still refused;

(4) The notices of eviction were served on the First Defendants by the Plaintiff as trustee and administrator of all native land on behalf of the landowning unit;

(5) For the development, which was a joint venture between the landowning unit, the Plaintiff and the Second Defendant, to take place, the land occupied by the First Defendants would need to be cleared;

(6) Customary and traditional rights do not override the statutory responsibilities of the Plaintiff and it's sole responsibilities is to administer

native land for the sole benefit of the landowners which is the purpose of the development project.

(7) The Plaintiff had always provided an alternative for the First Defendants for relocation;

(8) The interest of the landowners are paramount and the First Defendants cannot claim they have a right to reside on the land;

(9) The compensation for crops was paid as a condition for relocation.

5. In its Reply to the Counter-Claim, the Plaintiff states:

(1) Not all the First Defendants have resided on the land for over 70 years and some are only descendants of the original occupants;

(2) The original arrangement for occupancy was always a temporary one;

(3) The First Defendants are not entitled to claim they have a legal right over the land;

(4) The Plaintiff's statutory powers and responsibilities under the Native Land Trust Act (Cap 134) will override any other legislation.

6. The minutes of the Pre-Trial Conference held on 7April 2014 record, inter-alia, the following:

A AGREED FACTS

(1) The land is owned by the Mataqali Naulukaroa;

(2) The land was vacant until circa 1950s when some of the First Defendants, approached the landowning unit requesting to occupy the land;

(3) Unlawful occupation notices were sent to the First Defendants by the Plaintiff but they refused to leave.

(4) The First Defendants hold no lease over the land.

B. Issues to be Determined

(1) If these was an understanding to the arrangement for the First Defendants to live temporarily until they found more permanent residence.
(2) Whether the First Defendants have any legal rights to occupy the land by tradition and custom or whether their occupation was legal and in accordance with the Native Lands Act, Cap 133.
(3) Whether the First Defendants' action are unreasonable considering the relocation offer by the landowners;
(4) Whether the First Defendants are to vacate without any condition as they are trespassers;
(5) Whether the Plaintiff was acting in the best interest of the landowning units in accordance with the i-Taukei Land Trust Act;
(6) Whether the First Defendants are occupying under customs and traditions;
(7) Whether or not the First Defendants are trespassers;
(8) Whether or not the First Defendants have an equitable right to occupy the land.

7. The hearing commenced with the Plaintiff's first witness giving evidence. She was Ms Kelera Sauliga (PW1), an estate assistant. She said the development was given to the Housing Authority (H.A.). The current occupants are still on the land though they have been given notice to quit. The Plaintiff is the custodian of the land and has a duty to see that the landowners get the maximum return from the land.

8. She said the desire of the landowners is to develop the land and 48.30 hectares of the land has been given to the H.A. They did an inspection of the land since 2002 and had advised the occupants of the development plans and they were given eviction notices and alternate sites.

9. Some left and only the First Defendants remained. Exhibit P2 shows the compensation paid to the occupants for the crops. Exhibit P3 is the notice of eviction given on 9 March 2010 to one of the First Defendants who is still occupying the land.

10. At this juncture Counsel for the First Defendants agreed that all the eviction notices could be tendered as Exhibits.

11. PW1 continued all the land owners want to develop the land but cannot do so because the First Defendants are still occupying the land. If the land is developed it will fetch a higher return for the owners. The First Defendants are staying there for free and there is no "benefit" to the landowners. The Plaintiff wish to evict the current occupants so that the H.A. can develop the land.

12. Under cross-examination by Counsel for the First Defendants, PW1 said the Mataqali Naulukaroa is the owner of the land. Samuela Qaliduadua was the leader of the Mataqali. She could not answer if he had consented to the First Defendants staying on the Land.

13. Counsel for the Plaintiff at this point said she had no objection to 2 documents being tendered. These were a letter (MF I - 1 later Exhibit D3(a)) and it's English translation (MFI-2 later Exhibit D3 (b)). PW1 continued that Samuela's name is on the letter and name No.4 is his son who is dealing with the land since his father died. Both agreed to the 13th First Defendant, building his house and shop on the land, and she agreed that he built his house based on the consent. She was not aware if they gave money or gifts to the landowners to be on the land.

The 13th First Defendant was compensated $6813.79 for the crops. There will be no compensation for the house if he is evicted.

14. PW1 said both proposals from the First Defendants i.e. lease or payment of $50,000 were refused by the Plaintiff. The paramount interest of the Plaintiff is that the return on the land should be the highest and best use and once the development is complete and the Defendants are willing to pay, the Plaintiff is willing to lease.

15. When cross-examined by Counsel for the Second Defendant, PW1 said it is the wish of the Government that all Fijians have a right to housing. There was never any agreement between the Ministry of Local Government and the Plaintiff.

16. In re-examination, PW1 said between 1988 and 2010, the First Defendants never lodged any application to formalize the leases. All the Defendants do not have any lease at all.

17. The next witnesses was Saula Bilivanua (PW2), the chief of the Mataqali and in Court on their behalf. He said the land belongs to the Mataqali. Some of the First Defendants asked for land from his father. The only arrangement is that they could come and plant on his father's land. They had made arrangements to make monthly payments of $5 and then $10. Then the payments stopped because a dispute arose in 2007. The First Defendants are not honouring the agreement and not paying and not giving any benefit to the Mataqali. The Mataqali wants to do a project on the land to benefit the village through education. The H.A.'s development of the land will bring money to the Mataqali.

All the members of the Mataqali want the land to be given to the H.A. as they have seen the benefits.

18. When cross-examined by Counsel for the First Defendants, PW2 said if any of the First Defendants had come on the land before he was born (in 1967) he would not know of them. His father, Samuela who passed away in 2016, was in charge of the land. If the Defendants had made any arrangements with his father, he would not be aware. He said not all the names of the Mataqali are on the letter (Exhibit D3(a). He was not aware if the First Defendants gave gifts or tabua to his father. From 2016 the Defendants have stopped giving gifts.

19. In re-examination by his Counsel, PW2 said if the land is to be given out all members of the Mataqali have to be consulted and if the majority of 60% agree then the land can be leased. If 60% do not agree then the land cannot be leased. The majority of the Mataqali agree to lease to the H.A.

20. With that the Plaintiff closed its case and the First Defendants opened their case.

21. Their sole witness was Josaila Cokotiono (DW1). He said on 12 December 1986 he went to Samuela's house taking tabua and other gifts to him. This is the traditional way of asking for land. He did not sign on the letter marked as Exhibit D3(a). They were giving $10 each month, and paid rent to Samuela until the Plaintiff brought them to court. A receipt (Exhibit D4) was for the money he paid.

22. The Court perused this receipt dated 28.05.2005 and noted it is for $360 being for land rent for 2004, 2005 and 2006.

23. In cross-examination, DW1 said he knows all land is owned by the Mataqali and not by the chief or an individual. Only Samuela came and not the whole Mataqali. The money stated in Exhibit D4 was given to Samuela as were all gifts and for his benefit only. Only the Mataqali knows if the development is more beneficial to them. Because the Plaintiff did not pay for the expenses they did not move into the new site. They received $6,813.79 from the Plaintiff as compensation for damage to crops not for relocation. Some of them have moved to the new relocation site. From 2010 to now they have only given the landowners some things but not money, as advised by the lawyer.

24. With that the First Defendants closed their case. The Second Defendant's Counsel informed the Court that he was not calling any witness. I therefore fixed the next morning to hear oral submissions.

25. The Counsel for the Plaintiff submitted that when the Defendants appeared on the land, the Plaintiff was not involved. None of the members of the Mataqali received any benefit. The Plaintiff's witness (PW2) said all the members of the Mataqali want development. Since 2010 none of the Defendants have paid one cent. They are not farming the land. She asked for the Plaintiff's prayers to be granted and the First Defendants evicted.

26. Counsel for the First Defendants then submitted. He said the First Defendants acquired the land through the traditional method of gifts. Samuela and the members consented to the First Defendants residing on the land. Exhibit D3(a) illustrated that Samuela and others consented to the First Defendants residing on the land subject to observing customary obligations. That came to a standstill in 2010 when this action was instituted. They are waiting for the Court to decide

the matter. Counsel asked the Plaintiff to pay $50,000 to each of the First Defendants as they have an equitable right.

27. At the conclusion of the arguments, I said I would take time for consideration. Having done so I now deliver my decision.

28. This is a matter where only the Plaintiff and the First Defendants are involved. There is no claim against the Second Defendant and the Ministry of Local Government took no part in these proceedings. The claim is for vacant possession of the land presently occupied by the First Defendants. They on their part, having filed a Counter Claim are asking for the Plaintiff's claim to be dismissed on the grounds that they have a legal right to occupy the land and an equitable right over the land they occupy.

29. The pivotal issue here is whether the Plaintiff has a right to evict the First Defendants from the land. I shall therefore turn to the i-Taukei Land Trust Act 1940 (the Act).

30. S.3 of the Act established the i-Taukei Land Trust Board (Board) which is the Plaintiff in the instant action. S.4(1) lays down that "The control of all i-Taukei land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the i-Taukei owners or for the benefit of the i-Taukei."

31. "Control" is defined in the Oxford Advanced Dictionary of Current English as "power or authority to direct, order or restrain". I shall take it that the intention of the legislature is that the Board would have the power to manage and put into operation the development of the land for the advantage and profit of the i-Taukei owners in particular or the i-Taukei as a whole.

32. Here the evidence of PW1, the Plaintiff's estate assistant is significant. She said the Plaintiff is the custodian of the land and its duty is to see that the land owners get the maximum return from the land. The desire of the land owners is to develop the land and 48.30 hectares of it were given to the Housing Authority. If the land is developed then it will fetch a higher return for the owners. The First Defendants are staying on the land for free and there is no benefit to the landowners.

33. The Court notes that this evidence was not challenged by the First Defendants. Indeed their witness, DW1, in his evidence stated that for 10 years now they have not been paying rent. Before that they paid rent to one, Samuela and everything they gave was only to Samuela and only for his benefit.

34. The Court opines that this confirms that neither the Mataqali as a whole nor a majority of them received any rent or gifts.

35. The First Defendants seek to prevent the Plaintiff from administering/developing the land as the Plaintiff proposes to do. They do so on 2 grounds. First they say they were permitted to occupy the land through the i-Taukei traditional method of presenting gifts, and thus the Mataqali had consented to them residing on the land. Second they say that the principle of equitable estoppel applies here.

36. There was also a reliance on Section 35 of the Constitution. It would be expedient if I dealt with this at the outset. S. 35(1) imposes an obligation on the State to achieve the realization of the right of every person to adequate housing. In s. 163(1) (interpretation) "State" means the Republic of Fiji. As the Plaintiff is

not the State, the obligation to provide housing cannot be imposed on it. Its obligations are set out in para 30 above.

37. I shall deal with the first ground. It is crystal clear from the evidence that the Mataqali never gave the land to the First Defendants. One, Samuela, the chief, is supposed to have done that after receiving gifts for himself and for his sole benefit. This was confirmed by the evidence of the First Defendants' DW1 in cross examination when he also said that he knew all land is owned by the Mataqali and not by the chief or an individual, and only Samuela came and not the whole Mataqali.

38. The evidence that confirmed the validity of the Plaintiff's claim was given in re-examination by PW2. He said if land is to be given out all members of the Mataqali have to be consulted and if a majority of 60% agree then the land can be leased. If 60% do not agree then the land cannot be leased. The majority of the Mataqali agreed to the lease to the Housing Authority.

39. The First Defendants never produced any evidence that the majority of the Mataqali had agreed to lease the land to them. In fact the only document that the First Defendants produced was Exhibit D 3(a) which showed that only DW1 was allowed to build on the land and only showed signatures that could be numbered in one digit. This a far cry from the majority that was required.

40. It also fails to satisfy s.3 of the i-Taukei Lands Act 1905. This requires that the land be cultivated, allotted and dealt with according to i-Taukei customs. These custom and usage are ascertained by the examination of witnesses capable of

throwing light thereupon. The evidence showed with blinding clarity that the First Defendants did not comply with i-Taukei custom and usage. The legislature's intention is that the Court decide any dispute accordingly. This the Court has done in this Judgment.

41. Even if there had been any such evidence, the First Defendants cannot succeed as shown by the Privy Council decision in : Chalmers v. Pardoe [1963] 3 All E.R page 552 where the facts were as follows. Pardoe who was entitled to a lease of land in Fiji arranged with Chalmers whereby the latter could build on part of the land provided he got the consent of the Board without which it would not be lawful under s.12 of the Act for Pardoe to deal with the land. Chalmers erected 6 buildings on part of the land but did not get the consent of the Board. Subsequently Chalmers claimed an equitable charge on Pardoe's land for the cost of the 6 buildings. The Privy Council held that in the circumstances equity would, apart from statutory prohibition have intervened and prevented Pardoe from obtaining for nothing the buildings that Chalmers had erected. But their Lordships reached the same condition as the Court of Appeal that a dealings in the land had taken place without the prior consent of the Board as required by s.12; that the dealing was accordingly unlawful: and that in these circumstances equity cannot lend its aid to Chalmers. Their Lordships therefore, humbly advised Her Majesty that the appeal should be dismissed.

42. S.12(1) of the Act states it is shall not be lawful for any lessee to.....deal with the land without the consent of the Board first had and obtained and any dealing without such consent shall be null and void. In my opinion the dealing alluded to in para 39 above is accordingly nullified.

43. I turn to the second ground-estoppel. Counsel for the First Defendants cited the English Court of Appeal decision in : Inwards And Others v. Baker : [1965] 1 All E.R pages 446-450. In my opinion this case cannot help the First Defendants, because in the words of Danckwerts, L.J. "The Defendant was induced to give up his project of building a bungalow on land belonging to somebody other than his father, in which case he would have become the owner or tenant of the land in question and thus have his own home. His father induced him to build on his, the father's land and expenditure was incurred by the defendant for the purpose of the erection of the bungalow." (at para H on page 449).
Here there was no evidence that either the Mataqali as a whole or the Plaintiff had ever asked the First Defendants to come onto the land and to build thereon. There can therefore be no estoppel.

44. In the result the First Defendants' case against the Plaintiff has collapsed. The Counter-Claim for declarations to a legal right and to an equitable right to remain on the land has also similarly failed.

45. In the event on the totality of the evidence presented by both sides and the applicable law I am satisfied and I so find and so hold that the Plaintiff's plan to develop the land though the Housing Authority is for the benefit of the iTaukei landowners, the Mataqali Naulukarowa and has thus complied with the mandatory requirement ("shall") imposed on it by s. 4(1) of the Act.

46. In concluding the Court notes that the First Defendants in their Defence and Counter Claim never pleaded any claim to be given leases or to be paid any compensation/damages by the Plaintiff. Consequently they have no right to the same when vacating the land.

47. In fine I shall make the following orders:

(1) All the First Defendants are to vacate the land legally known as:

(a) Name of Land : Veikoba Subdivision
(b) Area : 52 acres
(c) Current zoning of land: Residential
(d) Legal description : NLC Lot 3 M/3 1, M/3 3(P/O – 1292 acres)

AND give vacant possession of the same to the Plaintiff by or before 14 March 2018.

(2) The First Defendants are to pay the Plaintiffs costs summarily assessed at $1,000.

(3) The First Defendants' Counter–Claim against the Plaintiff is hereby dismissed with no order as to costs.

Delivered at Suva this 14th day of February 2018.

HIGH COURT OF FIJI
SUVA

David Alfred
JUDGE
High Court of Fiji