

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 369 of 2017

BETWEEN : **LAGSEFURI KONGCHIU TAVO** **1ST PLAINTIFF**

AND : **MUA TAUKAVE** **2ND PLAINTIFF**

AND : **HENRY ENASIO** **DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr Faktaufon [Vama Law]

DEFENDANT : Ms M Rakai [Sherani & Co]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 04 October 2018

INTERLOCUTORY RULING

[An Application by the Defendant to Strike out Statement of Claim and Writ of Summons]

INTRODUCTION

1. The Defendant on 5 February 2018 filed a summons to strike out the Plaintiff's writ of summons and statement of claim on the grounds that it discloses no reasonable cause of action and/or it is otherwise an abuse of process of the court.

They have filed an affidavit in support of the application.

2. Said application is opposed by the Plaintiff who has filed an affidavit in opposition.

PRELIMINARY ISSUE

3. After filing of the said application, the Plaintiff without seeking leave of the Court had filed an amended Writ of Summons and Statement of Claim.

Said was left in abeyance, by my predecessor. Since the said was filed without leave of the court, the amended writ of summons and statement of claim so filed on 9 March 2018 is hereby struck out.

4. Hence for purpose of making a determination on the application for striking out, the court will rely on the writ of summons and statement of claim filed on 11 December 2017.

THE SUBSTANTIVE CLAIM

5. The 1st Plaintiff is the son of one Susau Tavo also known as Susan Fiu [Susan].

The 2nd Plaintiff is the son of 1st Plaintiff. They both are instituting proceedings on behalf of other descendants of Susau.

Susan and the Defendant's mother are step sisters. Their father is Garagsau.

The Plaintiffs are two of the many descendants of Susau.

They claim that sometimes on or about 1 February 1960, Susau's grandfather Garagsau gave to Susau a piece of land known as Taviagava formally known as Moafmofa [Taviagava].

The said piece of land was given to Susau in exchange of Susau's land known as Takakua which was duly entered in the Register of Rotuma Lands.

The exchange was approved by the Council of Rotuma on 3 December 1959 and confirmed by the Council on 8 March 1960.

The Taviagava was registered under the name of Susan in the Register as "hanua pau" which is land defined as vested in a single individual Rotuman by either sale or gift with the intention of creating "hanua pau" or has an instrument deposited with the District Officer under Section 16 of the Rotuma Lands Act [the Act].

The Takakua was registered in the Register as "hanua ne kainaga". This land is defined as held by that family community of Rotumans known as Kainaga, the members of each Kainaga holding the land in undivided ownership and the acknowledged head of the family's being the pure of the land as provided under the Act.

That on or about 1972, the Defendant's family who were then living at Motusa, Rotuma had their family house destroyed by the hurricane Bebe.

Immediately thereafter, the Defendant's mother (Susau's step sister) wrote to Susau (who was then living in Suva), requesting permission for her and her family to live in the house owned by Susau on Taviagava.

Susan gave permission for the Defendant's family to occupy the house temporarily until such time the Defendant's family house in Motusa was repaired.

Sometimes in 1981, the Defendant's mother requested permission from Susau to build a house on Taviagava, said request was declined.

Despite this the Defendant's family proceeded to construct a house without Susau's consent and knowledge.

The Defendant's family continue to claim the right to stay on Taviagava claiming that the land is owned by their clan AOTA and Susan obtained Taviagava in a fraudulent manner.

There is continuous dispute between the families which is escalating.

Despite various court proceeding the dispute has not been resolved [Civil Action 177 of 1997; Civil Action 189 of 2007 and Civil Action 357 of 2014].

Hence the Plaintiff, seeks a declaration that Taviagava belongs to Susau as "hanua pau" as recorded in the Register and now to her descendants who have a life interest in undivided shares.

Further orders sought are for the Defendants and family to vacate the Taviagava.

EVIDENCE ON AFFIDAVIT

6. The 2nd Defendant Claim that the Plaintiffs have wrongly commenced the proceedings.

The land in dispute is known as "Moafmofa" and not Taviagava.

The Plaintiffs are Uncle and nephew and are descendants of Susan.

In Suva Civil Action 177 of 1997 the 2nd Defendant had served the 1st Plaintiff's sister Tupou Taukave, the District Officers and Others. However his then Solicitor did not pursue the matter.

Tupou Taukave than filed a similar civil application in Suva Civil Action Number 189 of 2007 seeking eviction orders. The court ordered for her to file a proper Writ Action.

According to the 2nd Defendant, the Plaintiffs lack legal capacity to institute these proceedings and have not regularized the proceeding as ordered by the High Court in 2008.

The Plaintiffs have incorrectly alleged that the Takakua and Moafmofa lands are "hanua pau" which is owned by a single individual (freehold land).

That the AOTA including the 2nd Defendant, communally own the Takakua and Moafmofa land which is "hanua ne kainaga" (clan land).

The land in dispute is called Moafmofa and not Taviagava.

This land is registered in the lands Register as Hanua ne Kainaga or Clan Land belonging to AOTA Clan and not an individual. The 2nd Defendant relies on annexure E to his Affidavit which is an extract describing the land in dispute "hanua ne kainaga"(clan land).

He claims this proceeding is an abuse of process as the 1st Plaintiff's sister had a similar proceeding and they rely on the same fraudulent transfer of Susan and the District Officer.

Susan had fraudulently exchanged 3 acres 1 rod 27.9 perches of Moafmofa prime land owned by AOTA Clan for Takakua which is only 12 fathoms by 10 fathoms wide.

This exchange was fraudulent without the actual signature of the AOTA Clan, Garagsau, and consent of all the members of the clan.

The signature on the land Register is not that of Garagsau who was 87 in 1960.

The said transfer was made illegally in contravention with law.

7. The 1st Plaintiff filed an Affidavit in Response.

According to him, the land in dispute is known as Taviagava formally known as Moafmofa.

The land was transferred to Susan with approval of the Rotuma Council.

He is pursuing this action as his mother’s next of kin and descendant and due to the fact that the Defendant fails and refuses to accept the land is “hanua pau”.

That Takakua is “hanua ne kainaga” which is land held by family community known as kainaga.

He seeks eviction order against the Defendant.

The allegation of fraudulent transfer is purely speculative and scandalous and the allegations need to be proved at trial proper.

LAW

8. Order 18 rule 18(1) (a) and (d) of the High Court Rules reads:

“The Court may at any stage of the proceedings order to be struck out or amended any pleadings or the indorsements of any writ in the action, or anything in any pleadings or, in the indorsement, on the grounds that –

- a. it discloses no reasonable cause of action or defence, as the case may be; or*
- b.*
- c.*
- d. It is otherwise an abuse of process of the court;*

9. No evidence is admissible on an application under paragraph (1) (a).

10. Case laws have said that the “*jurisdiction to strike out proceedings under this rule should be very sparingly exercised where legal questions of importance and difficulty are raised*” – **Attorney General –v- Shiu Prasad Halka (1972) 18 FLR 210.**

DETERMINATION

No reasonable Cause of Action

11. The Defendant relies on the Affidavit in Response filed by the 1st Plaintiff saying that the Plaintiff has not disclosed at Probate or letters of administration to show authority to institute proceeding. Thus there is no reasonable cause of action shown.

12. However Order 18 rule 18 (2) clearly provides for no evidence shall be admissible on application under Order 18 rule 18 (1) (a). Hence the court cannot ask the Plaintiffs to disclosed probate or letters of administration.
13. In any event, the Plaintiffs have pleaded that the 1st Plaintiff is son of Susan and as descendant of Susan they have a life interest in undivided shares in the land Taviagava.
14. Section 26(3) of the Rotuma Land Act reads:

On the death of the owner of hanua pau his nearest relative shall inform the District Officer thereof and shall furnish him with such proof and particulars as shall be prescribed or in default of prescription as the District Officer shall require, and the District Officer, if satisfied that such death has occurred shall treat the hanua pau of which he was the registered owner at the time of his death as follows-

(a) if a document has been deposited pursuant to this section and such document names one individual Rotuman living at the death of the deceased, he shall register the land referred to in the deposited document in the name of such person as hanua pau;

(b) in respect of any hanua pau of which a transmission cannot be effected under paragraph (a), he shall ascertain whether the deceased has left descendant or descendants, and if he has left one descendant shall register such land as hanua pau in the name of such person, and if he left more than one descendant shall register such land as hanua ne'on tore in the name of such persons, and if he has left no descendants register such land in the name of the Crown as unowned land in trust for the Rotuman people.

15. Accordingly, I make findings that the Plaintiffs have locus standi in bringing the proceedings.
16. The Defendants also allege the Plaintiffs are relying on a fraudulent transfer done by Susan.

They rely on Section 12, 16, 18 and 19 of the Rotuma Lands Act and hence say there is no reasonable cause of action.

The Plaintiff maintains the transfer was not fraudulent.

There are allegations of fraud which I find is only appropriate to be decided on trial proper after hearing evidence from both parties and not on proceedings that are summarily heard on affidavits.

Abuse of Process

17. The Defendant submits that the Rotuma Land Act provides for what the Rotuma Lands Council ought to have done in dealing with commercial land.

There is no record of consent of the majority of the adults of the AOTA Clan consenting to be exchange of the lands.

18. Again I reiterate that this Court cannot on affidavit evidence uphold this submission that the transfer was fraudulent and the Plaintiffs cannot rely on the same thus the claim ought to be struck out.
19. I find that it is only proper that the court hears the evidence and decide on the issue of the transfer alleged to be fraudulent.
20. The Defendants have also referred to two other civil proceedings commenced by the first Plaintiffs sister.

These were matters between the Plaintiff's sister Tupou Taukave and the defendant.

From the documents submitted [annexures B, and C in the Defendant's affidavit in support'], I cannot ascertain the capacity in which she had instituted the proceedings. Was it a representative action or solely on her behalf.


In Action number 189 of 2007 the last order shown to this Court is for the Plaintiff there to file a writ. There is no information how the matter was thereafter dealt with. What final orders were made? Was the matter disposed off on merits or either wise?

21. There is insufficient evidence before this Court to hold that the Defendant has been unjustly harassed by the Plaintiffs due to this proceeding.

FINAL ORDERS

22. For reasons aforementioned, the Defendant's application for striking out fails and is dismissed.
23. Further the Defendant is ordered to pay cost summarily assessed at \$800. Said cost is to be paid to the Plaintiffs in 14 days.
24. The Defendant is directed to file and serve his statement of defence in 14 days.
25. The Plaintiffs shall file and serve a reply in 07 days thereafter.
26. Thereafter the Plaintiff is to file and serve a summons for directions.
27. Matter will be next called on 04 December 2018 to check on compliance and further orders.





Vandhana Lal [Ms]
 Acting Master
 At Suva.