

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

**Civil Action No. HBC 348 of 2022**

**BETWEEN** : **MUA GORDON**  
**Plaintiff**

**AND** : **MARSEU LOROSIO VAIVAO**  
**First Defendant**

**MONICA VAIVAO**  
**Second Defendant**

**ROTUMA ISLAND COUNCIL**  
**Third Defendant**

**DISTRICT OFFICER OF ROTUMA**  
**Fourth Defendant**

**OFFICE OF THE ATTORNEY GENERAL**  
**Fifth Defendant**

**Counsel** : **Mr V Faktaufon for the Plaintiff**  
**Mr S Fatiaki for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants**  
**Ms N Narayan for the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants**

**Hearing** : **21 June 2024**

**Affidavits/Submissions** : **2 July 2024<sup>1</sup>, 31 July 2024<sup>2</sup>, 1 August 2024<sup>3</sup> & 8**

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<sup>1</sup> Affidavit of Luke Savu for 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants.

<sup>2</sup> Submissions for 3<sup>rd</sup> to 5<sup>th</sup> Defendants.

August 2024<sup>4</sup>

Judgment : 4 August 2025

## **JUDGMENT**

**(On a summons to set aside default judgment)**

- [1] Firstly, my sincere apologies for the delay issuing this judgement.
- [2] This claim involves a dispute between Rotuman<sup>5</sup> landowners over a house situated on Rotuman land. The Plaintiff seeks orders from the High Court over ownership and use of the house.
- [3] The First and Second Defendants argue that the High Court has no jurisdiction to make the orders and that this is a matter to be resolved by the Rotuman landowners themselves in accordance with custom or by way of an appeal to Rotuma Lands Commission under the Rotuma Lands Act 1959.

### **Background**

- [4] The Plaintiff and First Defendant are siblings. The Second Defendant is the wife of the First Defendant. The First and Second Defendants reside in Rotuma on the land that is the subject of these proceedings. The Plaintiff resides in Canada.
- [5] The disputed land is Fuag Ri and is called Niutoto. This land is owned communally by the Plaintiff and First Defendants' family clan, called 'kainaga', on their paternal side<sup>6</sup>. This type of land ownership is identified in the Rotuma Lands Act as '*hanua ne kainaga*'.

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<sup>3</sup> Affidavit for Plaintiff in reply to affidavit of Luke Savu.

<sup>4</sup> Plaintiff's Legal Submissions.

<sup>5</sup> A 'Rotuman' is defined under s 2 of the Rotuma Lands Act 1959 as a person of Rotuman or part-Rotuman descent.

<sup>6</sup> Their mother is registered with a different kainaga in Rotuma.

- [6] The First and Second Defendants have lived on this land for at least the last 20 years. In or about 2017, an arrangement was made between the Plaintiff and First Defendant to build a house on the land for their parents. The Plaintiff agreed to pay the cost of building the house, such cost being about \$70,000 to \$100,000. It was agreed that the First and Second Defendants would stay in the house and look after their parents.
- [7] The house was built. Sadly, around this time their father passed away. As such, by 2022, the First and Second Defendants were occupying the house looking after the mother (**Maria**) of the Plaintiff and First Defendant. In about 2022, Maria and the Second Defendant fell out resulting in a dispute between the Plaintiff and the First and Second Defendant. The Plaintiff wanted the First and Second Defendants to vacate the house, leaving Maria in the house. However, the First and Second Defendants wished to remain in the house.
- [8] In accordance with the custom of their kainaga, the First Defendant called a clan meeting to resolve the dispute. A meeting was held on 20 August 2022 and was well attended. The First and Second Defendant attended along with the Plaintiff and Maria. Many of the members of the kainaga attended along with their district chief and, also, the then District Officer and Station Officer. A record of the Minutes of the meeting was prepared and is produced in this proceeding. The dispute between the Plaintiff and First Defendant was laid out clearly in the Minutes. A number of persons had an opportunity to speak on the matter, including the Plaintiff and First Defendant, the clan chief and the Station Officer. The Minutes reflect a constructive meeting, allowing all who wished to speak to do so. It is apparent that the discussion was aimed at reaching consensus, with family values and conciliation being encouraged. Ultimately, the Minutes record the clan decision as follows:

*Marseu [the First Defendant] and his family will not move, especially the grandson.*

*Mua [the Plaintiff] won't lose the house, for she built it.*

*Mua would be free to go back and forth whenever she wants.*

- [9] It was also decided that the First Defendant be appointed Puer Fo'ou (new care keeper) of the Fuag Ri. It was recorded in the Minutes that the clan unanimously

agreed with the outcome - although it is evident from the record of the Plaintiff's comments that she was not happy with the outcome.

[10] It does not appear that the Plaintiff was willing to abide the clan decision and, as such, the First Defendant sought a second meeting with the kainaga to seek reassurance of their decision in the August meeting. The second meeting occurred on 27 October 2022. Again, a detailed Minutes was recorded for the meeting. The meeting was well attended although without the Plaintiff who had by this time returned to Canada. The previous decision was unanimously confirmed by the clan. There was a full airing of the dispute and another opportunity for those present to speak. The First Defendant spoke as did his mother. The then District Officer is recorded as having stated:

- i. *That the Rotuma Act gives the Chiefs their power over the land.*
- ii. *That the clan must be informed when erecting houses on clan land.*
- iii. *That the clan must unanimously agree to stop Mua's [the Plaintiff] furniture from coming in except for anything that is for the mother's needs.*
- iv. *Marseu [the First Defendant] has the authoritative decision over what to do at Niutoto and with the stuff that comes into the house.*

[11] The Plaintiff was not appeased by the second decision of the clan (she claims she was not informed of the same). She sought to evict the First and Second Defendant from the house. According to her Statement of Claim, the Plaintiff served an eviction notice on the First and Second Defendants on 18 November 2022.

### **Present proceedings**

- [12] As the two defendants did not vacate the house, the Plaintiff filed the present proceedings on 12 December 2022. The orders sought by the Plaintiff being that the First and Second Defendants vacate the Plaintiff's house, that the First and Second Defendants not enter the house without the consent of the Plaintiff and that the First and Second Defendants do not interfere with any decision making in relation to the house.<sup>7</sup>
- [13] As no defence was filed, the Plaintiff obtained default judgment for possession of the land in May 2023. The First and Second Defendants subsequently learned of the judgment (and possibly the proceedings). They instructed counsel, who in turn filed a summons in July 2023 to set aside the default judgment.
- [14] Following the filing of affidavits by the Plaintiff and the First Defendant, the matter came on for hearing before Mansoor J on 31 October 2023. The hearing was adjourned part heard in order for written submissions to be filed by the parties on jurisdiction. The question that arose at the hearing was whether the court had jurisdiction to decide a dispute between Rotuman landowners involving Rotuman land.
- [15] The parties<sup>8</sup> subsequently filed written submissions on jurisdiction.<sup>9</sup> Shortly thereafter Mansoor J resigned and the matter was allocated to me. I heard the summons on 21 June 2024. I directed that the District Officer (the Fourth Defendant) file an affidavit in respect to the issue of jurisdiction. The other parties were given leave to respond to the new evidence.

### **Evidence and Submissions filed after the hearing**

- [16] The current District Officer at Rotuma, Luke Savu, executed an affidavit on 2 July 2024. Mr Savu confirmed that the land in question is registered with the District Office at Rotuma on its register of lands. He also stated that the First Defendant was

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<sup>7</sup> Counsel advised at the hearing that, sadly, the mother of the Plaintiff and the First Defendant passed away some time after these proceedings were filed.

<sup>8</sup> With the exception of the Third to Fifth Defendants.

<sup>9</sup> The First and Second Defendant's submissions were filed on 23 November 2023 while the Plaintiff's submissions were filed on 8 December 2023.

appointed as the ‘*puer fo ’ou*’ of the hanua ne kainaga by his clan. Mr Savu annexed the Minutes for the two meetings on 20 August and 27 October 2022. He explained, as follows, the customary practice in Rotuma for resolving disputes<sup>10</sup>:

- (a) *In the event of disputes pertaining to clan land, the traditional/customary method of resolving a dispute is for the disputing parties to call for a clan meeting;*
- (b) *The aggrieved party(ies) informs the district chief and the pure (clan head) for his/her clan of his/her grievance, then the pure calls for a clan meeting by inviting the adult members of the clan (it is customary for the pure to also invite the district chief, district officer and police as witnesses to the meeting, but these persons do not have a say/influence in the decision-making);*
- (c) *At the clan meeting, the disputing parties bring their grievance before the clan and the clan will resolve the dispute; and*
- (d) *Clan decisions are made through votes and the clan decision is what is decided by the majority.*

[17] Mr Savu further clarified at paragraph 9:

- (a) *I was appointed as the District Officer of Rotuma on or about 17 March 2023;*
- (b) *The District Officer at the time of this dispute resigned sometime in December 2022;*
- (c) *The District Officer and the Rotuma Island Council do not have the mandate to deal with Hanua Ne Kainanga, land;*
- (d) *The District Officer is responsible for the administration of the island of Rotuma and only acts as an intercessory between Rotuman and non-*

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<sup>10</sup> At paragraph 6.

*Rotuman matters, while all Rotuman matters are dealt with through their traditional/customary methods. In this regard, when clans make decisions pertaining to their land, they forward the minutes of their clan meeting, outlining their decision to the District Officer as evidence of the clan's decision;*

*(e) The Rotuma Island Council is only responsible to ensure that the various Rotuman clans abide by their traditional/customary laws and obligations. The Rotuma Island Council is constituted by a Chairperson, 7 district chiefs, 7 district representatives, (appointed by the various clans situated in each district through a district meeting) the District Officer, the subdivisional medical officer Rotuma, and the senior agricultural officer Rotuma, and of these, the latter 3 only have an advisory role.*

[18] The Plaintiff filed an affidavit in response, stating that she did not agree with the outcome of the clan meeting in August 2022. She challenged the legitimacy of the meeting and whether it complied with the provisions in the Rotuma Lands Act. She also stated that the meeting of 27 October 2022 had a predetermined outcome.

### **Decision**

[19] The main issue before me is whether this Court has jurisdiction to determine a dispute between Rotuman landowners involving Rotuman land. I am grateful for the detailed and thorough submissions of counsel. They have advised that this issue has not previously been determined by the courts – which surprises me. If the Court does not have jurisdiction, then the Plaintiff was not entitled to default judgment and, in such circumstances, the judgment must be set aside and the Plaintiff's proceeding struck out.

[20] There is much common ground between the parties. The land in question is Rotuman land registered under the Rotuma Lands Act. Both the Plaintiff and First Defendant are land owners of the Fuag Ri owned communally by their kainaga. The dispute pertains to the house only. The Plaintiff paid for the construction of the house. The house is situated on the communally owned land.

[21] On the basis of the agreed facts, and having regard to the provisions in the Rotuma Lands Act, I am satisfied that this Court does not have jurisdiction to decide the Plaintiff's claim. The dispute is between Rotuman landowners involving Rotuman land. It is a dispute that must be decided by the parties' clan (kainaga) in accordance with their customs/traditions. If they are not satisfied with the outcome of the clan's decision then their recourse is to the Rotuman Lands Commission under the Rotuma Lands Act.

[22] I have arrived at this determination on the following analysis and construction of the Rotuma Lands Act:

- i. Pursuant to the interpretation provision under the Rotuma Lands Act<sup>11</sup>, there are different types of Rotuman land ownership, being hanua ne kainaga, hanua ne 'on tore, and hanua pau. Hanua ne kainaga means *'land held by that family community of Rotumans known as a kainaga, the members of each kainaga holding the land in undivided ownership and the acknowledged head of the family being the pure, (or overlord) of the land'*. Hanua pau means *'land which is vested in a single individual Rotuman by sale or gift with the intention of creating hanua pau, or by an instrument deposited with the district officer as provided in section 26'*.
- ii. A Rotuman is registered as a member of a kainaga. They may only be registered in one kainaga and will be registered in their father's kainaga.<sup>12</sup>
- iii. Land that is registered under the Rotuma Lands Act is to be dealt with under that Act and not by the Land Transfer Act.<sup>13</sup> The Fuag Ri is registered with the District Office at Rotuma.

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<sup>11</sup> Section 2.

<sup>12</sup> Section 4(2) of the Rotuma Lands Act.

<sup>13</sup> Section 3(2) of the Rotuma Lands Act.

- iv. Pursuant to s 10(1), land registered under the Act ‘*shall vest in the persons registered as owners of such land...such rights, privileges, powers and obligations in relation to such land as are in this Act specifically referred to or are incidental to Rotuman native custom in so far as such custom is not inconsistent with the provisions of this Act*’. Ownership and use under s 10 are to be in accordance with ‘*native custom*’. Section 13 provides that no Rotuman or body of Rotumans may ‘*deal with*’ Rotuman land without the ‘*consent*’ of the District Officer – it appears from Mr Savu’s affidavit that the District Officer does not interfere with the decision-making of an individual kainaga with their land and simply recognises these decisions by receiving and retaining Minutes of the decisions by the kainaga. The role of the District Officer at the kainaga meetings is to remind the persons present of the requirements under the Rotuma Lands Act and to be witness to the meetings – in this manner, it can be said that by witnessing the meeting and by accepting the Minutes the District Officer is consenting to the kainaga’s dealing with the land.
- v. The emphasis on custom is emphasized at ss 10 and 18 – the latter provides that owners of the land are to deal with the land amongst themselves ‘*in accordance with Rotuman native custom*’.<sup>14</sup> Subsection (2) provides that no such dealing of the land shall be carried out without the written consent of the ‘*pure*’ and ‘*the majority of adult members of the Kainaga or ‘on tore resident in Rotuma*’. This is consistent with the District Officer’s affidavit that the clan make their own decisions on their land based on their customs/traditions.
- vi. The scheme of the Rotuma Lands Act is clear. Rotuman landowners are empowered to make their own decisions on the use of their land. They do so, in accordance with their customs and traditions.
- vii. The Plaintiff argues that the Court has jurisdiction because the dispute pertains to the house and not the land. Under s 2 of the Rotuma Lands

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<sup>14</sup> The Rotuman landowners can also create a hanua pau.

Act, 'land' is defined as '*includes land covered with water...all things growing thereon, and **buildings** and other things permanently affixed thereto*'.<sup>15</sup> A house is a building and as such falls within the definition of land.

- viii. A Rotuman landowner is not without recourse where they are dissatisfied with a decision of the clan pertaining to the land. A member of a clan may bring a dispute to the Rotuma Lands Commission for a decision under s 4. The Rotuma Lands Commission consists of three commissioners. They are empowered under s 4 to decide disputes pertaining to Rotuman land. The procedure for these inquiries is prescribed under s 5. Section 6 permits an appeal to the Commissioner, Eastern Division from decisions of the commissioner and provides that such decision on appeal shall be conclusive and final.
- ix. Alternatively, a member of the kainaga may pursue an appeal under s 32 to the Commissioner, Eastern Division from a decision on a dealing in land. Again, according to s 32 the decision on appeal is final. The Plaintiff and First and Second Defendants appear to agree that the Plaintiff could have exercised an appeal under s 32 from the clan decisions of 20 August and/or 27 October 2022<sup>16</sup>. The Third to Fifth Defendants disagree, arguing that the clan decisions do not constitute dealings as the term is used under s 32. They argue that a dealing is something in the nature of a transfer or alienation of the land. I am unable to accept that narrow construction given the wide definition of dealing under s 2 which includes '*any transaction of whatever nature by which land is affected under this Act*'. I am satisfied that clan decisions on the use of hanua ne kainaga are dealings with land that may be appealed to the Commissioner, Eastern Division under s 32.

[23] The above construction of the Rotuma Lands Act is in line with the court's construction of the iTaukei Lands Act 1905. Disputes over the use of iTaukei land is

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<sup>15</sup> My emphasis.

<sup>16</sup> The Plaintiff argues that this Court nevertheless has jurisdiction to make orders because the District Officer has failed or refused to submit an appeal to the Commissioner, Eastern Division.

required to be resolved by the iTaukei Lands Commission under s 16(1) of the iTaukei Lands Act. The application of s 16(1) was considered by the Court of Appeal in *Namatua v Native Lands and Fisheries Commission* [2005] FJCA 85 (4 March 2005). The Court of Appeal stated:

[31] *In our view, the originating summons is misconceived because the High Court has no jurisdiction to deal with a dispute that may arise under s 16 or on appeal to an Appeals Tribunal under s 7 of NLA. A decision of the Appeals Tribunal is final unless the provisions under s 7 of NLA are not complied with. That is not the complaint in this case.*

[32] *The High Court has no jurisdiction to deal with the dispute.*

[33] *Consequently, there can be no cause of action to be tried in the High Court.*

...

[35] *The trial judge recognized that the High Court has no jurisdiction when he stated:*

*In the Court's view, what it has been asked of is to decide upon as contained in the Plaintiffs' Originating Summons, goes to the issue of whether this Court has jurisdiction and therefore the competence to delve into and review the processes and procedures including the decisions of the NLC involving native customs and traditions, that are governed by its own laws and conventions. Under these circumstances, while it deliberates upon these jurisdictional issues, it would not, this Court believes, be advisable and in fact unwise, to prematurely intervene and act in any manner that would prove prejudicial to the exercise of the powers and discretions of such body.*

[24] The Court of Appeal reiterated at [38]:

*In our view, such a result is not a satisfactory one. The fact remains that the real question in controversy between the parties remains unresolved as to the*

*boundaries. The only lawful way to resolve this is for the 1<sup>st</sup> Respondent to determine the issue under s 16 of NLA.*

[25] In *Tokatoka Yavutu v Vunisa & Ors* [2010] FJHC 18 (28 January 2010), Inoke J considered the same issue, determining:

*[5] The parties here are Fijians. The proprietorship of the land in dispute has been determined and the Register signed by the Chairman of the Native Lands Commission. The dispute in this case relates to the conditions of the ‘allotment’ of the blocks comprising the land, but it is nevertheless a ‘dispute’ within s 16(1). That section requires the Native Lands Commission or a delegate of it appointed by the Minister to Enquire into it. This Court therefore has no jurisdiction.*

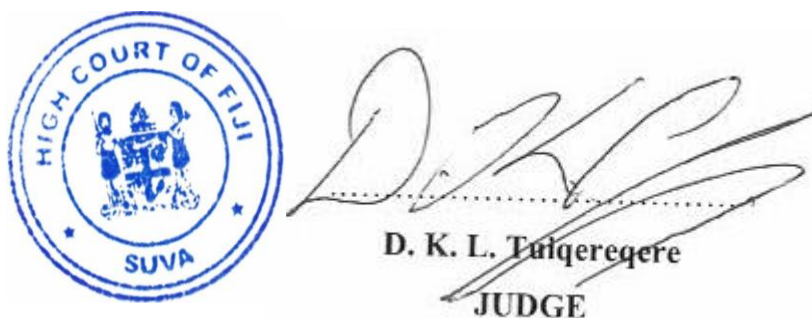
*[6] Further, if the parties are dissatisfied with the Commission’s decision, they have a right of appeal to the Native Lands Appeals Tribunal under s 7(1) of the Act. By virtue of that section and my decision in State v Native Lands Appeals Tribunal, [2009] FJHC 164 ... (14 August 2009)...this Court has no jurisdiction to hear this dispute should the matter go that far.*

[26] There is good reason for these land disputes to be resolved under the Itaukei Lands Act or the Rotuma Lands Act. Disputes between indigenous landowners over their land are subject to customary laws and practices. While the provisions in the Rotuma Lands Act are not identically worded as those contained in the iTaukei Lands Act, the structure of the two statutes are similar and in my view the design and purpose are the same. With respect to the Rotuma Lands Act, disputes are intended to be resolved by each kainaga and where a party remains dissatisfied with the decision they have recourse to the Rotuma Lands Commission and /or the Commissioner, Eastern Division.

## **Orders**

[27] This Court does not have jurisdiction to determine the Plaintiff's claim. My orders are as follows:

- i. The Plaintiff's default judgment for possession of the land sealed on 22 May 2023 is set aside.
- ii. The Plaintiff's Writ of Summons filed on 12 December 2022 is struck out.
- iii. The First and Second Defendants are entitled to costs summarily assessed in the amount of \$2,500 to be paid by the Plaintiff within one month.



**Solicitors:**

**Vama Law for the Plaintiff**

**Fatiaki Law for the First and Second Defendants**

**Attorney-General's Chambers for Third, Fourth and Fifth Defendants**