

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

**Civil Action No. 330 of 2019**

**BETWEEN:**           **SAVENACA MUCA DUITURAGA** of Naitasiri, Turaga ni Yavusa, Turaga ni Mataqali suing for himself and on behalf of Yavusa and its members.

**1<sup>ST</sup> PLAINTIFF**

**AND:**               **SAKEO DUITURAGA** of Naitasiri, Turaga ni Koro, Lewe ni Mataqali suing for himself and on behalf of Yavusa and its members.

**2<sup>ND</sup> PLAINTIFF**

**AND:**               **EREMASI BASITUKA** of Naitasiri Lewe ni Mataqali suing for himself and on behalf of Yavusa and its members.

**3<sup>RD</sup> PLAINTIFF**

**AND:**               **THE ATTORNEY-GENERAL AND MINISTER FOR JUSTICE** sued on behalf of the Republic of Fiji Islands, Minister for Lands and Mineral Resources, The Director of Lands and Surveyor-General, The Registrar of Titles and Minister for Fijian Affairs.

**1<sup>ST</sup> DEFENDANT**

**AND:**               **NATIVE LANDS COMMISSION** as a duly constituted body under the Native Land Trust Cap 133.

**2<sup>ND</sup> DEFENDANT**

**AND:**               **ITAUKEI LAND TRUST BOARD** as a duly constituted body under the Native Land Trust Act Cap 134.

**3<sup>RD</sup> DEFENDANT**

**BEFORE:**           **Justice Vishwa Datt Sharma**

**COUNSEL:**       **Mr Kumar V.** for the Plaintiff  
**Mr Naidu Y. with Mr Cagilaba T** for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants  
**Mr Cati J.** for the 3<sup>rd</sup> Defendant

**Date of Judgment:**   **25<sup>th</sup> April, 2024 @ 9.30am**

**JUDGMENT**

**[Summons seeking for Appointment and/or allocation of a 'Special Judge' who possess Expertise and knowledge of iTaukei Customs and Traditions]**

[1] On the outset all Judges are appointed as 'Puisne Judges' and not as 'Special Judges'. Section 15(2) of the 2013 Fiji Constitution explicitly grants every party to a Civil dispute the right to have the matter determined by a Court of Law or an independent and impartial tribunal.

#### A. Introduction

[2] The Plaintiff filed a Summons on 11<sup>th</sup> May 2023 returnable on 16<sup>th</sup> May 2023 and sought for the following Orders:

- (1) That the trial of this action is set down for hearing from the 16<sup>th</sup> May 2023 be vacated and adjourned to a further date to be fixed.
- (2) That there be an appointment and/or allocation of a 'Special Judge' who possess expertise and knowledge of iTaukei Customs and Traditions to hear and determine this matter.

[3] The application is made in support of the affidavit deposed by Savenaca Muca Duituraga [1<sup>st</sup> Plaintiff] and pursuant to *Order 35 Rule 3, Order 3 Rule 4 (1) of the High Court Rules 1988, Constitution of the Republic of Fiji 2013, any other Rules of the High Court and under the Inherent Jurisdiction and powers of this Honorable Court.*

[4] The Plaintiff's application is vigorously opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

[5] All parties to the proceedings whilst opposing the application, furnish Court with their respective written and oral submissions.

#### B. Substantive Matter

[6] The Plaintiff's say that they are lawful and bonafide members of their clan:

**1<sup>st</sup> Plaintiff being:** Turaga ni Yavusa, Turaga ni Matqali Yavusa Calia.

**2<sup>nd</sup> Plaintiff being:** Naitasiri, Turaga ni Koro, Lewe ni Mataqali

**3<sup>rd</sup> Plaintiff being:** Lewe ni-Mataqali

Sues on their behalf and in their respective roles and on behalf of their constituent units and members (hereinafter collectively referred to as the "the Plaintiff Units") for their common interest, grievance and remedy in hereditary title and interests to their Calia Lands namely; Calia Crown Grant 131, Naibenubenu Crown Grant 133, Wainivau Crown Grant 130, Wainivau Crown Grant 121, Burebasaga Crown Grant 623, Nabulu Crown Grant 370, Naivitoka Crown Grant 126, Navivikida Crown Grant 115, Nacalia Crown Grant 235, Davuilevu Crown Grant 151, Davuilevu Crown Grant 207, Davuilevu Native Grant 208, Uluicalia Crown Grant 131, Koroqaqa, Naivuku, Nakadi and Tole.

[7] The Plaintiff's Claim for themselves, their Mataqalis, Yavusa and its members contain declarations and orders as enumerated in the Plaintiff's Writ of Summons and the Statement of Claim together with compensation, Damages, interests and costs accordingly.

### C. Plaintiff's Contention

[8] In Summary, this Court no doubt is competent.

[9] Plaintiff will employ an iTaukei counsel to conduct this matter.

[10] Plaintiff is not asking for disqualification of the current presiding Judge rather seek an appointment of an iTaukei Judge to hear and determine this case.

[11] The Plaintiff in Support of his application relied upon the **Republic of Fiji 2013 Constitution** and at paragraph 14 of the affidavit states:

**"14 That** furthermore, intending no offence, I am also of the firm belief which I humbly submit here for the courts consideration that it is the best interest of Justice that the file be assigned to a Judge who is knowledgeable of the customs and traditions of iTaukei people, since the issues being pleaded here revolves around the subject of iTaukei customs and communally owned land."

[12] The Counsel for the Plaintiff emphasizes, stresses and beseeches this honourable Court not to consider and mistake this application as an application for Judge shopping which is not the case here for all intents and purposes but rather is it's a balancing of convenience exercise before trial in attempts to save courts time and resources whilst also ensuring the instructions, rights and interest of our clients be protected in the sense the Plaintiffs witnesses are all Fijians, village elders, clan leaders and representatives of the Mataqali totalling to 15 witness. Although length of time stated therein is of 5 days; our evidence and/or bundle is 6 to 8 inches thick comprising of statements in both English and the archaic iTaukei language which at the time of trial during the tendering process will create issues, in so far as everything has to be read from the documents by the witnesses and whether the same is correctly translated by the interpreters and then the same to be recorded by your Lordship will not only be an exhaustive but also a time consuming exercise.

[13] **Section 15 of the 2013 constitution** deals with '**Access to Courts or Tribunals**' and apart from the **Bill of Rights**, also has to be considered along.

[14] **Section 97 Chapter 5, Part A of the 2013 Constitution** deals with Judiciary, Courts and Judicial Officers is also an important factor to be considered which empowers this Court to hear this application of the Plaintiff and apply to provisions of the 2013 constitutions to its full meaning and effect.

[15] The Counsel submitted that having an iTaukei Judge to hear this matter will ensure faith in the Plaintiff's in the form that they will be assured that whatever they are stating at the

time of the trial is being rightly heard and comprehended by the Judge who understands their rights enshrined in the constitution.

- [16] All the Plaintiff's alongside other witnesses will speak Fijian dialect and the issue of Interpretation will arise and if there is an iTaukei Judge, he will understand what the Plaintiffs are saying if there is mistake in interpretation, he would be able to clarify.
- [17] The Plaintiff's rely on documents in Fijian/iTaukei Language, which will be read, explained, relied upon and tendered into evidence which may confuse a Judge who is not an iTaukei descendant.
- [18] Since this case revolves around the ownership of iTaukei Lands, their culture, customs, tradition and language which is very precious to them, an iTaukei Judge would be more suited and in a better position to understand the circumstances of the case.

#### D. 1<sup>st</sup> and 2<sup>nd</sup> Defendants Contention

- [19] Refers to Section 15 (2) of the 2013 Constitution which provides:

"(2) Every party to a civil litigation has the right to have the matter determined by a Court of Law or if appropriate, by an independent and impartial tribunal."

Section 97 (3) provides:

"(3) No person may interfere with the Judicial functioning of the Courts, or unreasonably interfere with the administration functioning of the Courts."

- [20] The Plaintiff's Summons Contravenes the Constitutional provisions set out in **Section 15 (2)** and **Section 97 (3) of the 2013 Constitution** by seeking to **forum - shop** in an attempt to secure a particular Judge. The applications may be considered as an insult to the bench as it may be construed as a question of the competence of the bench.
- [21] The public right to a fair trial aims to protect the interest of the public and in the interest of fairness and justice, must be abided by and unequivocally adhered to.
- [22] The Summons seeking relief is unconstitutional and contravenes the principle of fairness and justice and therefore without merit and should be accordingly dismissed.

#### E. 3<sup>rd</sup> Defendant's Contention

- [23] Concur with submissions and decision made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants opposing Plaintiff's application.

[24] Plaintiff's summons holds no water and therefore this case to be heard and determined by the current presiding Judge.

[25] Court to deal with the issue of Deed of Cession.

## F. Determination

[26] The Plaintiffs are members of Mataqali or tribe known as Calia and Davuilevu and brings this action because of their common interest, grievance and remedy in hereditary, title and interests to their Calia Lands as enumerated in the Plaintiff's Statement of Claim.

[27] The Plaintiff's Summons seeks for appointment and/or allocation of the Judge who possess expertise and knowledge of iTaukei Customs and Traditions to hear and determine this matter.

[28] The Question that immediately triggers my conscious are:

- (i) Whether the Plaintiff's seeking for an order for disqualification of the current presiding Judge and to remit the case file to another Judge for allocation and hearing and determination?
- (ii) Whether the Plaintiff's are seeking to forum-shop in an attempt to secure a particular Judge?

[29] The Plaintiff's counsel representing when asked during the application hearing on this subject matter, the counsel representing the Plaintiff's replied that they are not seeking for the current presiding Judge's disqualification from the case nor doing any forum-shopping.

[30] He added that he was not even doubting the competence of the current presiding judge rather it is a Balancing of Convenience exercise to ensure the instructions, rights and interests of the Plaintiff's/clients be protected accordingly.

[31] However, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counsel whilst opposing the Plaintiff's application submitted otherwise; stating that the Plaintiff's Summons is seeking to Forum-shop in an attempt to secure a particular Judge.

[32] Further, the Counsel requesting the 3<sup>rd</sup> Defendant whilst also opposing the Plaintiff's application also supported the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's submission made to the Court for Forum-shopping and added that the Plaintiff's summons seeking for orders holds no water and that the submissions in terms of the current presiding Judges competence speaks volumes and therefore, the presiding Judge should hear and determine this case.

[33] **Section 15(2) of the 2013 Fiji Constitution** which is the supreme law of the country explicitly grants every party to a Civil dispute the right to have the matter determined by

a Court of Law or an independent and impartial tribunal.

- [34] This provision underscores the importance of ensuring that Legal proceedings are conducted fairly and impartially, without the undue influence of party's seeking to manipulate the system for their own advantage.
- [35] **Section 97 (3) of the 2013 Constitution** prohibits any person from interfering with the Judicial functioning of the Courts or unreasonable interfering with the administrative functioning of the Courts. This provision safeguards the integrity and independence of the Judiciary, preventing external interference that could compromise the fairness and impartiality of judicial proceedings.
- [36] Making an application and requesting a change of Judge in a Court case is a serious matter and must be approached with a clear understanding of the Legal system and seeking an order to appoint and/or allocate an iTaukei Judge on the specific ground that warrant such a request.
- [37] There are no issues and rational of biasness, conflict of interest and/or Incompetency raised by the Plaintiff in his application seeking for the orders therein.
- [38] However, a change of a Judge is sought and an iTaukei Judge to be appointed and allocated in this case for the only reason based on that particular Judge's for the appointment who possess expertise and knowledge of iTaukei Customs and Traditions to hear and determine the issue in the current case.
- [39] Being above in mind, the Court can neither ascertained nor can see that it has been established or there is any better reason or grounds and/or any rational for the Plaintiff to seek an appointment/allocation of an iTaukei Judge to this case to determine the pending issue in this case.

## **G. In Conclusion**

- [40] The Plaintiffs have failed to raise and establish to this Court any specific grounds that warrant the appointment and/or allocation of a 'special Judge' to hear and determine the current case. Therefore, the Plaintiff's Summons of 11<sup>th</sup> May 2023 seeking for an appointment and/or allocation of a 'special Judge' who possess expertise and knowledge of iTaukei Customs and Traditions to hear and determine this case is doom to fail and is accordingly dismissed.
- [41] Judges appointed and or allocated with any cases by their Qualification, Experience, Expertise, and training are capable of understanding and comprehending the facts related to a case and upon hearing the evidence and application of the relevant applicable law(s) are capable of determining the existing substantive issue(s) in the cases before them accordingly.

## H. Costs

[42] The application proceeded to full hearing and parties furnished Court with their respective written submissions and orally argued the application.

[43] It is only just and fair that I grant each of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants summarily assessed costs (each) of \$1,000 (total of \$3,000) to be paid within 14 days timeframe by the Plaintiff.

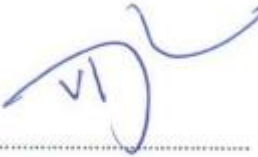
[44] I now proceed to make the following orders.

## I. Orders

- (i) The Plaintiff's Summons of 11<sup>th</sup> May 2023 seeking for the appointment and/or allocations of a 'Special Judge' who possess Expertise and knowledge of an iTaukei Customs and Traditions to hear and determine this case in its entirety is accordingly dismissed.
- (ii) The Plaintiffs' to pay each of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants a summarily assessed costs of \$1,000 each, a total of \$3,000 within 14 days timeframe.

Dated at **Suva** this **25<sup>th</sup>** day of **April, 2024**.



  
Vishwa Datt Sharma  
PUISNE JUDGE

cc: Sunil Kumar Esquire, Nausori  
Office of the Attorney General, Suva  
Native Land Commission, Suva  
iTaukei Lands Trust Board, Suva.