

RATU EPI VOLAVOLA

A

v.

ADI LADY LALABALAVU LITIA KALOAFUTOGA MARA

[SUPREME COURT—Rooney, J.—16 May 1986]

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Civil Jurisdiction

Trustees Land—Yanuca Island—freehold, not native land. Originating Summons—plaintiff beneficiary under a Trust Deed—defendant sole trustee—orders sought on allegation of mismanaged of Trust—Trust Deed in respect of the land—Trustee formerly Secretary for Native Affairs—further Trust Deed executed to give effect to the wishes of Chiefly Tokatoka Nakuruvakarua of which plaintiff a member—defendant then became trustee—striking out of certain inappropriate prayers—refusal to strike out summons. Discussion as to land tenure.

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T. Fa for the Plaintiff

K. Bulewa for the Defendant

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Application under Order 19 r.19(1) and (3) of the Supreme Court Rules by the abovenamed defendant, following the filing of a conditional appearance, for an order striking out the Originating Summons on the grounds that it disclosed no cause of action and was an abuse of the process of the court.

The plaintiff stated he was making the application in his capacity as beneficiary under a Trust Deed (the Trust Deed) dated 5 July 1930. The application named the defendant as sole trustee and sought "many declarations and orders" against the defendant on the basis that she had mismanaged the trust property and, in particular, that she be removed as trustee.

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The relief claimed by the plaintiff included (numbering is added for convenience)—

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- (i) "A declaration that Nakuruvakarua Company Limited as existing and is being managed by the Defendant contrary to the provisions of the Companies Act, 1983 in particular sections 4, 15, 133, 150, 160 and 180."
- (ii) "An Order that the police continue their criminal inquiry into the forgery by the said Aporosa Lalabalavu and thereafter to refer the relevant police inquiry docket to the Director of Public Prosecutions for his necessary action."
- (iii) "An Order that a new trust instrument be drawn out specifying the role of the trustees, increasing the number of trustees to three, clearly spelling out the way in which beneficiaries are to be paid, the time and regularity in which beneficiaries are paid yearly and ascertaining the names of surviving beneficiaries and where they are living."

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A The learned Judge made comments on the application and the perceived history of the matter e.g. the plaintiff was applying in his capacity as a member of a Fijian landowning unit in respect of the administration of Fijian land; as such he had no right to bring or maintain these proceedings.

B The Judge noted the defendant had not filed an affidavit in reply to the plaintiff's application.

The Judge proceeded on the assumption that the plaintiff had correctly recorded the history of the Trust Deed under which he claimed as beneficiary.

The Court said—

C The island, Yanuca, was situated off the cost of the province of Nadroga. The resort hotel "The Fijian" has been built on it.

The island is freehold land delineated in a plan endorsed on Certificate of Title Vol. 33 Folio 3336 dated 23 August 1909.

D Before 1930 an official, known as the Native Commissioner was registered as proprietor of the island.

The office of Native Commissioner was abolished and replaced by the Secretary for Native Affairs.

E On 5 July 1930 the then Secretary executed the Trust Deed in respect of the land which included the following—

"And whereas the said lands are held by the Proprietor on behalf of and for the benefit of certain native Fijians:

F Now these presents witness that the said Secretary for Native Affairs hereby declares that he stands seized of the said land in trust for the persons named in the Schedule hereto and their lawful heirs and successors according to Native custom as though the said persons constituted one Mataqali and the provisions of sections 5 and 6 of the Native Lands Ordinance 1905 apply to the said land.

G S.5 and s.6 of the Native Lands Ordinance 1905 as in force in 1930 referred to the extinction or reduction of mataqalis, the Crown declared to be the ("ultimus haeres") (Ed.'s note) "...the last or remote heir, that is, the sovereign who succeeds failing all relations (Scots Law) "Dictionary of English Law" Lord Jowitt p. 1798. On extinction and in the event that a mataqali became so reduced in members as to be unable to cultivate the lands or make use of them according to local custom the land could be purchased by a Provincial Council.

H By invoking that section the Trust Deed had sought to provide for a failure of lawful heirs and successors of the 28 persons named in the schedule, stated to be names of the family of the "Kalevu" of Cuvu, Nadroga.

In 1965 the Secretary for Native Affairs Ratu Penaia Kanatabatu Ganilau as trustee leased the land to Fiji Resorts Limited for a term of 99 years.

On 18 January 1969, so it appeared, a meeting of the Tokatoka Nakuruvakarua was held at Cuvu at which among other things it was resolved that the defendant be appointed as Trustee in place of the Secretary for Native Affairs. A

On 30 October 1969 Ratu Penaia Kanatabatu Ganilau gave effect to the wishes of the Tokatoka Nakuruvakarua by executing the Deed of Trust which recited that—

“... the persons in trust for whom the said land is held have signified their wish that the said Adi Lady Lalabalavu Litia Kaloafutoga Mara be appointed trustee. B

“... to hold the said land upon the trusts mentioned in the said Declaration of Trust dated the 5th day of July 1980”

The plaintiff in his founding affidavit stating he is a member of the chiefly Tokatoka Nakuruvakarua in the village of Cuvu, claimed that by virtue of that membership he is a beneficiary under the Trust Deed, his father being the Ratu Mosese Volavola whose name appeared second on the list of persons in the Schedule to the Trust Deed, being one of the persons who was instrumental in securing the defendant's appointment as trustee in 1960. C

The Court said the Native Lands Act (Cap. 133) dealing with Fijian Land and by s.5 and s.6 giving express recognition to Mataqali and other proprietary units defined (s.2). “Native Lands” as those which are neither crown land or the subject of the Crown Grant; and “Native owners” in the context relates to the owners of native lands. D

Yanuca Island is not native land but freehold, and has been treated as such since 1906. It has a Certificate of Title and is registered under the Land Transfer Act (Cap. 131), has never been placed under the control of the Native Land Trust Board or administered as if it were native lands. E

The Court referred to the Native Lands Act in making provision for such land and to the creation of a mataqali—only possible by custom. The concept of freehold is not recognized by Fiji Law. The tenure of Fijian land as provided for in s.3 of the Native Lands Act is something outside and beyond the law which applies to all other land in Fiji. F

It was necessary the beneficiaries under the Trust Deed could be identified. Hence the listing in it of 28 persons then living and “their lawful heirs and successors according to Native custom as though they constituted one Mataqali and the provisions of s.5 and s.6 of the Native Land Ordinance (Cap. 1905) apply to their land”. In other words, the Court said, “The persons entitled to the benefits of the Trust Deed were not the heirs under English law.....but the heirs under Fijian custom”. G

The declaration did not (nor could not) create a Mataqali under Fijian custom. H

- A Yanuca Island, once it was the subject of a Crown Grant could not be treated as native land. It was made the subject of a trust in favour of those considered the rightful owners.

So the Trust Deed, having listed the 28 persons made reference to their "lawful heir etc." according to Native custom as though the said persons constituted one Mataqali"

- B The plaintiff's membership of the Tokatoka Nakuruvakarua was incidental to his right to being regarded as a beneficiary under the Trust Deed with rights mentioned against the trustee.

- C *Held:* Some of the reliefs mentioned in the Originating Summons were not appropriate to the procedure adopted being those mentioned earlier which accordingly and for reasons stated viz paragraphs (i), (ii) and (iii) were struck out.

The application to strike out otherwise was refused.

Cases referred to:

- D *Meli Kaliavu and Others v. N.L.T.B.* 5 F.L.R. 17.

ROONEY, J.

Judgment

- E On the 3rd April, 1986 the plaintiff instituted this action against the defendant by an originating summons. The summons called upon the defendant to attend before a Judge in chambers on the 2nd May 1986. It is to be noted that the form of summons used did not require the defendant to enter an appearance. However a conditional appearance was entered on the 18th April, accompanied by an application by the defendant for an order under Order 18 Rules 19(1) and (3) of the Supreme Court Rules striking out the originating summons on the grounds that it disclosed no cause of action and is an abuse of the process of the Court.

- F The plaintiff states that he is making the application in his capacity as a beneficiary under a Trust Deed (the Trust Deed) dated the 5th July 1930. He names the defendant as the sole trustee. He seeks many declarations and orders against her based on allegations that she has mismanaged the trust property and in particular he seeks an order that she be removed as trustee.

In the application to strike out it is alleged that the plaintiff is making his application to the Court in his capacity as and by virtue of his membership of a Fijian landowning unit in respect of the administration of Fijian Land and that as such he has no right to bring or maintain these proceedings. [*Meli Kaliavu and others v. N.L.T.B.* 5 F.L.R. 17].

The defendant has not filed an affidavit in reply. I shall proceed to examine the application to strike out on the assumption that the plaintiff has correctly recited the history of the Trust Deed under which he claims to be a beneficiary.

The island of Yanuca is situated off the coast of the province of Nadroga. The resort hotel known as "The Fijian" has been built upon it. The island is freehold

land delineated on a plan endorsed on Certificate of Title Vol. 33 Folio 3336 dated 23rd August 1909. Sometime prior to 1930 an official, known as the Native Commissioner, was registered as proprietor of the island. The office of Native Commissioner was abolished and replaced by the Secretary for Native Affairs. On the 5th July 1930 the then Secretary, a Mr Armstrong, executed the Trust Deed in respect of the land which included the following:

"AND WHEREAS the said lands are held by the Proprietor on behalf of and for the benefit of certain native Fijians:

NOW THESE PRESENTS WITNESS that the said Secretary for Native Affairs hereby declares that he stands seized of the said land in trust for the persons named in the Schedule hereto and their lawful heirs and successors according to Native custom as though the said persons constituted one Mataqali and the provisions of sections 5 and 6 of the Native Lands Ordinance 1905 apply to the said land."

Sections 5 and 6 of the Native Lands Ordinance 1905, as in force in 1930, referred to the extinction or reduction of mataqalis. The Crown was declared to be the *ultimus haeres* on extinction and in the event that a mataqali became so reduced in members as to be unable to cultivate the lands or make use of them according to native custom the land could be purchased by a Provincial Council. By invoking that section the Trust Deed sought to provide for the situation that would arise if there was a failure of lawful heirs and successors of the 28 persons named in the schedule which was stated to be the list of the names of the family of the "Kalevu" of Cuvu, Nadroga.

In 1965 the Secretary for Native Affairs, Ratu-Penaia Kanatabatu Ganilau as trustee leased the land to Fiji Resorts Limited for a term of 99 years.

It appears that on the 18th January, 1969 a meeting of the Tokatoka Nakuruvakarua was held at Cuvu at which among other things it was resolved that the defendant be appointed as trustee in place of the Secretary for Native Affairs. On the 30th October, 1969 Ratu Penaia gave effect to the wishes of the Tokatoka Kuruvakarua by executing a deed of trust. This deed recited that "the persons in trust for whom the said land is held have signified their wish that the said Adi Lady Lalabalavu Litia Kaloafutoga Mara be appointed trustee to hold the said land upon the trusts mentioned in the said Declaration of Trust dated the 5th day of July 1930".

The plaintiff states in his founding affidavit that he is a member of the chiefly Tokatoka Nakuruvakarua in the village of Cuvu. He claims that by virtue of his membership of the Tokatoka he is a beneficiary under the Trust Deed. He further states that his father is the Ratu Mosese Volavola whose name appears second on the list of persons in the schedule to the Trust Deed. He was one of the persons who was instrumental in securing the defendant's appointment as trustee under the arrangements made in 1960.

It was submitted by Mr Bulewa for the defendant that the land held under the Trust Deed must be regarded as native land whose ownership is vested in a proprietary unit equivalent in all respects to a mataqali. He submitted that a member of a mataqali cannot claim to own the mataqali land or any right or interest therein. The leading authority cited is *Meli Kaliavu & Others v. The N.L.T.B.* (supra) where it was held that as individual members of a mataqali were not the owners of mataqali lands, they could not sue to recover damages personally or obtain an injunction for any wrong done to the mataqali itself.

A The Native Lands Act Cap. 133 which deals with Fijian land and which gives express recognition to mataqali and other propriety units by sections 6 and 9, defines "native lands" as lands which are neither Crown lands or the subject of a Crown grant (Section 2). "Native owners" in this context relates to the owners of native lands.

B The land comprising Yanuca island is not native land as defined by the Native Lands Act, as it is freehold. It has been treated as such since 1906. It has a Certificate of Title and is registered under the Land Transfer Act Cap. 131. It has never been placed under the control of the Native Land Trust Board or administered as if it were native land.

C The tenure of Fijian land as provided for a Section 3 of the Native Lands Act is something outside and beyond the law which applies to all other land in Fiji. A mataqali or other land owning unit recognised under Fijian custom can only be created by that custom. It has the nature and incidents recognised and understood by Fijian custom. It is not possible to create a mataqali by deed or other instrument and give it ownership over land which is subject to a different regime. The concept of freehold is not recognised by the custom of the Fijian people. Common ownership in which the co-owners are either joint tenants or tenants in common is part of the received law of Fiji as modified by local statutes. It has no application to Fijian land.

D As Yanuca Island has once been the subject of a Crown grant and could no longer be treated as native land, it was made the subject of a trust in favour of the people considered to be the rightful owners. I have no information as to how this situation first arose and when, but, the solution adopted was a practical one.

E It was necessary that the beneficiaries under the Trust Deed could be identified. Hence the Trust Deed, having listed the 28 persons then living, made reference to "their lawful heirs and successors according to Native custom as though the said persons constituted one Mataqali and the provisions of section 5 and 6 of the Native Land Ordinance Cap. 1905 apply to the said land". In other words, the persons entitled to the benefits of the Trust Deed were not the heirs under English law as applied in Fiji, but the heirs under Fijian custom.

F The declaration in the Trust Deed did not (nor could not) create a mataqali under Fijian custom. All it did was to provide a means by which the beneficiaries of future generations could be identified with certainty and whether their numbers increased or declined the ultimate destination of the title to the land was determined.

G The plaintiff's membership of the Tokatoka Nakuruvakarua is incidental to his right to be regarded as a beneficiary under the Trust Deed. As a beneficiary he enjoys rights against a trustee as provided for under the Trustee Act Cap. 65 and under the system of equity developed in the former Court of Chancery in England and which is now administered by this Court. It follows that the application to strike out these proceedings must be dismissed with costs.

H I have considered the relief claimed by the plaintiff and I am of opinion that not all of them are appropriate to the procedure adopted. Among other things the plaintiff seeks:

"A Declaration that Nakuruvakarua Company Limited is existing and is being managed by the Defendant contrary to the provisions of the Companies Act, 1983 in particular sections 4, 15, 133, 150, 160 and 180." A

The Nakuruvakarua Company Limited is not a party to this action. Whether the company exists or not is not a matter for a judicial pronouncement as this can be ascertained by a search in the Registry of Companies. If the company is being managed contrary to the provisions of the Companies Act, that may be investigated by the Registrar of Companies in the first instance under section 167 of the Companies Act. I therefore strike out the prayer quoted above. B

The plaintiff claims:

"An Order that the police continue their criminal inquiry into the forgery by the said APOROSA LALABALAVU and thereafter to refer the relevant police inquiry docket to the Director of Public Prosecutions for his necessary action." C

The police are not parties to these proceedings and any complaint against them of any failure to carry out their duty in this regard cannot be dealt with otherwise than on an application for judicial review. This relief cannot be allowed and is struck out.

The plaintiff also asks the Court to make: D

"An Order that a new trust instrument be drawn out specifying the role of the trustees, increasing the number of trustees to three, clearly spelling out the way in which beneficiaries are to be paid, the formula in which they are paid, the time and regularity in which beneficiaries are paid yearly and ascertaining the names of surviving beneficiaries and where they are living."

This would appear to involve a variation of the Trust Deed as contemplated by section 86 of the Trustee Act. Subject to the powers granted to the Court by section 92, it would be necessary to serve all the other beneficiaries before the Court could consider making any such order. I delete this prayer from the summons. E

Under clause 25 of the prayers the plaintiff asks for the winding up of Nakuruvakarua Company Limited. Such a claim cannot be entertained on an originating summons, but, must be brought under the provisions of Part VI of the Companies Act 1883. I strike out the prayer. F

Application dismissed.