

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

CIVIL ACTION NO. HBC 85 OF 2011

- BETWEEN** : **RUSIATE NAULIVOU** Manager of Namara Vuda.
PLAINTIFF
- A N D** : **JOSUA MALI** Villager of Namara Village, Namara.
1ST DEFENDANT
- A N D** : **NAPOLIONI TAVATU** Villager of Namara Village,
Namara.
2ND DEFENDANT
- A N D** : **SAKARAIA N TUINASAU** Villager of Namara Village,
Namara.
3RD DEFENDANT
- A N D** : **ULAIASAI RABUA** Villager of Namara Village, Namara.
4TH DEFENDANT
- A N D** : **SEVANAIA TUINAMATAYA** Villager of Namara Village,
Namara.
5TH DEFENDANT
- A N D** : **NATIVE LAND TRUST BOARD** A body corporate of 431
Victoria Parade, Suva.
6TH DEFENDANT
- A N D** : **BANK OF THE SOUTH PACIFIC/COLONIAL**
NATIONAL BANK a Commercial Bank of Suva Central,
Cnr Renwick and Pratt Street, Suva.
7TH DEFENDANT

R U L I N G

INTRODUCTION

- [1]. By way of background, Vomo Islands (there are two islands) are both freehold estates of which two yavusa's, namely Sabutoyatoya (Viseisei) and Sabutoyatoya (Wayasewa) are tenants in common, each owing 50% interest (as per judgement of Gates J in **Naulivou v Native Land Trust Board [2003] FJHC 341; HBC0069.1994L (12 November 2003)** as the Honourable chief Justice then was).

- [2]. The Fiji Court of Appeal, while confirming most of Gates J's ruling, ordered that profits derived from the lease were to be distributed equally to all registered members of the two co-owning yavusas.
- [3]. Rusiata Naulivou ("**Naulivou**") is a member of *Mataqali Boutolu* ("**mataqali**") of the *Yavusa Sabutoyatoya Wayasewa* ("**yavusa**") in the village of Namara in the District of Waya in the Province of Ba. By virtue of his membership of the *mataqali*, Naulivou would appear to have a direct beneficial interest in the profits derived from the lease of the two islands. Accordingly, he commences these proceedings in a personal capacity as member of the *mataqali*. He also sues in a representative capacity, purportedly, for and on behalf of the other members of the *mataqali*. The defendants question his locus in this latter regard.
- [4]. What is at issue in this case is how income from these leases are to be distributed.
- [5]. Naulivou is of the opinion that income from the leases accruing to the *yavusa* should be distributed equally to each individual member. That view appears to be consistent with the decision of the Fiji Court of Appeal.
- [6]. Naulivou is also aggrieved about a Deed of Trust ("**Deed**") that was purportedly, created and signed by the 1st to 5th defendants, with the assistance of the iTLTB. The said Deed, as far as I gather from reading between the lines of Naulivou's statement of claim and affidavits filed by both parties, has come to govern the way the income from the leases are distributed.
- [7]. Naulivou questions the creation of the Deed. He says that the 1st to 5th defendants had created the said Deed and have appointed themselves as trustees. He further alleges that the Deed is not valid in law because it was created by fraudulent means. Apart from that, he argues the Deed is void for uncertainty.
- [8]. Naulivou alleges that, upon registering the Deed, the defendants acted swiftly and obtained from the iTLTB the sum of \$96,554.04 (ninety six thousand, five hundred and fifty four dollars and four cents accruing to the Yavusa) and upon obtaining the money, they then deposited it into BSP Account No. 6545325. Since then, the entire sum of money has dissipated from BSP Account No. 6545325. This was confirmed by counsel

for the defendants during the hearing. It also emerged during the hearing that Naulivou has never received a single cent from the proceeds.

- [9]. According to Naulivou the defendants had acted in bad faith by using the Deed as the instrument by which they would prop themselves up in a position of power to ensure their access for personal gain to the *yavusa* funds.
- [10]. The defendants however assert that a Trust Deed (*Yavusa Sabutoyatoya Trust Deed* (“**Deed**”) dated 18 April 2011 and registered with the Registrar of Deeds on 18 April 2011) was prepared for the Yavusa and which governed how the lease monies was to be applied. The defendants say they were all appointed trustees of the said Trust by the elders of their respective *mataqalis* and *tokatokas* - and which are constituents of the *yavusa* in question. In an affidavit filed for and on behalf of the defendants, a document is annexed which purports to show that the majority of the members of the *yavusa* had signed an authority for the money in question to be paid into BSP Account No. 6545325. That account belongs to a company purportedly set up for the benefit of the members of the Yavusa. I observe that the plaintiff pleads that he did not consent to such an arrangement, nor did other members of the *mataqali* which he represents.
- [11]. Notably, there is a statement annexed to the same affidavit which purports to show that 204 out of the 327 adult members of the *yavusa* had not consented to Naulivou’s action against the defendants.

RELIEF SOUGHT

- [12]. Naulivou seeks the following relief in his statement of claim:
- (i) a declaration that the Trust Deed in question is null and void and is of no legal effect.
 - (ii) a declaration that the 1st – 5th Defendants are not the Trustees of the Yavusa Sabutoyatoya, District of Waya in the Province of Ba.
 - (iii) an injunction restraining the 1st – 5th Defendants from acting as Trustees for the Mataqali Yavusa Sabutoyatoya, District of Waya in the Province of Ba.
 - (iv) that the 1st – 5th Defendants provide a full accounting of all monies that have come into their possession and all activities undertaken and arrangements entered into whilst they have purported to act as Trustees of the Yavusa Sabutoyatoya of the District of Waya in the Province of Ba.
 - (v) an order that the 6th Defendant repay to the Yavusa Sabutoyatoya of the District of Waya, in the Province of Ba the sum of 75, 803.29 (SEVENTY

FIVE THOUSAND EIGHT HUNDRED AND THREE DOLLARS AND TWENTY NINE CENTS), being part of the monies that it had unlawfully paid to the 1st – 5th Defendants, which belonged to the Yavusa Sabutoyatoya.

- (vi) an order restraining the 6th Defendant from paying out any monies collected by it from the leasing and or alienation of any native land registered in the name of the Yavusa Sabutoyatoya to the 1st – 5th Defendants, their agents, servants, whomever and whatsoever, and from paying any monies into account no. 6545325 with the 7th Defendant and or any other bank account with any other bank until determination of this matter.
- (vii) an order that the 7th Defendant immediately cease all and or any further transactions on account no. 6545325 by the 1st – 5th Defendants, their servants, agents, whomsoever and whatsoever.
- (viii) any other relief this honourable court may deem just.
- (ix) costs.

APPLICATION BEFORE ME

- [13]. What is before me now is an application by the defendants to strike out the claim under Order 18 Rule 18(1)(b) and (d) on the ground that it is scandalous frivolous or vexatious and is otherwise an abuse of process.

OBSERVATIONS

- [14]. I have considered the arguments in detail and in my view, the plaintiff's claim has merit. Prima facie, he is entitled to his share of the income from the lease of the islands. The fact that he did not receive a single cent from the \$96,554.04 that the iTLTB paid out to the purported defendant/trustees merits further investigation by this Court.
- [15]. I think it would be inappropriate for this Court to summarily determine at this stage whether the so-called Deed of Trust is valid, and if so, whether or not the so-called trustees had acted in breach of any of their fiduciary obligations to the beneficiaries, of which the plaintiff is one.
- [16]. But at the end of the day, what cannot be avoided is that there was a Fiji Court of Appeal ruling which directed that profits derived from the lease were to be distributed equally to all registered members of the two co-owning yavusas, and if the plaintiff did not receive a single cent out of it, then all who were involved in handling the money should be made to account.

CONCLUSION

- [17]. Accordingly, I dismiss the 1st to 5th defendants' application to strike out the claim and award costs to the plaintiff which I summarily assess at \$850 -00 (eight hundred and fifty dollars only).
- [18]. For the record, I will deal separately with the issue as to whether or not the plaintiff is entitled to sue in a representative capacity.
- [19]. This case is adjourned to **Thursday 01 May 2014 at 10.30 a.m.**



Anare Tuilevuka
JUDGE
25 April 2014.