

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL CASE NO.: HBC 255 OF 2017

BETWEEN : RATU JONE NAEQE NAKAUTOGA on and on behalf of himself and on behalf of the members of the MATAQALI Nalimai, Koro, Nasasau and Tamusua of Yavusa Tamusua, Tamusua & Nabukeru village, Mataqali Nainasuyata, Nainasuiria, Nalevukaya, of Yavusa Yasawa, of Yasawairara village, Mataqali Natalau of Yavusa Rara of Yasawairara village, Mataqali Natovatu of Yavusa Bouwaqa of Dalomo of Dalomo village.

[Plaintiff]

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

[1st Defendant]

AND : ELISAPECI BALEDROKADROKA, company official, of Bukama, Yasawa; and PENIJAMINI VUKIVOU of Lautoka, Police Officer; as agents for PRODUCTIONS PACIFIC LIMITED, and THE DIRECTOR, CAST AND CREW of the TV Series SURVIVOR.

[2nd Defendants]

Before : A.M. Mohamed Mackie- J.

Counsel : Ms. S. Ravai for Plaintiff

: Mr. J. Cati for 1st Defendant

: Mr. A. Khan for 2nd Defendant

Date of Hearing : 7th March 2019.

Date of Ruling : 19th March 2019.

RULING

(On Adjournment and conversion of the Action)

A. Introduction:

1. This ruling is made pursuant to the objection raised by the learned counsel

for the 1st and 2nd defendants against the adjournment of the substantial hearing on an instant verbal application made on behalf of the plaintiff on the hearing date i.e. 7th March 2019.

2. The learned counsel, Ms. Ravai, who claimed to be appearing as a friend of Court out of courtesy, moved for an adjournment of the hearing, on the ground that the Plaintiff's Solicitor is waiting for the renewal of his Practicing Certificate.
3. Having heard the submission of the learned counsel for the defendants made in opposition to the application for adjournment and for the striking out the action, the court in fairness to the plaintiff, who was present in court, granted 7 days for him to reply by way of written submission and fixed the matter for ruling. The plaintiff has filed written submissions. Though, the ruling was fixed for 28th of March 2019, since I am leaving this bench on 21/3/19 the date for ruling is advanced by notice to the parties.

B. Background:

4. This is an action commenced by the plaintiff by way of his Originating Summons dated and filed on 6th December 2017, together with his undated affidavit in support, praying for the following reliefs against the defendants.
 - a. A DECLARATION that Mataqali's; Natalau of Yasawa-i-Rara Village , Nailimai, Koro, Tamusua, Nasasau of Tamusau Village, Nalevukaya and Nainasoriyata of Yasawa-i-Rara Village, and Natovatu of Teci Village, are the owners of the various Native lands in Yasawa more specifically detailed in the Native Land Commission final report Table 1 pages 11 & 12.
 - b. A DECLARATION that all such Native lands that are owned by the Plaintiff Mataqalis are Native Reserves.
 - c. A DECLARATION that the first Defendant has facilitated, entered into, and or dealt with the subject Land and the plaintiff's intellectual property by way of giving authority, consent and entry to the second Defendants and their principals PRODUCTION PACIFIC LIMITED, and THE DIRECTOR, CAST, AND CREW of the TV Series SURVIVOR

for the purpose of producing films and shooting for the TV Series Survivor.

- d. A DECLARATION that the 1st Defendant's action is unlawful by its failure to obtain the consent of the plaintiff Mataqalis.
 - e. AN ORDER that the Defendants pay damages to the plaintiffs for the unlawful use of their Native Land and intellectual property & for such other reliefs.
5. Subsequent to the affidavits in opposition and reply being filed, on 30th November 2018, this matter was fixed for hearing on 7th March 2019.
 6. Accordingly, when the matter came up for hearing on 7th March 2019, the learned counsel, who claimed to be appearing as a friend of the Court, moved for the adjournment on the ground that Mr. Nawaikula, who is on record for the plaintiff is waiting for the renewal of his Practicing Certificate.

C. Submissions:

7. Though, this court did not recognize the appearance of Ms. Ravai, for the sake of record, I shall reproduce the submission made by her on behalf of the plaintiff/ Solicitor on record as follows;

"My Lord, if I may is a friend of the Court sitting from the Court out of courtesy that the solicitors for the Plaintiff Nawaikula Esquire, the Principal has yet to receive his practicing certificate.

My Lord, if I may my instructions this morning is that the Plaintiff's solicitors were also ready for this hearing this morning. However given the unfortunate circumstances regarding

They are still waiting for it to be processed and issued. Because of that delay, that's the reason he's not able to proceed with the hearing before you this morning.

.....

Yes My Lord, I'm only appearing as a friend of the Court, just to inform the Court with the issues with the Plaintiff.

My Lord I do not know anything about the history of this matter and only appear as a friend.

My Lord if I may, the particular affidavit of my learned friend; I've been informed that we were only served with a further affidavit by the 1st Defendant yesterday, and perhaps My Lord if another mention date could be given; I'll inform my Principal of all that has been submitted before you; and perhaps he can then confirm his position; no offence".

8. The Learned counsel for the 1st defendant made his submission as follows;

"My Lord the matter is fixed for substantive hearing before you this morning, unfortunately we were notified that Mr. Nawaikula who acts for the Plaintiff has not had his practicing certificate yet.

My Lord this comes at the eleventh hour. The matter has already been set for hearing last on the 5th of December. Practitioners had the opportunity to have his PC renewed, My Lord.

I understand that there will be an application for hearing but My Lord, this is an abuse of process. Mr. Nawaikula ought to have had his PC renewed, he had sufficient time. If he hadn't had the time, new Counsel should have been obtained from last week, My Lord. It is an abuse of process; we seek humbly My Lord that the matter be struck out with costs to the Defendants".

9. Mr. Khan: who appeared for the 2nd defendant, among other things, had this to say.

"My Lord, my position is same as that of the 1st Defendant's in this matter. As Your Lordship will see from the pleadings as there are; it is absolutely, I mean I do come across matters like this but this one takes the cake by itself so to speak; they are not only disputed matters they are seeking declarations, and as far as my client is concerned My Lord, there is not a single prayer that relates to my client for any orders, so I would have applied for the claim against

... I mean those matters have to be tried and tested by a proper Writ of Summons process. My learned friend is absolutely right in saying that this is a short cut of sacramenting what otherwise should be the platform where witnesses are called and, they are institutions in bold My Lord; one is the ITaukei Land Trust Board and

then we have got the Native Lands Commission; I mean this thing is bringing into fall the title and ownership of land and rights pertaining to land and all those bundles of rights that a person has.

The only legal person who could deal with that is iTLTB which is the 1st Defendant but, I see that they have difficulty with that, and that the Court will affidavit with assertions on behalf of so many other people, I mean they have not deposed anything other than what one of them is deposing, which is the person by the name of Ratu Jone Naeqe Nakautoga, and as to what basis does he have to bring the claim is again a matter that has to be tested as well; preliminary issue before we could even come to this stage; and unfortunately I did not appear on previous occasions My Lord to enlighten the Court as to what my experience has been, and that's about 3.5 decades in this country My Lord, of dealing with these matters, and it's out of respect I sort of had let this matter go, thinking that common sense will prevail, at some stage my learned friend would have picked up and got the message that this is not the proper forum.

I strongly object that we are put not only to an abusive process, we are actually being harassed by it being alive on the file of this Court, Sir. This is my position. My second position is, as I said to you, when there is sufficient evidence prima facie that the Originating Summons is not the proper avenue to explore, a Writ of Summons is the proper avenue to restore, then the Court has the jurisdiction; I think it's Order 85 in any event the Court has the discretion to strike out that particular claim, and that litigant, the Plaintiff start afresh with a proper protocol of litigation, My Lord.

This would be perhaps no less than 10 or 12 times that we have come before the Court with nothing more than an affidavit and a declaration; and those declaration has nothing to do with any of the They went ahead and sued the Police Officer, they already sued the cast and crew of a movie with no service on them at all; and they are sitting on the confinement absolutely abusive and an abuse of process; I ask that the claim against all the; particularly the 2nd Defendants and my learned friend's application for the 1st Defendant I totally support that; that they be struck out and if my learned friend does get his Practising Certificate, then he can pursue with the proper Writ of Summons, My Lord.

The doors of the Court are open but certainly it should be closed to them, because this is not the way the business of this Court I hope that I'm not talking too much, I keep myself within the bounds of decency, My Lord but I can assure you that I felt that we have been abused in this matter through this process".

D. The Law;

10. Adjournment of summons (O.28, r.6)

6.-(1) The hearing of the summons by the Court may (if necessary) be adjourned from time to time, either generally or to a particular date, as may be appropriate, and the powers of the Court under rule 5 may be exercised at any resumed hearing....

Continuation of proceedings as if cause or matter begun by writ (O.28, r.9)

9.-(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

Directions, etc., by Court (O.28 .r.5 r r (3&4)

(3) Without prejudice to the generality of paragraph (2), the Court shall, at as early a stage of the proceedings on the summons as appears to it to be practicable, consider whether there is or may be a dispute as to fact and whether the just, expeditious and economical disposal of the proceedings can accordingly best be secured by hearing the summons on oral evidence or mainly on oral evidence and, if it thinks fit, may order that no further evidence shall be filed and that the summons shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without cross-examination of any of the deponents, as it may direct.

(4) Without prejudice to the generality of paragraph (2), and subject to paragraph (3), the Court may give directions as to the filing of evidence and as to the attendance of deponents for cross-examination and any directions which it could give under Order 25 if the cause or matter had been begun by writ and the summons were a summons for directions under that Order.

Failure to prosecute proceedings with despatch (O.28, r.11)

11.-(1) If the plaintiff in a cause or matter begun by originating summons makes default in complying with any order or direction of the Court as to the conduct of the proceedings, or if the Court is satisfied that the plaintiff in a cause or matter so begun is not prosecuting the proceedings with due despatch, the Court may order the cause or matter to be dismissed or may make such other order as may be just. (Emphasis mine)

E. The Discussion

11. This is the first date of substantial hearing of this Originating Summons, which was fixed on 30th November 2018. Perusal of the record shows that for some reason or the other the court after fixing the hearing date, has made a minute to the effect "*If the hearing date is not suitable to plaintiff's counsel, they may be at liberty to move for a new hearing date*" which shows that there had been a reservation of liberty for the plaintiff to make an application to move out the hearing date, if necessity arises.
12. The reason adduced for this instant application of adjournment of hearing is the alleged delay in obtaining the practicing Certificate for Mr. Nawaikula, who is in record as the Solicitor for the plaintiff.
13. But, this is not a suddenly cropped up issue. The Plaintiff's learned Solicitor on record should have been aware of his predicament. He could have very well made a formal application in advance with notice to the defendants' Solicitors/ Counsel or at least given sufficient notice to them about his intention to move for an adjournment when the matter comes up for hearing.
14. Instead, the plaintiff's learned Solicitor Mr. Nawaikula opted to inform the defendants' counsel, through another practitioner of this court, for the first time on the day of hearing, about the intention of moving for the adjournment, which, probably, would have taken both the learned defense counsel by surprise, who were ready for the hearing, particularly the learned counsel for the 2nd defendant having travelled all the way from Suva.
15. The learned counsel, who claimed to be appearing as a friend of the court, maintained the position that her appearance was only for a limited purpose and to assist the court. I do not agree with this position because generally it is when the court is in need of the assistance of a counsel, it would make the request from a practitioners in court to assist the court as a friend of the court. A practitioner, who is on record and has no current practicing Certificate, cannot instruct another practitioner, to appear as a self-appointed friend of the Court to seek adjournment.

16. The application of Ms. Ravai was objected to by both the counsel for the defendants on the basis that this hearing was fixed in November 2018, the plaintiff's Solicitor knew about the expiry of his Practicing Certificate and the defendants have incurred substantial cost in defending this action, which they claimed to be an abuse of process of the court.
17. Learned defence counsel, while also arguing that there is no a valid cause of action for the plaintiff, were also heard to say that in any event this action could not have been filed and proceeded by way of Originating Summons since there are number of pivotal issues, which could be resolved only through a proper writ action and the plaintiff can resort to that avenue if he wishes so.
18. This Court has observed from the date of first Summons returnable date that the plaintiff has been appearing in this Court on every single day. I see even today that the plaintiff is present in Court, apparently, along with the chiefs or members of other Mataqalis, whom he claims to be representing. Apparently there is no fault on his part that compelled to move for this adjournment.
19. I can understand that the Plaintiff's learned Counsel would have had some difficulty in obtaining his Practicing Certificate in time, and this could perhaps be due to reason/s beyond his control. But he did nothing to the advantage of the plaintiff to avoid this type of unfavorable situation, by making an early application for adjournment or by duly notifying the Solicitors/ Counsel for the defendants about his intention to move for the adjournment. This court had reserved the liberty for the plaintiff's solicitor to make application in advance to move out the hearing date, if necessity arises. This opportunity was not made use.
20. However, perusal of the record shows that the Solicitors for the Plaintiff have on 28th February 2019, filed Subpoena Duces Tecum and Notice to produce on a witness from the 1st defendant Board. This shows that the Plaintiff's Solicitors have taken some action towards the prosecution of the action when the hearing was around the corner.
21. Courts are here to see that justice is done in matters before them. No

party should be deprived of the hearing of his/her matter, in a Court of Law, when no blame could be pinned on him/her.

22. The question I pause to myself is, whether a litigant should suffer the consequences of the delay in renewing the practicing Certificate and be deprived of an opportunity to be heard at the proceedings before the Court, may be of the summary nature but must be heard and dealt with some caution; But the circumstances rather herein call upon me to impose a reasonable costs in favor of the defendants, since the defendants have all along appeared and responded to plaintiff's claim without any delay or default. Since the plaintiff also has appeared in this case throughout the proceedings, I will allow the matter to be heard and determined in a just and fair manner rather than proceeding to deprive the plaintiff of his day in the Court.
23. More importantly, it must be put on record that, as the learned Counsel for both the defendants drew my attention, I observe that there are number of substantial issues of facts, particularly with regard to the identity of the Land and whether any part or portion of the plaintiff's land has in fact been used for this filming or shooting as alleged by the plaintiff. This in my view requires this action to be converted or commenced as a writ action.
24. On careful reading of the pleadings before this Court in the form of affidavits, I find that the task before this Court is not merely the interpretation of a section of the iTaukei Land Trust Act, namely S-15, as pointed out by the plaintiff in his written submission.

F. Court Orders:

1. The application made for the adjournment of hearing on 7th March 2019 is granted.
2. I order summarily assessed costs of \$ 7,50.00 each in favor of 1st and 2nd Defendants against the Plaintiff/ Solicitor to be paid in 28 days from today.(Total costs \$1,500.00)
3. Acting on Order 28 Rule 9 (1), this action is hereby converted to be continued as a writ action subject to the payment of the above costs.

4. On payment of the aforesaid costs, within the said time period, the plaintiff shall continue as if the action had begun by way of writ.
5. Parties shall be at liberty to treat the affidavits filed so far as pleadings and to add thereto or to apply for more particulars thereof.
6. In the event the Plaintiff / Solicitor fail to pay the costs within 28 days from today as aforesaid, this Originating Summons shall stand dismissed.
7. If the Plaintiff thereafter intends to file a fresh action, he may do so only after paying the costs hereby ordered to the defendants or by depositing the same to the credit of this action.



A. M. Mohammed Mackie

Judge

At Lautoka

19th March, 2019