

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 127 OF 2016

BETWEEN : **JOSUA MALINAVITILEVU NAULIVOU**, Company Director of Namara Village, Vuda, suing in his personal capacity as a member of the Yavusa Sabutoyatoya of Wayasewa in Yasawa and in a representative capacity for and on behalf of the Yavusa Sabutoyatoya of Wayasewa in Yasawa.

PLAINTIFF/APPLICANT

AND : **RATU KITIONE EPARAMA TAVAIQIA**, on behalf of the Yavusa Sabutoyatoya of Viseisei, Vuda.

FIRST DEFENDANT/FIRST RESPONDENT

AND : **ITAUKEI LAND TRUST BOARD**, a body corporate of Victoria Parade, Suva.

SECOND DEFENDANT/SECOND RESPONDENT

AND : **REGISTRAR OF TITLES**, of Suvavou House, Victoria Parade, Suva.

THIRD DEFENDANT/THIRD RESPONDENT

Appearances : Mr I. Fa for the plaintiff/applicant
Ms P. Low for the first defendant/first respondent
Mr W. Mucunabitu for the second defendant/ second respondent
Third defendant/third respondent – excused from this proceeding

Date of Hearing : 22 February 2019

Date of Ruling : 09 April 2019

RULING

[On leave to appeal out of time]

Introduction

- [01] This is an application for leave to appeal the learned Master's ruling of 27 July 2018 made striking out the plaintiff's claim on ground that it is *res judicata* and as a result it is an abuse of process.
- [02] By his amended *inter partes* summons (on 22 November 2018 the court granted leave to the plaintiff to file his amended summons) filed on 28 November 2018 (*'the application'*), the plaintiff/applicant (*'the plaintiff'*) seeks the following orders:
1. **AN ORDER** for the Plaintiff/Applicant to be granted an enlargement of time to file its Application for leave to appeal against the decision of the Master delivered on 27 of July 2018.
 2. **AN ORDER** for the Plaintiff/Applicant to be granted leave to appeal against the decision of the Master delivered on 27 of July 2018 where the Master:
 - a) Dismissed the Plaintiff's action as it is an abuse of process of the Court;
 - b) The Plaintiff be ordered to pay a summarily assessed cost of \$2,000.00 to the first defendant within a month from today.
- [03] The application is made under Order 3, Rule 4 and Order 59, Rule 11 of the High Court Rules 1988, as amended (*'HCR'*) and upon the inherent jurisdiction of this court. It is supported by an affidavit of Rusiate Naulivou sworn on 20 August 2018.
- [04] The first defendant/first respondent (*'the first defendant'*) opposes this application. He has filed an affidavit of Jeremaia Natoko sworn on 17 October 2018.
- [05] Initially, on 20 August 2018 the plaintiff filed his application seeking leave to appeal the Master's decision of 27 July 2018. This was objected to by the first defendant on the basis that there is no application to seek enlargement of time as the plaintiff's application is made outside the appealable period. As a result of it, the plaintiff filed his amended application on 28 November 2018, following leave being granted for the plaintiff to do so.

[06] Precisely, the plaintiff seeks leave to appeal the Master's decision out of time, i.e. enlargement of time and leave to appeal.

[07] At the hearing, both parties made oral submissions through their respective counsel. Additionally, written submissions were also tendered. I had the benefit of reading their written submissions, which were quite comprehensive. I am grateful for both counsel and their team for their elaborative work.

Grounds of Proposed appeal

[08] The proposed grounds of appeal, it also highlights the background facts of the case, are as follows:

1. That the Master erred in law and in fact in finding that the doctrine of *res judicata* applies to the present case and the plaintiff is estopped from bringing this action seeking the Court to decide the matter that had already been adjudged by the High Court and affirmed by the Court of Appeal and the Supreme Court, on the following grounds:

(i) *That the plaintiffs' cases of action in its Statement of Claim, as set out below, have not been determined by the High Court in Naulivou v Native Land Trust Board [2003] HBC 0069. 1994L [2003] FJHC 34HBC 0069. 1994 L [2003] FJHC 341 as alleged.*

"Cause of Action against the 1st Defendant

22. *That the 1st Defendant and or its predecessors are not and have not been at any time the registered proprietor of Vomo Island.*

23. *That the Yavusa Sabutoyatoya of Wayasewa of which the Plaintiff is a member and the Yavusa Sabutoyatoya at Viseisei Vuda of which the 1st Defendant is a member are two separate and distinct Yavusas.*

24. *That the Yavusa Sabutoyatoya of Wayasewa Yasawa and the Mataqali Sabutoyatoya of the Province of Yasawa are one and the same entity as during the time of the Wilkinson Land Commission landownership in the Province of Yasawa was through the Mataqali.*

25. *That the Mataqali Sabutoyatoya in Yasawa Province holds an indefeasible title Certificate of Title Volume 12 Folio 1019 being the Certificate of Title of Vomo Island comprising 109 hectares.*
26. *That the 1st Defendant does not hold any title or interest in Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island Comprising 109 hectares.*

Cause of Action against the 2nd defendant

27. *That the 2nd Defendant has acted unlawfully and continues to act unlawfully by issuing leases and licenses and or alienating land on Vomo Island.*
28. *That the 2nd Defendant has acted unlawfully and continues to act unlawfully by receiving monies from the issuing of leases, licenses and or alienating land on Vomo Island and the payment of those monies or any part of it's the 1st Defendant.*

Cause of Action against the 3rd Defendant

29. *That Vomo Island being land comprised in Certificate of Title Volume 23 Folio 1019 comprising of approximately 109 hectares is land subject to the provisions of the Land Transfer Act Cap 131 Laws of Fiji.*
30. *That Vomo Island has been in the possession of the Plaintiff since 1899 after the land was purchased by then Mataqali Sabutoyatoya of Yasawa Province. That the land has since then been used by the Plaintiff and his ancestors for farming and sustenance.*
31. *That due to the continuous possession and occupation of Vomo Island by the Mataqali Sabutoyatoya Yavusa Sabutoyatoya of Wayasewa for the last 100 years the Yavusa Sabutoyatoya is entitled to a vesting order pursuant to section 78 of the Land Transfer Act Cap 131 Laws of Fiji."*

That a review of the original court file will reveal that the Plaintiff's Statement of Claim in the case of Naulivou v Native Land Trust Board [2003] HBC 0069, 1994L [2003] FJHC 341 did not plead the above causes of action or raise them as issues for determination by the High Court in Lautoka. Therefore, the

decision of the High Court of Lautoka in Naulivou v Native Land Trust Board [2003] HBC 0069. 1994L [2003] FJHC 341 did not determine the issue raised by the plaintiff as held by the Master.

(ii) That the agreed issues for determination in the case of Naulivou v Native Land Trust Board [2003] HBC 0069. 1994L [2003] FJHC 341 [which could be easily identifiable by a review of the Court file are:

“(i) Is there one Yavusa Sabutoyatoya or two?

(ii) Were the premiums and the rental proceeds paid out by the Native Land Trust Board on leasing of Vomo Levu and Vomo Lailai in the correct proportions?

(iii) If not, what is the measure of damages and costs?”

Clearly, the matters for determination in the present case and in the case Naulivou v Native Land Trust Board [2003] HBC 0069. 1994L [2003] FJHC 341 are different and therefore the doctrine of *res judicata* cannot apply as alleged.

(iii) That the Master of the Court at paragraph 19 of his decision sets out the relief claimed by the plaintiff in Naulivou v Native Land Trust Board [2003] HBC 0069. 1994L [2003] FJHC 341 as follows:

“WHEREFORE the plaintiff claims for the Yavusa, its Tokatokas and members the following orders:

- a) For a declaration that Tokatokas Natabale, Natabataka, Lotuma, Waributa and Veto of Yavusa Sabutoyatoya of Namara in the tikina of Waya are collectively entitled to half share of premium and lease money distributable as landowners share received by the Native Land Trust Board on lease of the islands of Vomo Levu and Vomo Lailai from the 12th day of March 1989 till expiry of lease;
- b) For an Order that the Native Land Trust Board pay to Tokatoka Natabale, Natabataka, Lotuma, Waributa and Veto of Yavusa Sabutoyatoya of Namara in the tikina of Waya half a premium and lease monies distributable to the landowning units being owners of Vomo Levu and Vomo Lailai from 12th day of March 1989 till date of Order:

- c) *General damages.*
- d) *Any other order the Court deems just.*
- e) *Costs of this action"*

In setting out the above, the Master not only failed to set out the causes of action pleaded by the plaintiff but also fails to clarify that the reasons the plaintiff were claiming those remedies was because in 1990 Vomo Island was decided by the Native Land and Fisheries Commission and the Native Land and Fisheries Commission and the Native Land Appeals Tribunal to be Native Land.

This was aptly described in the decision of the Court of Appeal in Iosua Malinavitilevu Naulivou v Ratu Josefa Iloilovatu Uluivuda and Native Land Trust Board Civil Appeal No. ABU 0002 of 2004L as follows:

"[10] In 1990 the Native Land and Fisheries Commission enquired into the ownership of the islands. It directed that they were to be registered in the Registrar of Native Lands under the ownership of Yavusa Sabutoyatoya of Viseisei "with the administration and use of the islands vested solely with the holder of the Tui Vuda." The plaintiff appealed to the Appeals Tribunal established by the Native Lands Act (Cap. 133). In a letter send by the Commission to the Board in March 1991 it was stated that the Appeal Tribunal sat in October 1990. Accordingly to the Commission the two yavusas agreed that the plaintiff was "also be included in the ownership of the island after approaching the Tui Vuda to soro or seek forgiveness for questioning his control of the island." It is not clear whether the "i soro" was ever performed but the plaintiff claims that despite the recognition by the Native Lands and Fisheries Commission that it was indeed part of the proprietary unit owning the Vomo Islands it continued to receive nothing from the Board."

- (iv) *That the Orders made by the High Court in Naulivou v Native Land Trust Board HBC 0069. 1994L quoted by the Master at paragraph 20 of his decision were:*

"1. CT Register 12 Folio 1019, the land title to Vomo Island, which includes the islands of Vomolevu and Vomolailai is a freehold.

2. *The subject freehold is owned by two yavusas, Sabutoyatoya [Viseisei] and Sabutoyatoya [Wayasewa] as owners in common.*
3. *The two yavusas are separate yavusas.*
4. *The income from the subject freehold is to be distributed on the basis of 50% of the income to each yavusas.*
5. *With the two yavusas, distribution should follow the distribution as laid down in Regulation 11 of the Native Land Trust (Lease and Licences) Regulations Cap. 134.*
6. *Liberty to the parties to apply for direction on Trusteeship, distribution or correction of little matters."*

That these Orders were not the subject of any causes of action filed by the then plaintiff in his Writ of Summons/Statement of Claim for determination by the Courts nor were they the subject of any relief claimed by the then plaintiff in his Statement of Claim/Writ of Summons.

That these Orders were made and created by the High Court on its own volition and the plaintiff was not given any warning that such Orders would be made, nor were they granted an opportunity to address the same in light of the fact that they would surely prejudice the plaintiff's rights.

- (v) *That the Master had wrongly characterized the following passages quoted at paragraph 21:*

"In our view, the Plaintiff is now attempting to raise on appeal an entirely new case inconsistent with that presented to the High Court. It is however established law that such a course is not open to it (see ex parte Reddish, in re Walton (1877) 5 Ch D 882). This ground of appeal fails."

and paragraph 23:

"... The issue of indefeasibility of title was not pleaded before the trial Judge at first instance. An attempt was made to do this in the Court of Appeal but rejected by that Court which on page 11 of its Judgment ruled that: "The Plaintiff is now attempting to raise on appeal an entirely new case inconsistent with that presented to the High Court. It

is however established law that such a course is not open to it. (see exparte Reddish, in re Walton (1877) 5 Ch D 882)."

of his judgment to support his finding that the issues raised by the plaintiff were res judicata. In fact, that passages support the plaintiff's contention that the issue of indefeasibility of title was not res judicata as they were not pleaded in the High Court matter and could not be raised in the appeal.

- (vi) *That the decision of the High Court of Australia in Brewer v Brewer (1953) 88 CLR 1 is not an authority for the proposition put forward by the Master in the first instance of paragraph 25 of his decision where he said:*

"It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment."

2. *That the Master erred in law and in fact in holding that the plaintiff by filing this action had acted in abuse of the Court for the following reasons:*

- (i) *That the issues raised by the plaintiff in its Statement of Claim/Writ of Summons in this matter has not been adjudged or determined by the Court at any time. They are:*

"Cause of Action against the 1st Defendant

22. *That the 1st Defendant and or its predecessors are not and have not been at any time the registered proprietor of Vomo Island.*
23. *That the Yavusa Sabutoyatoya of Wayasewa of which the plaintiffs is a member and the Yavusa Sabutoyatoya of Viseisei Vuda of which the 1st Defendant is a member are two separate and distinct yavusas.*
24. *That the Yavusa Sabutoyatoya of Wayasewa Yasawa and the Mataqali Sabutoyatoya of the Province of Yasawa are on and the same entity as during the time of the Wilkinson Land Commission landownership in the province of Yasawa was through the Mataqali.*
25. *That the Mataqali Sabutoyatoya in Yasawa Province holds an indefeasible title Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island comprising 109 hectares.*

26. *That the 1st Defendant does not hold any title or interest in Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island comprising 109 hectares.*

Cause of Action against the 2nd Defendant

27. *That the 2nd Defendant has acted unlawfully and continues to act unlawfully by issuing leases and licenses and or alienating land on Vomo Island.*

28. *That the 2nd Defendant has acted unlawfully and continues to act unlawfully by receiving monies from the issuing of leases, licenses and or alienating land on Vomo Island and the payment of those monies or any part of it's the 1st Defendant.*

Cause of Action against the 3rd Defendant

29. *That Vomo Island being land comprised in Certificate of Title Volume 23 Folio 1019 comprising of approximately 109 hectares is land subject to the provisions of the Land Transfer Act Cap 131 Laws of Fiji.*

30. *That Vomo Island has been in the possession of the Plaintiff since 1899 after the land was purchased by then Mataqali Sabutoyatoya of Yasawa Province. That the land has since then been used by the Plaintiff and his ancestors for farming and sustenance.*

31. *That due to the continuous possession and occupation of Vomo Island by the Mataqali Sabutoyatoya /Yavusa Sabutoyatoya of Wayasewa for the last 100 years the Yavusa Sabutoyatoya is entitled to a vesting order pursuant to section 78 of the Land Transfer Act Cap 131 Laws of Fiji."*

(ii) *The above causes of action are not being re-litigated as they have never been brought before a Court until this case was filed by the plaintiff.*

(iii) *That the matters taken up to the Court of Appeal and Supreme Court was a response to the High Court creating new issues for determination which were never before it and the Court of Appeal and the Supreme Court clarifying that it could not hear these issues as they were not part of the pleadings in the High Court, hence the need for the plaintiff to file a new action.*

- (iv) That the allegation that the plaintiff did not mention that his relatives were involved in the case of *Naulivou v Native Land Trust Board* [2003] HBC 0069. 1994L [2003] FJHC 341 as constituting an abuse of process is misconceived and is a red herring, as the plaintiff has commenced this proceeding in a representative and personal capacity from the Yavusa Sabutoyatoya in Wayasewa and more importantly, the issues raised are new issues and have not been determined by the Court at any time in the past.
- (v) That the fact that the plaintiff has filed a new case setting out new causes of action against the defendants does not constitute harassment.
3. That the decisions cited by the Master at paragraphs 6 – 25 of his judgment, on the principle of *res judicata*, and paragraphs 27 – 31 of his judgment, on abuse of process, in fact supports the plaintiff's case as there can be no *res judicata* if a cause of action has not been adjudicated or determined by the Court and it would logically follow, that it cannot be an abuse of process.
4. The appellant reserves the right to file and amend their grounds of appeal.

The law

[09] Order 3, R 4 of the High Court Rules 1988, as amended ('HCR'), provides so far as relevant:

"Extension, etc., of time (O.3, r.4)

4 (1) *The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.*

(2) *The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*

(3) *The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose..."*

[10] The HCR, O 59, R 8 (2), states that: **no appeal shall lie from interlocutory order, judgment of the Master to a single judge or the High Court without the leave of a single judge of the High Court which may be granted or refused upon the papers filed.** (Emphasis provided)

[11] As regards to time for appealing, the HCR, O 59, R 9, says that an appeal from an order or judgment of the Master shall be filed and served within the following period:

(a) 21 days from the date of the delivery of an order or judgment:

or

(b) **in the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal** (Emphasis supplied).

[12] Under Rule 10 (1) of the HCR, an application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to a single judge after expiration of that period. According to R 10 (2), such an application may be made by way of an *inter partes* summons supported by an affidavit.

[13] The HCR, O 59, R 11, provides that: any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.

Test for leave to appeal

[14] In *Denarau Corporation Ltd v Slatter & Gutherine Co Ltd* [2013] FJCA 94, Hon. Justice Calanchini held [at para. 13]:

“Leave will be more readily granted when legal rights as distinct from matters of practice and procedure are involved and some injustice may be caused”

[15] In the case of *Hunt v Peasegood* (2000) *The Times*, 20 October 2000, it was said:

“The court considering a request for permission is not required to analyse whether the grounds of proposed appeal will succeed, but merely whether there is a real prospect of success.”

[16] Lord Woolf MR said in *Swain v Hillman* [2001] 1 All ER 91 that:

“a ‘real’ prospect of success means that the prospect of success must be realistic rather than fanciful.”

Test for leave to appeal out of time

[17] The test for the granting of leave to appeal out of time is as follows:

“The governing principles for the granting of leave to appeal out of time are as follows:

- (i) Length of delay;*
- (ii) Reason for the delay;*
- (iii) Chance of appeal succeeding if time for appeal is extended; and*
- (iv) Degree of Prejudice to the Respondent if application is granted.*

(See, Nair v Prakash [2013] FJCA 147; Misc. Action 10.2011 (30 October 2013) and Prasad v Prasad [2016] FJCA 116; ABU0031.2016 (30 September 2016)

Discussion

[18] As I said, this is an application for leave to appeal out of time the interlocutory decision of the Master delivered on 27 July 2018. By his decision, the Master struck out the action under O 18, R 18 of the HCR on the ground that it is an abuse of process of the court. The Master found that the plaintiff’s action was res judicata.

Enlarge of time to file leave to appeal

[19] The plaintiff seeks an enlargement of time to file the application for leave to appeal.

[20] The Master’s ruling was delivered following an application filed by the defendant to strike out the action under O 18, R 18. The application to strike out the action is an interlocutory application. Therefore, the decision made on that application is an interlocutory order. It follows that the Master’s decision of 27 July 2018 is an interlocutory application.

[21] There is no direct appeal against an interlocutory judgment or order of the Master. An interlocutory judgment or order of the Master may be appealed with the leave to a judge of the High Court. An application for leave to appeal an

interlocutory order or judgment of the Master must be filed and served within 14 days of the delivery of the order or judgment (see O 59, R 11).

- [22] The Master delivered his interlocutory ruling on 27 July 2018. The 14 day-time period for making application for leave to appeal the interlocutory ruling expired on 9 August 2018. However, the plaintiff filed his application for leave to appeal on 20 August 2018, which is some 10 days late.
- [23] The reason adduced by the plaintiff for the delay in filing the leave application was that the written decision of the Master was not released by the High Court Registry until 7 August 2018, which was received by his lawyer in Suva on 8 August 2018.
- [24] Mr Fa of counsel for the plaintiff submitted that if 14 days are reckoned from the date of delivery of the written ruling of the Master (7 August 2018), his application for leave to appeal the interlocutory order of the Master is not out of time. It is within the time for making an application for leave to appeal an interlocutory order of the Master.
- [25] Ms Low of counsel for the first defendant did not seriously challenge Mr Fa's submission that the Master's decision of 27 July 2018 was released to the plaintiff only on 27 August 2018 by the Registry.
- [26] The Court of Appeal Rules ('CAR'), Rule 16 sets out that every notice of appeal is to be filed and served within the prescribed period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected).
- [27] In the absence of counter evidence that the decision of the Master was issued to the plaintiff earlier than 7 August 2018, I would accept the plaintiff's explanation for the delay in filing the application for leave to appeal that the plaintiff was issued with the Master's decision only on 7 August 2018 despite it was pronounced on 27 July 2018. If we calculate the 14 day-period from the date of delivering the decision, which I have accepted to have been delivered on 7 August 2018, the 14 day period expired on 21 August 2018. The plaintiff had filed his application seeking leave to appeal the interlocutory ruling of the Master on 20 August 2018, which is well within 14 days from the date of delivery of the Master's ruling. The question of delay then does not arise.

[28] For the sake of completeness, even if the plaintiff's application for leave is out of time, I am satisfied with the explanation given by the plaintiff for the delay.

Leave to appeal the Master's decision

[29] I now turn to the leave to appeal application filed by the plaintiff. The plaintiff seeks leave to appeal the Master's interlocutory ruling of 27 July 2018, which effectively struck out the plaintiff's claim on the ground that it is an abuse of process of the court. It was abuse of process of the court, according to the Master, because his claim was caught within the principles of *res judicata*.

[30] The first defendant objects the application for leave on the grounds that:

- a) The application is out of time-10 days out of time.
- b) Deponent not authorised to swear the affidavit-no authority to confirm authorisation.
- c) The ruling of the Master is correct and fair.
- d) The plaintiff's proposed grounds of appeal have no merits as the plaintiff's claim (current action) is a clear abuse of the process of the court.

[31] The essence of the submission made on behalf of the first defendant was that:

1. The plaintiff's summons for leave to appeal must be dismissed as there is no real prospect of success if the matter is appealed in that:
 - The claim struck out by the Learned Master is brought in the same capacity and deals with the same matters and issues that were claimed previously in the Original High Court Proceedings thus caught within the principles of Res Judicata and the extended doctrine of Res Judicata Estoppel.
 - The plaintiff's claim before the Master should have been brought together in the Original claims as it arose from the same matter (Vomo Island) and issues have been adjudicated and decided upon the courts of competent jurisdiction; and
 - The principles of res judicata and issues estoppel bars the plaintiff from bringing forward the current claims, it is not in the public interest and against good public policy to do so and it would otherwise be an abuse of the Court's process.

[32] The proposed appeal seeks to challenge the Master's ruling striking out the plaintiff's claim on the ground that it is an abuse of process of the court. In doing so, the Master heavily relied on the principles of *res judicata*.

[33] The test when considering whether or not to granting leave to appeal an interlocutory order or judgment is that whether the appeal, if leave is granted, has real prospect of success.

The first action

[34] In *Naulivou v Native Land Trust Board* [2003] FJHC 341; HBC0069.1994L, the action brought by the plaintiff's father (Naulivou), (*the first action*), the plaintiff's father it was claimed:

- 1) to sue in his capacity as member and representative of Yavusa Sabutoyatoya (Wayasewa);
- 2) that the Certificate of Title Volume 12 Folio 1019 of Vomo Island ("*Title*") is freehold;
- 3) that the Yavusa Sabutoyatoya (Wayasewa) is also the registered proprietor of Vomo Island and ;
- 4) that the members of Yavusa Sabutoyatoya (Wayasewa) did not receive, but ought to receive, lease monies obtained from the leasing of Vomo Island.

[35] The decision of the High Court in the first action on 12 November 2013 was as follows:

- 1) *CT Register 12 Folio 1019, the land title to Vomo Island, which includes the islands of Vomolevu and Vomolailai is a freehold.*
- 2) *The subject freehold is owned by the two yavusas, Sabutoyatoya [Viseisei] and Sabutoyatoya [Wayasewa] as owners in common.*
- 3) *The two yavusas are separate yavusas.*
- 4) *The income from the subject freehold is to be distributed on the basis of 50% of the income to each yavusa.*
- 5) *With the two yavusas, distribution should follow the distribution as laid down in Regulation 11 of the Native Land Trust (Leases and Licences) Regulations Cap. 134.*

- 6) *Liberty to the parties to apply for directions on Trusteeship, distribution or correction of title matters.*

[36] The decision of the High Court in the first action was appealed to the Court of Appeal (*Malinavitilevu v Uluivuda* [2005] FJCA 53, ABU 0002].2004S (29 July 2005)). On appeal, the Court of appeal said: *'Orders 1, 3 and 6 of the High Court, not being subject of the appeal are confirmed; the appeal against Order 2 is dismissed; Orders 4 and 5 are set aside and that profits derived from the lease are to be distributed equally to all registered members of the two co-owning yavusas.'*

[37] On further appeal to the Supreme Court of Fiji (*Malinavitilevu v Uluivuda* [2010] FJSC 1; CBV005.2005 (29 January 2010), the Supreme Court said: *'...The issue of indefeasibility of title was not pleaded before the Trial Judge at first instance. An attempt was made to do this in the Court of Appeal but rejected by that Court which on page 11 of its judgment ruled that: "The plaintiff is now attempting to raise on appeal an entirely new case inconsistent with that presented in the High Court. It is however established law that such a course is not open to it."...'*

The second action

[38] The current action brought by the plaintiff, which was struck out by the Master, against the defendant, Ratu Kitione Eparama Tavaiqia on behalf of the Yavusa Sabutoyatoya (*'the second action'*) seeking the relief:

1. *A declaration that the Mataqali Sabutoyatoya of Yasawa is the registered proprietor of Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island comprising 109 hectares.*
2. *A declaration that the Mataqali Sabutoyatoya of Yasawa is one and the same as the Yavusa Sabutoyatoya of Wayasewa in Yasawa.*
3. *That the Yavusa Sabutoyatoya of Wayasewa in Yasawa is entitled to a vesting order pursuant to section 78 of the Land Transfer Act that Certificate of Title Volume 12 Folio 1019 comprising of approximately 109 hectares is vested in the Yavusa Sabutoyatoya of Wayasewa in Yasawa Province.*
4. *A declaration that the Yavusa Sabutoyatoya of Viseisei Vuda represented by the first defendant is not the registered proprietor of Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island comprising of 109 hectares.*
5. *A declaration that the Yavusa Sabutoyatoya of Viseisei is not entitled to any monies that arises from the granting of any lease, license of alienation of land on Vomo Island.*
6. *A declaration that the second defendant is not authorised by law to administer Vomo Island as a native land and to issue leases, licenses, or alienates land on Vomo Island in any manner or form.*

7. *A declaration that all these leases and licenses issued or granted by the second defendant on Vomo Island to third parties or any instrument to alienate and or create any tenancy over land on Vomo Island is null and void and of no effect.*
8. *That the second defendant provide a Statement of Account to the plaintiff for all monies that is has received from:*
 - (i) *The granting of any lease or license to third parties of land on Vomo Island.*
 - (ii) *The granting of any instrument to third parties to alienate land or the creation of any tenancies over land on Vomo Island.*
9. *An order for costs.*
10. *Any other relief that this honourable court may deem just.*

[39] The claim in the second action is based on the issue of indefeasibility of title.

[40] Mr Fa contends that the plaintiff is not re-litigating the issue of indefeasibility of title as both the Court of Appeal and Supreme Court have conclusively stated that the issue of indefeasibility has not been raised in the High Court in *Naulivou*.

[41] Ms Low on the other hand submits that the claim struck out by the learned Master is brought in the same capacity and deals with the same matters and issues that were claimed previously in the original High Court Proceeding (the first action) thus caught within the principles of Res Judicata and extended doctrines of Res Judicata Estoppel, and that the plaintiff's claim before the Master should have been brought together in the original claim as it arose from the same subject matter (Vomo Island).

[42] For my part, in order to decide whether leave should be granted to appeal the Master's interlocutory order made striking out the claim, I am not required to analyse whether the grounds of proposed appeal will succeed, but merely whether there is a real prospect of success.

[43] As was held in *Denarau Corporation Ltd (above)*, leave will be more readily granted when legal rights as distinct from matters of practice and procedure are involved and some injustice may be caused.

[44] In my opinion, the grounds of proposed appeal raise some issues of law and legal rights as distinct from matters of practice and procedure and have real prospect of success. Whether or not the res judicata principles will apply to the plaintiff's claim is a question of law and facts.

[45] I do think the first defendant will not be prejudiced by the grant of leave to appeal.

Conclusion

[46] For the reasons set out above, I would grant leave to appeal the Master's interlocutory order delivered on 27 July 2018. Accordingly, the plaintiff will file and serve a notice of appeal within 7 days from the date of this ruling. The cost shall be in the cause.

The outcome

1. Leave to appeal the Master's decision dated 27 July 2018 is granted.
2. Plaintiff shall file and serve a notice of appeal within 7 days from the date of this ruling.
3. Costs shall be in the cause.

M. H. Mohamed Ajmeer
..... 9/4/19

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

09 April 2019

Solicitors:

For the plaintiff: M/s Fa & Company, Barristers & Solicitors

For the first defendant: M/s howards Lawyers