

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

000042

AT LAUTOKA

Civil Jurisdiction

Action No. 190 of 1975

BETWEEN: MOSESE RADREU and TOBIA SAUNIVARU Plaintiffs

A N D : 1. EMPEROR GOLD MINING COMPANY LIMITED
2. EMPEROR TIMBER INDUSTRIES COMPANY LIMITED Defendants

A N D : NATIVE LAND TRUST BOARD Third Party

Mr. S.M. Koya, Counsel for the Plaintiffs
Mr. B.C. Patel, Counsel for the 1st and 2nd Defendants
Mr. A. Kato, Counsel for the Third Party.

JUDGMENT

This action arises out of the defendants' tree felling operations on native land near Nadarivatu in the Western Division.

The plaintiffs, a landowning mataqali, allege in para 1 of their Statement of Claim that the land affected is native land near the Koroboya Forest and that they own it. They claim in para 7 that without the consent and authority of the plaintiffs the defendants have felled 451,472 super feet worth \$33,860.40c at \$7.50 per super feet between 1/8/75 and 5/11/75. In other words the defendants have trespassed on the plaintiffs' land. That sum is claimed as liquidated damages along with a claim for general damages coupled with a prayer that the defendants be restrained from pursuing their logging operations on the plaintiffs' land.

It is not disputed that the defendants hold a timber concession from the Native Land Trust Board, hereinafter called the Board, under an agreement Exhibit D.3, dated 28.5.71, made between the defendants and the Board. The defendants plead that the timber concession, Exhibit D.3, lawfully entitled them to carry out their logging operations. They admit, in para 7 of the defence, removing 427,462 log feet and allege payment to the Board of \$4287.00 in royalties. There is a counter claim but the defendants abandoned it during the trial. As an alternative the defendants plead that the Board warranted that they had the authority to grant the concession and that the defendants are entitled to be indemnified by the Board if found guilty of trespass and they joined the Board as a third party.

It would be as well to point out at this stage that a timber concession is simply an authority or licence from the Board to enter upon native land in order to fell and remove trees. It does not amount to a lease or such like disposition of land.

The Board, as third party, allege that under the Native Land Trust Ordinance they have authority to grant timber concessions on all native land without the consent of any mataqali. Alternatively they state that the plaintiffs consented to the concession being granted. At the beginning of the trial the Board agreed with the plaintiffs that this was native reserve which is a special category of native land.

Annexed to the concession, Exhibit D.3, is a plan showing the boundaries of the timber concession which is oblong in shape and extending north/south longitudinally and overlapping the land of three mataqalis although the agreement makes no reference to any mataqali. Exhibit D.6 is an enlargement of part of the aforesaid plan which presents the timber concession only. It reveals that the northern portion of the concession covers 2462 acres of land belonging to mataqali Nabunisiga; south of this it embraces 4,926 acres of land belonging to mataqali Virara and the southern most tip is on land belonging to the plaintiffs covering 770 acres.

I will first consider the contention of the Board that they have authority to grant timber concessions on all native land without the consent of the mataqali land-owners. I am adopting this course because the plaintiffs agree that their 770 acres of land fall within the concession granted under Exhibit D.3. If the Board do require the consent of the plaintiffs in granting timber concessions to logging companies then the issue will arise as to whether the plaintiffs consented.

The onus of arguing the extent of the Board's authority to grant timber concessions was undertaken by Mr. B.C. Patel the advocate for the defendants.

The Board is a creature of statute namely the Native Land Trust Ordinance, Cap. 115 and the extent of its powers can only be expressed under that Ordinance.

S.4(1) of the Native Land Trust Ordinance, Cap. 115 states- "4.(1). The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners."

In other words it makes the Board legal owners of all native land as trustees for the Fijian owners.

By definition, as set out in S.2, which I will refer to later, native land includes native reserve and Part III of the Ordinance deals specifically with native reserve curtailing the powers of the Board in dealing with native reserve as opposed to other native land.

Part III of the Ordinance is headed "Native Reserves" and comprises Sections 16 to 18 inclusive. S.16(1) and (2) state as follows:-

"S.16(1). Subject to the provisions of the Crown Acquisition of Lands Ordinance, the Forest Ordinance, the Oil Mines Ordinance, the Mining Ordinance and to the provisions of this section, no land in any native reserve shall be leased or otherwise disposed of.

"(2) Leases or licences may with the consent of the native owners be granted by the Board to native Fijians in accordance with regulations made under S.33 of this Ordinance. "

Mr. H.C. Patel submitted that under S.16(1) the power of the Board to grant licences on native reserve land was not limited except by the ordinances referred to in S.16(1) and he laid emphasis on the Forest Ordinance, Cap. 128.

Subsection (1) of S.16(supra) does not refer to licences but to the disposal or alienation of native reserve. Licences are covered by S.16(2).

Mr. Koya, for the Plaintiffs, argued that S.16(3) requires the Board to obtain the consent of the Fijian owners, which under S.16(3)(c), is obtained in such manner as may be prescribed by regulations under S.33, or in the absence of such a regulation then consent of the Fijian owners will be obtained in such manner as the Board considers appropriate. However, S.16(3), unlike S.16(2), refers only to leases and not to licences of native reserve land and therefore it does not help in ascertaining the Board's authority in regard to granting licences. Moreover S.16(3) is solely concerned with dispositions of native reserve to the Land Development Authority and to no one else; therefore it has no reference to commercial enterprises such as the defendants and does not apply to these proceedings.

S.16(2), which deals with the granting of leases and licences on native reserve expressly limits such grants to one

class of persons namely native Fijians. It does not permit licences on native reserve to be granted to non-Fijians, and this approach is endorsed by S.16(3) which permits leases of native reserve to be granted to the Land Development Authority "as if it were a native Fijian." In addition S.16(3)(a) forbids the Land Development Authority from subletting or disposing of such land except to a native Fijian.

Thus Part III of the Ordinance limits the powers of the Board to grant leases and licences of native reserve to one class namely Native Fijians. If the Board has authority to grant licences on native reserve to the defendants or to any persons other than native Fijians it will have to be found elsewhere in the Native Land Trust Ordinance and the Board argue that it is found in the Forest Ordinance.

Licences to fell trees are governed by the Forest Ordinance, Cap.128. Section 33(1) thereof, authorises the Conservator to issue licences to fell trees but S.33(2) requires the prior consent of the Board in the case of native land. S.2 of the Forest Ordinance defines native land as -

"land which is neither Crown land nor the subject of a Crown or native grant but includes land granted to a mataqali under S.18 of the Native Land Trust Ordinance."

The same definition of native land is contained in S.2 of the Native Land Trust Ordinance which also includes the definition of native reserve as "land set aside and proclaimed as such under the provisions of this Ordinance."

Land is set aside as native reserve under S.18(1) of the Native Land Trust Ordinance which empowers the Governor General to set aside land for the use of a mataqali as native reserve. Thus the definitions of native land in the Forest Ordinance and the Native Land Trust Ordinance include native reserve.

The land which is the subject of this action has been accepted by the third party at the beginning of the trial as being native reserve for the purposes of these proceedings.

S.33(2)(3) and (4) of the Forest Ordinance requires the Conservator to obtain the consent of the Board, or the Director of Lands or the registered owner or lessee before he can issue a licence to fell trees on native land, Crown Land or freehold land

as the case may be. Thus the Forest Ordinance treats the Board in the same way as any other owner or registered lessee in requiring the Conservator to obtain the owner's consent before he issues a licence to fell timber on their lands. The Conservator does not require the mataqali's consent but that of the Board which is vested with legal ownership by virtue of S.4 of the Native Land Trust Ordinance.

The Board's wide powers over native land are emphasised by S.5 of the Native Land Trust Ordinance which forbids Fijian owners of native land from in any way disposing of, transferring or charging their own land without the Board's consent and any agreement purporting to do so without such consent is null and void. It is worth noting that native land in S.5 includes native reserve.

For the purposes of these proceedings S.7 of the Native Land Trust Ordinance reads,

"S.7. Subject to the provisions of _____
_____ the Forest Ordinance _____
_____ no licence in respect of native land shall be
granted save under and in accordance with the provisions of
this Ordinance."

Section 8(1) of the Native Land Trust Ordinance which empowers the Board to grant leases and licences of native land excludes native reserve. It reads:

"S.8(1). Subject to the provisions of the next succeeding section, it shall be lawful for the Board to grant leases or licences of portions of native land not included in a native reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed."

Section 9 merely enacts that the Board has to be satisfied that the grant of a lease or licence is not adverse to the interests of the Fijian owners. It does not set out any special procedure to be adopted by the Board in order to ensure that the interests of Fijian owners shall not be adversely affected.

The parties' advocates in presenting submissions did not refer to Section 8(1).

When Mr. Koya argued that the Board required the consent of the plaintiffs before granting the timber concession his submission was, in my view, only correct if the land is native reserve. The combined effect of sections 8(1) and Part III of the Native Land Trust Ordinance is to limit the Board's powers of granting timber concessions on native reserve to native Fijians. Hence in purporting to grant the concession to the defendants the Board were, if it is native reserve, exceeding their powers under the Native Land Trust Ordinance unless they are saved by any other Ordinance. Mr. B.C. Patel submits that they are saved by the Forest Ordinance.

Section 16(1), of the Native Land Trust Ordinance is subject to the provisions of the Forest Ordinance but it would be strange if the Forest Ordinance vested powers in the Board in relation to native reserve beyond those vested in it by the Native Land Trust Ordinance which created the Board. In fact it would be strange if the Forest Ordinance vested any powers in the Board because it is only concerned with the Board in the same way as any other landowner.

The Forest Ordinance is intended to protect the forests of Fiji from being denuded of trees and Section 33 controls logging operators by requiring them to obtain licenses from the Conservator who can only issue them a licence to fell trees if the land owner consents. Thus Section 33(2) of the Forest Ordinance states,

"(2) A licence relating to native land shall only be issued with the prior consent of the Native Land Trust Board."

Licences under the Forest Ordinance differ from those granted under the Native Land Trust Ordinance. Timber concessions issued by the Board authorise a grantee to take timber from the land but this is of no effect unless the Conservator issues a tree felling licence. A "Forest Licence" merely permits the felling of trees which would otherwise be illegal under the Forest Ordinance. It falls into a similar category as other licences viz., to use a motor vehicle on a road, to possess firearms, sell alcohol etc. The Conservator cannot permit a licensee to remove the logs; he merely authorises the act of felling. The logs can only be removed by the landowner, in this case the Board, or the person to whom

they conceded that right, in this case the defendants. Therefore a "Forest Licence", cannot usurp the landowner's proprietary rights by purporting to permit the licensee to remove the landowner's timber. Hence if a person, including the Board, mistakenly grants a timber concession thinking that he owns the land the subsequent issue of a 'Forest Licence' to the purported grantee does not make the concession lawful. The result is the same if the Board purports to grant a timber concession to a non-Fijian on native reserve thinking that it is non-reserve or in the mistaken belief that it has power to grant timber concessions on native reserve.

Therefore if this is native reserve the fact that the defendants hold a licence from the Conservator does not make the concession lawful. I conclude, with respect, that Mr. B.C. Patel's submission fails.

To sum up:-

Section 4 of the Native Land Trust Ordinance places the Board, as trustees, in the position of legal owners of all native land including native reserve.

Section 8(1) gives the Board an owner's powers of leasing and licensing native land which is not native reserve.

Part III of the Ordinance bars the Board from granting rights over native reserve to any but native Fijians and also requires the Board to obtain the consent of the native landowners.

Those powers are not extended by the provisions of the Forest Ordinance Cap. 128.

In my view, the Board, on their admission that the land is native reserve acted ultra vires in purporting to grant the concession. If this is native reserve the defendants are trespassers.

My conclusion, if it be correct, raises problems in regard to the parties' pleadings because they do not allege that the land in question is native reserve and this is important having regard to the Board's limited powers of dealing with native reserve.

Submissions of the parties were directed to whether or not the Board required the consent of the plaintiffs in granting the concession. Although para 1 of the plaintiffs' reply to the defence alleges that the concession is void it gives no particulars of the basis for that allegation and Mr. Koya, for the plaintiffs,

argued in support thereof by contending that the Board, as trustees needed the consent of the beneficiaries, i.e. the plaintiffs, before granting the concessions. He stated that Section 16(3) made reference to the need for consent and submitted that the rules of equity obliged the Board to obtain the plaintiffs' consent. By reason of Section 8(1) and Part III I would say, with respect to Mr. Koya, that his submissions appertaining to consent were superfluous in that if this is native reserve the Board could not, even with the plaintiffs' consent, grant such a concession to the defendants. If it is not native reserve then, in my view, consent of the mataqali is not required.

When I was considering my judgment I came upon Section 8(1) and requested the advocates to address me on the effect it had upon the pleadings and where, if at all, the onus lay in alleging that the land was or was not native reserve. It took several weeks to get the parties together again to argue that aspect.

Mr. Koya then referred to para 7 of his Statement of Claim which alleges that consent of the plaintiffs had not been obtained, the implication being that the reference to consent inferred that the land was native reserve. However, para 7 says that it was the defendants who had not sought the consent of the plaintiffs whereas the Ordinance places that obligation on the Board if the land is native reserve and not on the persons dealing with the Board. In any event if this is native reserve, the question of the plaintiffs' consent is immaterial because the defendants cannot receive a concession on it. In my view there was no suggestion in the Statement of Claim that this was native reserve. It was simply pleaded as native land.

Mr. Koya also submitted it was sufficient to allege that the acts of the defendants were unlawful and that he had done so. If this is not native reserve there is no evidence that the defendants are trespassers; on the contrary the concession Exhibit D3 provides evidence that they are not trespassers. The Third Party's admission that the land is native reserve cannot bind the defendants.

It is frequently sufficient in actions for trespass for the plaintiff to prove he has possession and leave it to the

defendant to justify his alleged acts of trespass.

The plaintiffs could not have been misled by the Third Party's admission that this is native reserve because they have throughout the proceedings assumed that the concession would have been lawful if the plaintiffs had consented. Whereas if this is native reserve the defendants would be trespassers even if the plaintiffs had consented. Were the plaintiffs relying on this being native reserve a capable and experienced lawyer such as Mr. Koya would have pleaded it. The pleading would have been unanswerable had it been proved. At this stage even if the plaintiffs were allowed to amend their Statement of Claim so as to allege that this is native reserve or if I otherwise included an issue as to whether or not this is native reserve, there is no evidence on which one could hang such an amendment. Consequently I must proceed on the Statement of Claim as it stands which is that this is native land and that the defendants are trespassers because the plaintiffs did not consent to their activities. The existence of the concession is a good answer to that claim. I find that the defendants are not trespassers provided they have kept to the territorial limits of their concession.

The issue remaining is whether the defendants have been operating within the limits of their concession. This has been denied by the plaintiffs, but the latter have led no evidence on this issue. P.W. 1, Tombia Senivalu, gave evidence as a member of the Mataqali. He referred to the concession area shown in Exhibit D3 and stated that his mataqali were not approached for their consent. The absence of mataqali consent was the essence of his evidence, at no stage did he complain that the defendants had felled trees outside the concession area.

P.W. 2, Mosese Randru, who is acting as head of the plaintiff mataqali also gave evidence that the plaintiffs had not been approached for their consent in the granting of the concession. He never suggested that the defendants had been felling outside the concession area.

The plaintiffs put in Exhibit F.1, consisting of some correspondence between their solicitors and the Native Land Trust Board. Nowhere in those letters do the plaintiffs complain that the defendants were logging outside of the concession area. They

complain that the plaintiffs were not approached for their consent.

None of the letters complains that the concession had been illegally created over native reserve nor did the plaintiffs' witnesses make any mention of native reserve. The emphasis was, as I have pointed out earlier in the judgment, directed to the complaint that the consent of the Mataqali had not been obtained.

D.W. 4, PECELI RINAKANA, a Forest Ranger, stated in his evidence in chief that he ensured that the defendants kept within the limits of their timber concession when felling trees. He checks this whilst examining the area to record the amount of timber cut down for the purpose of collecting the royalties payable under the agreement by the defendants to the Native Land Trust Board. In cross-examination it was not suggested to him that the defendants had felled timber on the plaintiffs' land which was outside the concession limits.

I find on the undisputed evidence of the defence witness, which was quite credible, that the defendants have not felled trees outside the concession area.

The Native Land Trust Board as Third Party called two witnesses whose evidence was directed towards proving that the plaintiffs had consented to the concession. Their evidence was a little assistance because if this was not native reserve then consent of the plaintiffs was not required and if it is native reserve the concession would be unlawful whether the plaintiffs consented or not. During the evidence of the Third Party's second witness there was an altercation at the Bar between Mr. Kato for the Third Party and Mr. Koya for the plaintiffs when the former was about to ask whether this was native reserve or not. Mr. Koya objected on the ground that the Third Party had agreed it was native reserve. Mr. Kato endeavoured to argue that the proclamation in the Gazette was so badly worded that one could not be sure whether the area in question had been made native reserve and that in having agreed that this was native reserve he may have been in error. It was not suggested during that altercation that the defendants had agreed that this was native reserve and Mr. B.C. Patel for the defendants was not drawn into the discussion. Whatever the status of the land in question the Native Land Trust Board accepted from the outset that it was native reserve. But that admission does not help the plaintiffs in suing the defendants.

I find that as between the plaintiffs and the defendants the latter are the grantees of a concession to fell timber on native land. In the absence of evidence that it is native reserve I am unable to find that the concession is unlawful.

I find that the defendants have not felled trees outside the limits of their concession.

It follows that the plaintiffs' claim fails and the question of the Third Party indemnifying the defendants does not arise.

The plaintiffs will pay the costs of both defendants, and of the Third Party. Defendants' costs to be on the higher scale.

I would add that the Native Land Trust Board should check whether this and other timber concessions are on native reserve.

I draw attention to this because sometime ago I pointed out that the Board's practice of requiring a higher rent as the price of their consent to a transfer of a lease of native land was illegal. In spite of this Court's comment this illegal practice continues. The Fiji Court of Appeal has recently drawn attention to that illegal practice.

LAUTOKA,
8th September, 1978.

(Sgd.) J.T. Williams
JUDGE