IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 53 of 2019
[High Court Civil Case No. HBC 116 of 1999]

BETWEEN : **1. RATU EPELI KANAKANA**
2. VILIAME ROKOVESA
3. MAKERETA WAQANIBAU
4. METUI MUDUNAVOSA
5. SERUPEPELI DAKAI
6. NIKOTIMO DELAIVUNA
7. EPELI VAKALALABURE
8. JOSEVA NAVARA
9. SAKIUSA TUBUNA
10. SIRELI KOROI

10 Appellants

11. ITAUKEI LAND TRUST BOARD

11th Appellant

AND : **ATTORNEY GENERAL, ITAUKEI LAND & FISHERIES COMMISSION**

Respondents

Coram : **Dr. Almeida Guneratne, P**
Lecamwasam, JA
Dayaratne, JA

Counsel : **Mr N. Tuifagalele for the 1st to 10th Appellants**
Mr J. Cati for the 11th Appellant
Ms M Motofaga for the Respondents

Date of Hearing : **01 November 2022**

Date of Judgment : **24 February 2023**

JUDGMENT

Dr. Almeida Guneratne, P

[1] I agree that the appeal should be dismissed for the reasons given by Lecamwasam, JA.

Lecamwasam, JA

[2] The Appellants (Plaintiffs in the original action, and hereinafter referred to as Plaintiff-Appellants) prefer this appeal against the order of the High Court at Suva dated 22 December 2010, which dismissed the Plaintiffs' claim with no order as to costs. The Plaintiff-Appellants pleaded the following in particular before the High Court:

a. *That because of the nature of Fijian native title, the sale of any part or the whole of their lands by their chiefs did not extinguish native title, nor did their chief have any right to sell such lands;*

b. *The 10 October 1874 Deed of Cession (**'Deed of Cession'**) did not extinguish native title or the hereditary estate;*

c. *The State had breached its fiduciary duty by failing to ascertain native title and to protect their interest;*

d. *That because of the above breaches, they were relocated to the village of Suvavou which was land belonging to other native owners, and they lost occupancy of the claim area without surrender or extinguishment of their title;*

e. *Breach of State obligations in pre-cession negotiations that His Excellency Sir Hercules Robinson promised on behalf of the Crown that native interests would be taken into account.*

[3] At the pre-trial conference, parties had agreed on the claim area, which is stated as the first agreed fact at pg.383(vol.2) in the following terms:

"*THE claim area are the Boundaries of the Land of the Kai Suva commencing at the junction of the Tamavua river and creek and at the creek " Tuara or Qaqara" thence ascending this latter to its course on the hill "Na Ului Roko Leka" thence to the hilltop Namadai thence descending to the junction "Waisomo" and " Waiqariti" thence downstream to the junction of creek Nabuni and Wai ko Nasamabula thence down this latter to the sea thence around the sea coast past European town of Suva to the mouth of Tamavua river and the point of commencement as described by Carew and lands of Yavusa Nayavumata included in the Polynesian company map above the Carew bound and bordering with Tamavua native lands and marked red in map 1."*

[4] The learned High Court Judge, in his judgment described the claim area in similar terms as follows:

"the Suva peninsula lands commencing at the junction of the Tamavua river and creek and at the creek "Tuara or Qaqara" thence ascending this latter to its course on the hill "Na Ului Roko Leka" thence to the hilltop Namadai thence descending to the junction "Waisomo" and "Waiqariti" thence downstream to the junction of creek Nabuni and Wai ko Nasamabula thence down of Suva to the mouth of the Tamavua river and the point of commencement as described by Carew and lands of Yavusa Nayavumata included in the Polynesian company map above the Carew bound and bordering with Tamavua native lands."

[5] The Plaintiff-Appellants further described the basis of their claims thus:

a. The Appellant units owned native titles to their respective blocks of land in the Claim Area before advent of Europeans into Claim Area.

b. Such titles were communally owned and entailed in nature so that it was also held for future generations and because of this the titles were inalienable. Such native titles were not extinguished by sale or cession and subsisted as at 10th October, 1874 when the Chiefs of Fiji ceded radical title with sovereign powers over such lands to the Crown.

c. The Crown had discretion as to processes to ascertain which titles had been sold bona fide and which were still owned by the Appellant Units.

d. Because of this discretion and the vulnerability of the Appellant Units the Crown became a fiduciary towards them.

e. The Crown breached this fiduciary duty by issuing Crown Grants out of grace (ex gratia) over areas that had been sold by non-owners in the Claim Area and taking areas of disallowed sales on wrong interpretation of Article 4 of the Deed of Cession.

f. Further that over a 300 acre reserve that was rented by it at quit rent it unilaterally changed this to annuity that had no relation to value of the land and ousting the Appellant Units from the Claim area.

g. Despite the Appellant Units seeking compensation by approaches to the Crown and the State from 1887 up to 1999 no compensation apart from the annuity had been paid with lands they now occupy outside the Claim Area nor any lands returned except for a small piece in Nacovu (Flagstaff).

h. Though the Crown and State had entitled their customary fisheries such fisheries had been destroyed by the Crown and State having set up the capital of Fiji on their adjoining land and the fishery dumped with pollution, overfished and mangrove areas reclaimed so that shell fish can no longer be consumed as well as inshore fish.

i. The obligations of the State are now those of the State which has a duty to correct errors of the Crown by the 2nd Respondent ascertaining what area in the Claim area belonged to what unit as at 10th October, 1874, paying compensation for areas covered by Crown Grants, transferring leases to 12th Appellant over areas leased out by Director of Lands and paying compensation through State Acquisition of Lands Act for areas left in the hands of the State for public purpose.

j. Costs was also sought.

[6] In addition to the above assertions, in the amended claim, the Plaintiff-Appellants have also referred to issues such as cession, infidelity and breach of the same, relocation of native units, state obligations, crown grant area, reserve area, fishing rights area etc. They have elaborated on these points at length in their statement of claim and have adduced evidence in support during the trial.

[7] As evidenced by the Submissions of the Respondents at papragraph 1.3, all 11 Plaintiff-Appellants instituted action in the High Court on their own behalf and on behalf of the constituent units and members for their common interest, grievance, and remedy in the claim area. They specifically claimed their hereditary interest in the native titles owned by their forefathers before the advent of Europeans into the claim area, the occupation of which area they no longer enjoyed nor for which they had been adequately compensated. By way of remedy, they sought compensation for their losses and return of such lands in the hands of the government.

[8] The learned High Court Judge having considered the position of the Plaintiffs as well as the Respondents in his 96 page judgment dismissed the claims of the Plaintiffs, however did not make any order as to costs.

[9] Being aggrieved by the above orders of the High Court, the Plaintiff-Appellants submitted an appeal on the following grounds of appeal:

1. *The Learned Judge erred in law and or in fact in not accepting oral evidence of Plaintiff units' witnesses as to boundaries of their ancestral lands in the claim area.*

2. *The Learned Judge erred in law and/or in fact in not accepting inalienability of native title of the Plaintiff units as to their ancestral lands in the claim area.*

3. *The Learned Judge erred in law and/or in fact in not accepting that native title in the claim area was not extinguished by sale before 10th October, 1874.*

4. *The Learned Judge erred in law and/or in fact in not accepting that native title in the claim area was not extinguished by cession of 10th October, 1874.*

5. *The Learned Judge erred in law and/or in fact in overlooking or disallowing claims of breaches of fiduciary obligations by the Crown in the claim area and the State breaching its duty to correct such breaches.*

6. *The Learned Judge erred in law and/or in fact in dismissing the Plaintiff units' claims as to their fishing rights areas.*

[10] There are two pertinent issues which will govern the outcome of this appeal. The first is in relation to the Plaintiff-Appellants' position that the Deed of Cession of 10th October 1874

did not extinguish native title or inalienability of such title. Lending my mind to this issue first, I find that the Deed of Cession is unequivocal on the aspect of the sovereignty and possession of the islands where it states in clause 1:

> *"That the possession of and full sovereignty and dominion of the whole of the group of islands in the South Pacific known as Fiji ... are hereby ceded to and accepted on behalf of Her Said Majesty the Queen of Britain and Ireland, her heir and successors, to the intent that from this time forth, the said islands and the waters and reefs and other places as aforesaid lying within or adjacent thereto may be annexed to and be a possession and dependency of the British Crown."*

[11] However, clause 4, provides a qualification in relation to the title of lands within the islands which vested with the Crown. The Clause deemed absolute proprietorship of all lands to be vested in Her Majesty her heirs and successors, except the lands:

> *"...now alienated so as to become bona fide the property of Europeans or other foreigners or not now in the* ***actual use or occupation*** *of some chief or tribe, or not* ***actually required*** *for the probable future support and maintenance of some chief or tribe" (emphasis added)*

This particular section clarifies that native title was extinguished by the above Deed of Cession, at least in relation to land which was not physically occupied, either by Europeans and other foreigners or by native tribes. Such vesting of *"absolute proprietorship of all lands…in Her Majesty, her heirs and successors"*, left no encumbrances or any other attachment in existence except such rights that were retained exclusively in the Deed of Cession.

[12] Further, the Deed of Cession vested a broad range of powers in the Crown, which directly and indirectly affect proprietory rights in land ownership, native or otherwise. Of particular relevance are clauses 2 and 5 of the Deed of Cession. The former cedes power to the Crown in relation to the form of government and the legal system to be implemented in Fiji. This indicates at a minimum, that the Crown had the discretion to decide how *inter alia* land ownership will be governed. At the same time, clause 5 of the Deed of Cession stipulates that:

"*Her Majesty shall have power, whenever it shall be deemed necessary for public purposes, to take any lands upon payment to the proprietor of a reasonable sum by way of compensation for the deprivation thereof."*

This includes the acquisition of even native lands for public purposes. Together, these clauses raise the question of whether the Crown envisaged any significant proprietary rights in land to remain with the native communities.

[13] According to historical records, the original offer of cession was conditional, which was later withdrawn and an unconditional offer of cession was made to the British Monarchy as the Monarch was not in favour of a conditional cession. The Wilkinson report states the terms of the Deed of Cession had been entered into after much thought and discussions. It contains a sufficient account of the background against which the Deed of Cession was negotiated, making the subsequent agreement palatable to all parties. Wilkinson describes this effect of discussions as "*magical".* As per *paragraph 15 & 16 (of page.45 vol 1)* the chiefs had agreed to the Deed in one voice stating *"It is clear! Good! Good! It is well! It is well!"* after the contents were explained to them. The cession of Fiji had thus been voluntary. Therefore, if the ancestors intended to retain any rights to land, such reservation ought to have been unambiguously reflected in the Deed of Cession. In the absence of any reservation or exclusionary provisions in the deed I find that all the rights to the land whether by way of alienability or otherwise have been extinguished with the execution of the Deed of Cession.

[14] My finding is further buttressed by 03 excerpts from the resolution in i-taukei found at pages 49 and 50 of Volume 1. The said paragraphs leave no doubt that the King of Fiji and all other high chiefs of the Islands ceded title of the country to the British Monarchy without any reservation. The translated version of the relevant excerpts read as follows:

i. "*UNTO HER MAJESTY QUEEN OF BRITAIN*:- *We, King of Fiji, together with fother highChiefs of Fiji, hereby give our country, Fiji,* ***unreservedly (emphasis added)*** *to Her Britannic Majesty Queen of Great Britain….."*
AND

ii. *"Instruments of cession for the islands of Fiji by Thakombau, styled Tui Viti and Vunivalu, and by the other high Chiefs of the said Islands to Her Most Gracious Majesty Victoria, by the Grace of God of the Untied Kingdom of Great Britain and Ireland Queen, Defender of the Faith, &c., &c., &c."* AND

iii. "*AND WHEREAS in order to the establishment of British Government within the said islands, the said Tui Viti and other the several high Chiefs thereof, for themselves and their respective tribes,* ***have agreed to cede the possession of, and the dominion and sovereignty over the whole of the said islands (emphasis added),*** *and over the inhabitants thereof, and have requested Her said Majesty to accept such Cession, - which Cession the said Tui Viti and other high Chiefs, relying upon the justice and generosity of Her said Majesty, have determined to tender unconditionally, and which Cession on the part of the said Tui Viti and other high Chiefs is witnessed by the execution of these presents…."*

[15] I concede that sufficient historical records exist to establish that preliminary negotiations for the cession of Fiji between the British representative and native chiefs had included attempts by the chiefs to indicate that they had no right to tranfer the soil (*qele*) to outsiders and that the soil belong to the people (*sa kedra na lewe ni mataqali*). Nevertheless, such a stance did not find its way into the Deed of Cession, which was the result of informed negotiations between the parties. One could only surmise that the chiefs had either abandoned their rights or perhaps had relied "*upon the justice and generosity of Her Majesty"* as evidenced by the resolution in i-taukei, to recognize native title to lands. The latter position has not found articulation in the Deed of Cession, leading one to the conclusion that the former is the case.

[16] In response to the Plaintiff-Appellants' contention that the chiefs had no right to alienate soil rights, I urge sufficient attention to be given to the position held by the chiefs at the time of signing the Deed of Cession. They were representatives of the people and the symbol of respective indigenous Fijian communities. Therefore, the chiefs had signed on behalf of the indigenous or native people as it would not have been practical to obtain the

signature of each and every native Fijian, even assuming that all natives possessed sufficient literacy to do so. Hence, I hold that the chiefs represented all other Fijians and had the sole authority to sign the Deed of Cession on behalf of their respective areas and the people.

[17] In light of the above, it is fallacious to claim proprietary rights pertaining to land after 10th October, 1874. I hold that the absence of reservation of the above rights in the Deed of Cession extinguished such rights. Therefore it is too late in the day for the Plaintiff-Appellants to claim any rights over the claim area on the basis of inalienability.

[18] The second issue I wish to deal with is the basis of the Plaintiff-Appellants' claim as per paragraphs 2a-2j of Plaintiff-Appellants' submissions. I draw particular attention to issues c, d & e. For purposes of clarification, I will reproduce those paragraphs here too:

> c. *Such native titles were communally owned and entailed in nature so that it was also held for future generations and because of this the titles were inalienable.*
>
> *d. The Crown had discretion as to processes to ascertain which titles had been sold bona fide and which were still owned by the Appellant Units.*
>
> *e. Because of this discretion and the vulnerability of the Appellant Units the Crown becames a fiduciary towards them.*

[19] The grievance of the Plaintiff-Appellants here is that as the crown had discretion as to the processes through which to ascertain titles to land, it cast a fiduciary obligation on the crown via-a-vis the Plaintiff-Appellants. The Plaintiff-Appellants argue that such fiduciary obligation effectively stops the provisions of the Limitation Act of 1971 from applying to the Plaintiff-Appellants as long as the fiduciary rights were intact.

[20] In this regard, I draw attention to the establishment of the Lands Claim Commission (appointed on 30th October 1875) and Native Lands Commission (appointed in 1890) in order to determine the rights of the native Fijians and other claims of native Fijians, which the Plaintiff-Appellants have conveniently overlooked. These measures were taken, it could reasonably be surmised in part to fulfil the Crown's obligations under clause 7 of the Deed of Cession. Clause 7 *inter alia* promises that *"all claims to title to land by*

whomsoever preferred…shall in due course be fully investigated and equitably adjusted". In light of this, even if I entertain the possibility of a fiduciary relationship between the Crown and the Plaintiff-Appellants', albeit without conceding it, I find that the above Commissions satisfy the obligation cast on the Crown to investigate and adjust land claims by native people.

[21] By setting up of these two commissions, the Crown had taken steps to use its discretion to ascertain the rights of the natives in regards to land title. The outcome of the Commission may not be on all fours to the satisfaction of the natives. However, it does not vitiate the fact that the Crown had taken necessary steps and thereby discharged its alleged fiduciary obligation towards the native inhabitants. If the native inhabitants had grievances regarding the outcome of the Commissions they should have taken necessary steps by filing action in a court of law regarding compensation or any other land rights within the period prescribed by law, which they have failed to do. The instant case has been filed more than a century after the above Commissions conducted their investigations, i.e. filed in 1999 and amended on 29 September 2006. The Plaintiff-Appellants forefathers should have taken steps at that time against the findings of the Commissions. Therefore, I hold that the Limitation Act applies to this situation and there exists no disability preventing prescription from running against the Plaintiff-Appellant. For purposes of this action, prescription began running on the day the Commissions concluded their investigations and submitted the findings to the Crown. As the action before the High Court was filed more than 100 years after the Commissions concluded their investigations, I deem it unnecessary to elaborate on the applicability of the provisions of Limitation Act to the issues at hand. Having failed to come before court within the prescriptive period, I hold that the Appellants cannot maintain this action.

[22] The Plaintiff-Appellants also relied on the non-availability of certain documents pertaining to the areas sold by the Crown and the State, its successor which they could not obtain due to the fraudulent conduct of the state. Claims 9.3 and 9.4 of their statement of claim alleges that fraudulent acts of the crown were concealed by the Defendants until February 1999.

They also allege fraud by the Native Land Commission in not ascertaining the 'Plaintiff Units' as they are termed, after it had found that the purported sale of their land by the Crown in July 1868 was not made in good faith. The Plaintiff-Appellants submit that the disability of fraud, which stays prescription, ended only in February 1999 after which they had come before court by way of filing the instant action. I find no legitimate basis on which to hold with the Plaintiff-Appellants on this ground either, since most of these documents are public documents which no state can conceal or hide. Sufficient diligence on the part of the Plaintiff-Appellants would have yielded the documents on time.

[23] I am also not estopped from considering the issue of prescription on the basis that it did not arise in the course of the inquiry into preliminary legal issues. Hon. Judge Pathik's decision on preliminary legal issues begins at page 428 (Vol 2 of the record) and deals with the issue of prescription at 446. Without dismissing the matter for being prescribed, his Lordship stated that " *....I would rather hear evidence and then form a view on this aspect in determining the action".* His Lordship Justice John F. Byrne had not dealt with the issue of prescription at all in his interlocutory judgment dated 24th February 2000. His Lordship only dealt with the issue pertaining to the Interlocutory judgment. As such, I am at liberty to consider the issue of prescription.

[24] Therefore, I hold that the Plaintiff-Appellants have not come to courts within the prescribed period and therefore this case cannot be maintained. I do not find that the learned High Court Judge had erred in coming to the relevant conclusion in his judgment. Now, I answer the grounds of appeal in seriatim:

[25] *1. The Learned Judge erred in law and or in fact in not accepting oral evidence of Plaintiff units' witnesses as to boundaries of their ancestral lands in the claim area.*

As per the honourable High Court Judge the Plaintiff-Appellants have called 22 witnesses while the Defendant had called 04 witnesses. In addition, a great number of documents had been produced and large volumes of submissions had been filed. The boundaries of the claim area was an agreed fact between the parties during the pre-trial conference. As such, eliciting

oral evidence from witnesses regarding the boundaries of the claim area in the course of the trial was in my view a redundant exercise. Therefore, there was no necessity for the learned Judge to make special reference in his judgment to the oral evidence pertaining to the respective Mataqali parcels of land and failure on his part to mention such evidence cannot be considered as a serious flaw. The mere absence of any reference to such oral evidence does not definitively suggest that it had not been taken into consideration. Further, I do not see any reason to interfere in the learned High Court Judge's reliance on archival documents since those are more reliable. Therefore, it is not erroneous for oral evidence not to play an integral part in the learned Judge's findings. Hence, I reject this ground of appeal.

2. The Learned Judge erred in law and/or in fact in not accepting inalienability of native title of the Plaintiff units as to their ancestral lands in the claim area.

Plaintiff-Appellant units had pleaded in para 4.9 of their amended claim that their title in the claim area were owned by the hereditary unit, entailed in nature, inalienable with the tail of the estate being hereditary. The burden of proof was on the Plaintiff-Appellants to prove the inalienability of title in the claim area which they failed to do. For the reasons I have stated in the foregoing paragraphs, I reject this ground of appeal.

3. The Learned Judge erred in law and/or in fact in not accepting that native title in the claim area was not extinguished by sale before 10th October, 1874.

I answer this ground of appeal also in the negative for reasons stated extensively in the foregoing paragraphs.

4. The Learned Judge erred in law and/or in fact in not accepting that native title in the claim area was not extinguished by cession of 10th October, 1874.

As per proceedings and the documents produced before the High Court, it is clearly evident that native title in the claim area was extinguished by the Deed of Cession of 10th October 1874. For reasons I have already elaborated in paragraph 11 downwards, I reject this ground of appeal.

5. *The Learned Judge erred in law and/or in fact in overlooking or disallowing claims of breaches of fiduciary obligations by the Crown in the claim area and the State breaching its duty to correct such breaches.*

The learned High Court Judge has sufficiently dealt with the above position from pages 90-94 of his judgment. I too have lent my mind to these issues in the foregoing paragraphs and therefore I answer the above ground of appeal in the negative.

6. *The Learned Judge erred in law and/or in fact in dismissing the Plaintiff units' claims as to their fishing rights areas.*

As discussed extensively in the foregoing paragraphs, the Deed of Cession of 1874 extinguished all rights of the plaintiff-Appellants in relation to their native land units including fishing areas.

[26] In conclusion, I dismiss the appeal and order parties to bear their own costs.

[27] **Dayaratne JA**

I agree with the reasons and conclusion of Lecamwasam, JA.

[28] **Orders of the Court**

1. Appeal dismissed.
2. Parties to bear their own costs.

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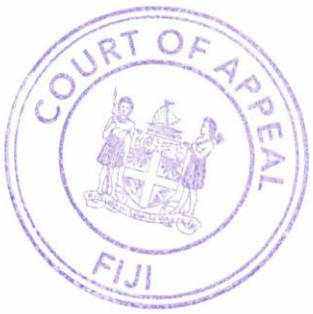
Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL



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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice V. Dayaratne
JUSTICE OF APPEAL

SOLICITORS:

Mr N. Tuifagalele for the 1st to 10th Appellants

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