

1. NAIMISIO DIKAU NO. 1
2. AISAKE VALETIRI
3. NAIMISIO DIKAU NO. 2
4. SIDORE SOROBULA
5. ABOROSIO BOLARUA

A

v.

1. NATIVE LAND TRUST BOARD
2. MOHAMMED ALI WOODCRAFT LIMITED

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[SUPREME COURT—Rooney, J.—9 May 1986]

Civil Jurisdiction

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*(Native Land—Mataqali is owner of land—locus standing of members—members of Mataqali have no capacity to bring action.)*

S. M. Koya for the Plaintiff  
 A. Rogan for the First Defendant  
 H. Lateef for the Second Defendant

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Five plaintiffs in their personal capacity and as representatives of 22 other members of the Mataqali Nabati sued the defendants who are respectively the Native Land Trust Board (NLTB) and a Company which had obtained from the NLTB a license to cut and remove timber on land of which the Mataqali Nabati, was the registered owner in the Registrar of Native Lands maintained under Native Lands Act (Cap. 133) (NLA) s. 4.

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Plaintiffs sought:

- (1) A declaration that the licence issued by the first defendant to the second defendant is unlawful and void in law;
- (2) an injunction against the defendants from entering, cutting or felling or carrying away timber from the land;
- (3) damages and costs.

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Objection was taken that plaintiffs had no locus standing to proceed with the action. It was said that the plaintiffs and those they represent comprise 27 out of 72 Fijians who are members of the Mataqali Nabati that the owner of the land is the Mataqali and not its individual members; that plaintiffs have no capacity to bring this action at all. *Meli Kaliavu & Others v. The Native Land Trust Board* 5 F.L.R. 17 in which it was held:

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"If any damage had been suffered by the Mataqali as a result of any action by the Native Land Trust Board for which the Board is liable in law to pay damages, the Mataqali could undoubtedly recover them. It was not however

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A open to individual members to sue and recover damages in their own personal capacity. Nor could the plaintiffs succeed in their claim to the equitable remedy of an injunction.”  
was cited.

And see *Serupepeli Dakai & Others v. The Native Land Development Corporation & Others* 542/79 per Kermode, J. thus:

B “No member of a land owning Mataqali can legally object to any other person coming onto his Mataqali’s land with the authority or permission of the Native Land Trust Board. He cannot personally bring an action for trespass to the land or claim damages for a trespass which does not directly infringe his personal rights. In this instant case the plaintiffs have purported to object to a lease granted to the first defendant and they seek damages for alleged trespass.

C The control and administration of all native land is vested in the Native Land Trust Board. If there is any trespass to Native Land it is the Board which is entitled to maintain an action.”

D In reply Counsel argued that plaintiffs were not precluded from seeking a declaration as they have a right to use the land owned by their Mataqali. He referred to Regulation 17 of Native Land (Forest) Regulations made pursuant to s. 33 of Native Land Trust Act (Cap. 134); further s. 23 of NLA did not exclude the right of interested parties to seek relief by way of declaration if their rights are interfered with by Trespass.

E *Held*: Whatever rights the plaintiffs may have to the use and occupation of the land or its produce arise out of their membership of the Mataqali Nabati. The scheme of the Native Land Act, Cap. 133 envisages proprietary units as being the only recognised native owners of such land (see section 2). A Mataqali is the principle type of community which can be recognised as a proprietary unit (sections 6, 8 and 10(2)). The concept of individual rights of ownership is nowhere recognised. The averment in paragraph 2 of the statement of claim that the members of the Mataqali Nabati (which includes the plaintiffs) as the landowners cannot be accepted as correct. It is the Mataqali which is the owner of the land in question.

F The claims of the plaintiffs were too indirect and unsubstantial to justify proceedings for a declaration relating to land in which they have no proprietary interest (*Thorne R.D.C. v. Bunting* (1972) 1 Ch. 471). See also *Meli* (supra) as to the lack of locus standi by members of a Mataqali. The plaintiffs had no locus standi.

G Action dismissed.

Cases referred to:

*Guaranty Trust Company of New York v. Hannay and Company* (1915) 2 K.B. 536  
*Meli Kaliavu & Others v. The Native Land Trust Board* 5 F.L.R. 17.

H *Serupepeli Dakai & Others v. The Native Land Development Corporation & Others* (542/79).  
*Thorne R.D.C. v. Bunting* (1972) 1 Ch. 471.

ROONEY, Mr Justice.

## Judgment

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In this action the plaintiffs sue in their personal capacity and as representatives of twenty-two other members of the mataqali *Nabati*. The defendants are the Native Land Trust Board and a limited company which has obtained from the Board a licence to cut and take away timber on land of which the mataqali *Nabati* is the registered owner in the Register of Native Lands maintained under section 6 of the Native Lands Act, Cap. 133. The plaintiffs seek:

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- (1) A declaration that the licence issued by the first defendant to the second defendant is unlawful and void in law;
- (2) an injunction against the defendants from entering, cutting or felling or carrying away timber from the land;
- (3) damages and costs.

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After Mr Koya had opened his case on behalf of the plaintiffs, Miss Rogan for the first defendant raised a preliminary objection that the plaintiffs had no locus standi to proceed with the action. That objection should have been taken at a much earlier stage in the proceedings and preferably before the order for directions was made. But, as the objections goes to the root of the matter, it cannot be defeated by mere delay.

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The substance of the objection is that the plaintiffs and those they represent, together comprise 27 member out of total of 72 Fijians who are members of the Mataqali *Nabati*. It is submitted that the owner of the land is the mataqali and not its individual members and the plaintiffs have no capacity to bring this action at all.

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I have been referred to two decisions of this Court. The first is *Meli Kaliavu & Others v. The Native Land Trust Board* 5 F.L.R. 17 in which it was held that "if any damage had been suffered by the Mataqali as a result of any action by the Native Land Trust Board for which the Board is liable in law to pay damages, the mataqali could undoubtedly recover them. It was not however open to individual members to sue and recover damages in their own personal capacity. Nor could the plaintiffs succeed in their personal claim to the equitable remedy of an injunction".

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It was so decided in 1956. In an unreported case *Serupepeli Dakai & Others v. The Native Land Development Corporation & Others* (542/79) Kermode J. did not refer to the earlier decision. The issue of the locus standi of the plaintiffs was not raised. However, in the course of his judgment the learned Judge said:

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"I appreciate that it might be difficult for the plaintiffs, to understand that legally no individual Fijian can be said to 'own' any native land in the sense that the word 'own' usually conveys. Fijians in land owning units have customary rights to occupy and use native land but individually they are not 'owners' of such land.

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'Native Owners' in both the Native Lands Act and the Native Land Trust Act is defined as: 'native owners' means the mataqali or other division or subdivision of the natives having the customary right to occupy and use any native land. Members can enjoy two rights usually associated with ownership namely the right to occupy and use the land but they cannot sell or charge the land.

No member of a land owning mataqali can legally object to any other person coming into his mataqali's land with the authority or permission of the Native

A Land Trust Board. He cannot personally bring an action for trespass to the land or claim damages for a trespass which does not directly infringe his personal rights. In this instant case the plaintiffs have purported to object to a lease granted to the first defendant and they seek damages for alleged trespass.

B The control and administration of *all* native land is vested in the Native Land Trust Board. If there is any trespass to Native Land it is the Board which is entitled to maintain an action.

C If the Fijian land tenure system is to enure, it must be appreciated that the interests of all members of every land owning mataqali from new born infants to the old and infirm and the interests of unborn generations of Fijians must be safeguarded and protected. The land must be controlled and administered as trust land by a trustee or Board of Trustees for the benefit of the Fijians now and in the future entitled to occupy and use such land.

D Government has set up land agencies to deal with native land. One is the Native Land Commission charged with the duty of (inter alia) ascertaining what lands are the rightful and hereditary property of native owners. The other is the Native Land Trust Board charged with the duty of controlling and administering all native land for the benefit of the Fijian owners. Their powers and duties are spelled out in the Native Land Trust Act under which the Board was created.

While criticism may if justified properly be levelled at the way the Board functions, there can be no justifiable criticism levelled at the existence of the Board or some similar suitable central agency to control and deal with all native land for the benefit of the native owners.

E The Fijian land system is one which in the modern commercial world requires a legal entity to control and manage the land. The English legal system which we have adopted was not designed to cope with a land system which has no physical or corporate legal owner. Creating trustees by law and vesting control and administration of all native land in trustees, which as a board is by law a body corporate with perpetual succession, is not only a practical and legal necessity but is eminently desirable in the best interests of the Fijian people and unborn generations of Fijians."

F Miss Rogan submitted that if individual members of any mataqali or other land holding unit were given the right to sue because they objected to the manner in which the defendants exercised its power of control over native lands, there would be no end to the litigation that might ensue.

G Mr Lateef for the second defendant submitted that this was an action in trespass. Section 23 of the Native Land Trust Act, Cap. 134 confers upon the Board the right to take such actions and that this excludes by implication the rights of the Fijian owners and occupiers of the land to institute such proceedings.

H In reply Mr Koya contended that the plaintiffs are not precluded from seeking a declaration as they have a right to use the land owned by their mataqali. He referred to regulation 17 of the Native Land (Forest) Regulations made under section 33 of the Native Land Trust Act, Cap. 134. This regulation reads:

"17(1) Subject to the succeeding paragraphs, nothing in these Regulations shall be deemed to affect any native fishing and hunting rights established by

native custom or to prohibit the cutting and removal from native land by any Fijian of any timber, reeds or other forest produce, which may be necessary for the construction or repair of a dwelling-house for the permanent abode of himself and his family, for the construction of temporary huts on any land lawfully occupied by him, for the upkeep of his fishing stakes and landing places, for firewood to be consumed for domestic purposes or for the construction and upkeep of any work for the common benefit of the native inhabitants of his village.

(2) Except with the general or special permission of the Conservator no person shall be permitted under paragraph (1) to cut or remove any form of forest produce in a locality outside the district in which he ordinarily resides, nor may any tree specified in class A, B, C or D of the First Schedule be felled under the aforesaid paragraph solely for removal of its bark or felled or converted in contravention of the limitations prescribed by regulation 12.

(3) Subject to the limitation in paragraph (2), forest produce for the purposes stated in paragraph (1) may be taken free by individuals for their own use or for the use of others entitled to the same privilege:

Provided that where free and voluntary assistance is not available there may be issued at the discretion of a forest officer empowered by the Conservator in that behalf a free permit authorising the employment of paid labour for the cutting and collection of such produce. Forest produce cut and removed by a person licensed under regulation 3 is subject to royalty except as provided for in subparagraph (a) of paragraph (1) of regulation 8."

He argued further that section 23 of the Act does not exclude the right of interested parties to seek relief by way of declaration if their rights are interfered with by way of trespass.

Whatever rights the plaintiffs may have to the use and occupation of the land or its produce arise out of their membership of the mataqali *Nabati*. The scheme of the Native Lands Act, Cap. 133 envisages proprietary units as being the only recognised native owners of such land (see section 2). A mataqali is the principal type of community which can be recognised as a proprietary unit (sections 6, 8 and 10(2)). The concept of individual rights of ownership is nowhere recognised. The averment in paragraph 2 of the statement of claim that the members of the mataqali *Nabati* (which includes the plaintiffs) as the landowners cannot be accepted as correct. It is the mataqali which is the owner of the land in question.

The tenure of native lands by Fijians is described as follows in section 3 of Cap. 133:

"3. Native lands shall be held by native Fijians according to native custom as evidenced by usage and tradition. Subject to the provisions hereinafter contained such lands may be cultivated, allotted and dealt with by native Fijians as amongst themselves according to their native customs and subject to any regulations made by the Fijian Affairs Board, and in the event of any dispute arising for legal decision in which the question of the tenure of land amongst native Fijians is relevant all courts of law shall decide such disputes according to such regulations or native custom and usage which shall be ascertained as a matter of fact by the examination of witnessed capable of throwing light thereupon."

A There is nothing in that section which gives a right to any member of a mataqali to challenge the action of the Native Land Trust Board established under the Native Land Trust Act, Cap. 134. The section seeks to regulate the rights of Fijians in accordance with native custom. This is not a suit in which the question of the tenure of land amongst native Fijians is relevant. It is an action in which a group seeks to assert a right on the basis that they have a beneficial interest in land owned by the mataqali of which they are members.

B The common law and the rules of equity cannot be applied to a system of land holding which is alien to and independent of the law of England as the received law of this Dominion. In the result there is in existence a system of legal dualism.

C A mataqali cannot be equated with any institution known and recognised by common law or statute of general application. The composition, function and management of a mataqali and the regulation of the rights of members in relation to each other and to persons and things outside it are governed by a customary law separate from and independent of the general law administered in this Court.

In *Guaranty Trust Company of New York v. Hannay and Company* (1915) 2 K.B. 536, Bankes L. J. stated at 572:

D ".....It is the person, therefore, who is seeking relief, or in whom a right to relief is alleged to exist, whose application to the Court is not to be defeated because he applies merely for a declaratory judgment or order, and whose application for a declaration of his right is not to be refused merely because he cannot establish a legal cause of action. It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established, as I think it is established, that relief is not confined to relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible."

G That quotation has long been used to support the view that declaratory actions should not be limited. The general nature of the statement presupposes the existence of a legal right recognised by law. This is not the case here. The claims of the plaintiffs are too indirect and insubstantial to justify proceedings for a declaration relating to land in which they have no proprietary interest. (*Thorne R.D.C. v. Bunting* (1972) 1 Ch. 471).

H It was established by *Meli Kaliavu and Others* (supra) that individual members of a mataqali have no *locus standi* to sue and recover damages in their own personal capacity or to obtain an injunction. Their right to obtain a declaration must similarly be circumscribed. Such rights as they may have as members of a mataqali are not founded on the common law or any statute.

About 85% of the land in Fiji is owned by mataqali and other proprietary units. The number of people interested as members of these units comprises nearly one half of the population. None of these people have any individual title to the land in question. To admit the possibility that any member of a mataqali with a sense of grievance could move this Court for declarations involving not only the Native Land Trust Board, but, other parties who do business with the Board, might have the effect of innundating this and other courts with a pernicious type of litigation which would bring the orderly control of Fijian land by the Board to an end.

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I am of the view that the plaintiffs in this case have no locus standi. I uphold the objections made and dismiss the action.

In regard to costs, the defendants are entitled to such costs as they would have received if they had applied to strike out the proceedings at an earlier stage. They cannot claim the costs of a full trial. The taxing master should proceed accordingly and exercise his discretion in the matter having regard to this direction.

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*Judgment for the Defendants.*

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