

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

Civil Action No. 228 of 2022

**BETWEEN** : **SAKIUSA KITI** of Namalata Village in the District of Tavuki in the Province of Kadavu suing in his personal capacity as a bona fide registered member of the Mataqali Valewai and in a representative capacity as appointed spokesperson of the majority members of Mataqali Valewai of Namalata Village, in the District of Tavuki, in the Province of Kadavu. Landing, Vuda Point. Lautoka.

**PLAINTIFF**

**AND** : **ANARE SOVU, PENIELI BIKEI, NAVITALAI BOGITINI, JOSUA DAVETA & LETILA DICA MATAITOGA** of Namalata Village, in the District of Kadavu.

**DEFENDANTS**

**Counsel:**                      **Plaintiff: Mr. S. Raikanikoda.**  
   **Defendant: Ms. L. Jackson**

**Date of Hearing: 17.01.2023**  
**Date of Judgment: 03.02.2023**

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff instituted this action by way of originating summons, seeking removal of Defendants as trustees of Mataqali Valewai Trust (MVT) and also restraining them from acting as trustees of MVT and also, restraining dealing with property of MVT. Defendants were appointed as trustees of MVT for a period of three years on 27.8.2018. The term had expired, hence they are no longer trustees of MVT in terms of express Deed of Trust that

created trusteeship. There is no longer a need to remove them, as their time period had expired. There is no evidence of any meeting to appoint new trustees after expiration of the term of the present trustees of MVT, hence cannot function as trustees of MVT in terms of Deed of Trust of MVT. The members of MVT must conduct a meeting in terms of Deed of Trust of MVT dated 20.12.2013.

## FACTS

2. Plaintiff filed an Originating Summons seeking the following orders
  - (a) That the Defendants be restrained from acting in their capacity as Trustees of the Mataqali Valewai Trust and/or from dealing with or representing the Mataqali Valewai Trust;
  - (b) That the Defendants be restrained from dealing with any Mataqali Valewai Trust properties or monies held in the Mataqali Valewai BSP Account No. 82596471 or any other bank account under the name of Mataqali Valewai Trust;
  - (c) That all Defendants be removed as Trustees of the Mataqali Valewai Trust with immediate effect.
  - (d) That the Defendants to pay costs to the Plaintiff incidental to this (sic) proceedings on a full solicitor/client indemnity basis; and
  - (e) That costs be in the cause of the application; and
  - (f) Such further orders and or directions.
3. Plaintiff filed an affidavit in support annexing a judgment of this court in HBC 287 of 2016, where MVT was dealt regarding the previous trustees and they were removed in the said case after oral evidence was heard by the court.
4. Plaintiff had instituted this action in his personal capacity as well as in representative capacity and tries to re litigate the issues of the said case HBC 287 of 2016 and also another action HBC 206 of 2020.
5. According to the Plaintiff the term of the previous trustees ended with the decision of this Court in HBC 287 of 2016, which was delivered on 26.7.2018. He further stated that Annual General Meeting held on 24.11.2016 it was decided to withdraw said action, but this was not done.

6. After removal of the previous trustees in pursuant to said judgment, new trustees were appointed.
7. According to the Plaintiff the new trustees appointed in 2018 had no power to withdraw money from MVT and such withdrawal has dried up all the accumulated money of MVT.
8. Defendants had not submitted any accounts of their affairs but blames the previous trustees for not finalizing the accounts of affairs prior to 2018 August, when new trustees were appointed.

### ANALYSIS

9. Plaintiff had instituted this action both in his personal capacity and also representative capacity. He had annexed some signatures stating that those were signatures of Mataqali Valewai, but this had not been established by Plaintiff with the submission of relevant register.
10. Plaintiff in his affidavit in support states “Annexed herewith and marked as SK1 is the signatories of the majority members authorizing myself to be spokesperson for the majority members in this matter”.
11. The documents annexed as SK1 states:

“They are to represent us in Court on issues affecting our mataqali in light of the judgment from the High court Case: Civil Action No HBC 287 of 2026.  
All proceedings by them in the court of law reflects our unanimous views and opinions.”
12. Plaintiff in this originating summons had sought permanent restraining orders against Defendants acting as trustees of MVT including dealing with the trust property.
13. Originating summons states that the relief sought are ‘pursuant to common law principles and pursuant to the inherent jurisdiction’.
14. In terms of Order 7 rule 3(1) of High Court Rules 1988, every originating summons must include a statement of questions that Plaintiff seeks relief. This is to identify the cause of action. Plaintiff had not done so and it is not clear what is his cause of action and under what legal provision he is seeking the relief, in the originating summons.
15. Plaintiff in the paragraph 10 of the Affidavit in support states:

“That the Defendants had also try to remove Kamal Doe t/a Kemps Wholesalers & Retailers a tenant leasing Mataqali Valewai commercial block at Natuba, Vunisea, Kadavu, a business dealings that was legally formulated and secured by old trustees. Now the Anare Sovu’s team under Civil Action No 206 of 2020 is trying to remove Kem’s wholesalers & Retailers from Vunisea, Kadavu, a move that is childish and unethical and its simplest economic terms and principles and what would be their business Plant for such commercial piece of?”

16. Plaintiff sought “urgent attention and action” for the third party said Kamal Doe who is not a party to this proceedings, but was part of the proceedings in HBC 206 of 2020 where the court had already ordered vacant possession from said Kamal Doe, after hearing evidence.
17. Plaintiff is precluded from re-litigating said eviction in a different action and cannot blame Defendants for execution of court order. This also shows bona fide of Plaintiff in this action.
18. Defendants admit that their time period as trustees had ended as they were appointed for a specific time period of three years in terms of Deed of Trust of MVT. They cannot operate as trustees of MVT in terms of said Deed of Trust. Plaintiff had not sought a declaration in this regard but sought removal which is superfluous.
19. In the affidavit in opposition Defendants had admitted they were appointed on 27.8.2018 the minutes of the said meeting is attached to the affidavit in opposition.
20. Since three years had lapsed on 26.8.2021, there were no authority for the said appointees to act as trustees after 26.8.2021 in terms of the Deed of Trust. The court is mindful of the restrictions imposed during the year of 2021 and also 2022 regarding gatherings due to spread of pandemic, but again that is not the sole reason for failure to call a meeting. Considerable time had lapsed after lifting of all the restrictions relating to such gatherings.
21. It should also be noted that according to Deed of Trust at Clause 4(d) under power of trustees States  
“To report to the members finances of the Trust on six monthly basis.”
22. There was no evidence of such power was exercised by the trustee who were appointed in 2018 pursuant to removal of previous trustees by this court.
23. Halsbury’s Laws of England (Vol98) Nature and Creation of Trusts states,

“An express trust is created when a person (the 'settlor') directs that certain identified property (the 'trust property') will be held either by him or by others in whom he has vested the property as trustees under an equitable obligation which binds the trustees to deal with that property (which is owned by them as a separate fund) for the benefit of beneficiaries who have an equitable proprietary interest in the trust property and its fruits from the moment the trust is created<sup>1</sup>.

Once the settlor has created his trust by vesting property or rights in a trustee, he drops out of the picture and has no rights in respect of the trust<sup>2</sup> unless he happens also to be a beneficiary or a trustee of the trust or he has expressly reserved some power within the trust structure (for example a power of revocation, a power to appoint capital to members of a specified class, a power to replace the trustees with new trustees)<sup>3</sup>.

The trustee holds the property or must exercise his rights of property in a **fiduciary** capacity, and stands in a fiduciary relationship to the beneficiary<sup>4</sup>. The property affected by a trust (the 'trust property' or 'trust estate') must be vested in the trustee<sup>5</sup>, whether the property is a legal estate, a legal right or an equitable interest where the legal title is vested in some other person<sup>6</sup>. The trustee will normally have administrative powers over the trust property, enabling him to manage and administer it for the benefit of the beneficiaries or to further purposes, as well as powers to distribute income or capital to the beneficiaries or to further purposes”

24. In this action an expressed trust was created by Deed of Trust that created MVT. The term of trusteeship is defined in the said deed of trust, and they are bound by equitable obligations.

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<sup>1</sup> This is a slightly modified version of a dictum of Aikens LJ. For the full dictum see *Williams v Central Bank of Nigeria* [2013] EWCA Civ 785 at [37], [2013] All ER (D) 60 (Jul).

<sup>2</sup> *Bradshaw v University College of Wales, Aberystwyth* [1987] 3 All ER 200, [1988] 1 WLR 190 per Hoffmann J; *Re Murphy's Settlements* [1998] 3 All ER 1, [1999] 1 WLR 282

<sup>3</sup> As to the distinction between a trust and a power see para 2.

<sup>4</sup> *Plowright v Lambert* (1885) 52 LT 646 per Field J. See also *Barnes v Addy* (1874) 9 Ch. App 244 per Lord Selbourne LC; *Re Barney*, *Barney v Barney* [1892] 2 Ch. 265; *Mara v Browne* [1896] 1 Ch. 199, CA, per AL Smith LJ; *Tito v Waddell (No 2)* [1977] Ch. 106–243, [1977] 3 All ER 129–243 per Megarry V-C; and para 393 et seq.

Exceptionally, settled land under the Settled Land Act 1925 is vested in the tenant for life and not the trustees of the settlement. The tenant for life is treated as a trustee to a limited extent: see the Settled Land Act 1925 s 107; and settlements vol 91 (2019) para 574. Note that, with very limited exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see s 2; and real property and registration vol 87 (2022) para 103; settlements vol 91 (2019) paras 406, 474 et seq<sup>5</sup>

<sup>6</sup> *Head v Lord Teynham* (1783) 1 Cox Eq Cas 57; *Poole v Pass* (1839) 1 Beav 600; *Knight v Bowyer* (1857) 23 Beav 609 at 635 per Romilly MR.

25. Trustees have fiduciary relationship with the beneficiaries, hence cannot refrain from submitting six monthly financial statements to the beneficiaries who were the members of MVT for over four years. Even during the period of restrictions on gathering circulating and exhibition of accounts on bi-annual basis could happen without hindrance.
26. Defendants are using actions of former trustees as scapegoat to hide their failure to act in fiduciary and or equitable obligation as to the finances of MVT. Though said bi annual submission was a power of trustees it is essential under circumstances.
27. Defendants had even failed to state the carried forward balance of the MVT account or accounts, when they assumed the duties as trustees.
28. Even after filing this action Defendants had neglected to submit any finances but had confirmed some investments, and state all the required written records of accounts were with them, but no such record submitted.
29. It is sad to note that one of the trustee is an accountant by profession, but had neglected to provide any annual financial statements and or bi-annual financials of MVT as required under Deed of Trust.
30. Defendants must submit updated finances forthwith and also direct the Secretary to the Trust and or the Defendants to call for a meeting in terms of Deed of Trust.
31. In paragraph five of the affidavit in support Plaintiff state that there were more than \$100,000 deposits in MVT accounts without substantiating such an amount was handed over in August, 2018, to Defendants.
32. Defendants had stated that they had maintained the records of the accounts since 2018, so it should not take long to prepare proper accounts and submit to the general membership. It is strange that they had not done so for over four years!

## CONCLUSION

33. Plaintiff had not identified the proper cause of action and law to be applied by way of a statement that is required to identify cause of action. This was required to be done by way of a statement in terms of Order 7 rule 3 (1) of High Court Rules 1988. Without such a statement it is not possible to identify the cause of action considering the nature of this action and the affidavit in support. So this application is incomplete and struck off due to non-compliance. Defendant had also sought to strike out affidavit in support for non-compliance of Order 41 rule 11(1) and (2) of High Court Rules 1988. I am not inclined to

strike off an affidavit on technical ground when they are curable. Even if I am wrong on that, Plaintiff in the affidavit in support had stated two main allegations. One is relating to eviction of a third party by Defendants in terms of a court order. This action for eviction was ordered by the court and cannot be questioned in this action at all. Next allegation is the handing over of more than \$100,000 by previous trustees to present trustees. There was no evidence that such an amount was handed over. So Plaintiff's allegations remains not proved. So, even on merits, Plaintiff's allegations were not substantiated. The term of trustees had ended in 2021 and there is no evidence of annual finance statement being submitted to the members irrespective of accounts being not completed prior to August, 2018. Defendants are directed to provide finances since August 2018 to membership of MVT and call a meeting in terms of Deed of Trust.

### **FINAL ORDERS**

- a. Defendants are directed to submit finances since 2018 August, on bi annual basis in terms of Clause 4(d) and or their fiduciary duties.
- b. A meeting of Mataqali Valewai Trust to be convened as soon as possible after finalizing the accounts in terms of said Trust Deed to appoint trustees.
- c. Plaintiff's originating summons struck off, subject to above orders.
- d. No cost granted considering circumstances of this case.

**Dated at Suva this 3<sup>rd</sup> day of February 2023.**



**Justice Deepthi Amaratunga**  
**Judge High Court, Suva**