

**IN THE HIGH COURT OF FIJI**

**[WESTERN DIVISION] AT LAUTOKA**

**Civil Action No. HBC 49 of 2010**

**BETWEEN** : **EMOSI BURUAVATU** suing for an on behalf of the members of Tokatoka Bitolevu, Mataqali Kawabu, Yavusa Davutukia of Votua Village, Koro-levu-wai, Nadroga, Navosa, Landowner

**PLAINTIFF**

**AND** : **NATIVE LAND TRUST BOARD** a corporate body duly constituted under the Native Land Trust Act Cap 134

**FIRST DEFENDANT**

: **MICHAEL TAYLOR and RUTH TAYLOR** both of Kadrakulu, Nadroga, Businessman and Businesswoman respectively

**SECOND DEFENDANTS**

**Appearances** : Mrs Peniana Salele for the **Plaintiff**  
Mr Rupesh Singh for the **Defendant**

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**Judgement**

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**1. Introduction**

1.1 In these proceedings the Plaintiff representing the members of landowning unit known as Tokatoka Bitolevu of Mataqali Kawabu in Yavusa Davutukia seeks an Order that the first Defendant is to forthwith suspend operation of lease NL No 27506 'A' by withdrawing the same and an Order that the first Defendant revise by amending the area covered under Native Lease 27056 'A' by excluding from such lease the Plaintiffs land Namahara, Nawauroro and Nakauvadra as per the boundaries set by the Native Lands and Fisheries Commission.

The Plaintiff also seeks compensation in the following:

- a) Special damages to be quantified later
- b) General damages to be assessed by the Court
- c) Any other relief as the court may deem Just
- d) Costs of the action on Solicitor – Client basis

**2. The Amended Statement of Claim of the Plaintiff**

2.1 The amended Statement of Claim states that the Plaintiff is seized of

leadership of the Tokatoka as its Chief and head and by virtue of that status he is responsible for dealing with all matters that concern the Tokatoka as a landowning unit.

- 2.2 That the first Defendant is trustee to all registered Native Land that is controlled and administered by it pursuant to the Native Land Trust Act, Cap 113 and sometime in year 2001 had issued a lease to the second Defendant being NL 27506 'A' of land referred to as Naibale (Part of) Lot 1 on SO 4654 or Native Land Commission (NLC) Lot 9.
- 2.3 That the Tokatoka owns neighbouring land known as Namahara, Nawauroro and Nakauvadra that consist of traditional sacred grounds where traditional burial sites and old village site are located and are NLC Lot 10 and NLC Lot 11.
- 2.4 **THAT** during the period 3.3.10 to 5.3.10 the Archaeology Department of the Fiji Museum inspected the sacred grounds and produced a report on its assessment on archaeological impact. The report strongly recommended that a buffer boundary be established for preservation of the historical sites also referred to as the cultural sites.
- 2.5 **THAT** at sometime in late 2009 the Second Defendants carried out certain works on the land towards the southern portion of the lease close to the beachfront by clearing vegetation, carrying out excavation using bulldozers and digger whilst construction of buildings took place on the Tokatoka land (hereinafter referred to as "the works").
- 2.6 **THAT** the works carried out by the Second Defendants took place on the Plaintiffs sacred grounds as confirmed in a survey report dated 21<sup>st</sup> April 2010.
- 2.7 **THAT** the Second Defendant were immediately notified of their interference with the sacred grounds but continued nevertheless. That as the works continue further damage and destruction were caused to the Tokatoka's sacred grounds.
- 2.8 **THAT** by the First Defendant's failure to immediately rectify and/or revise the Second Defendants' lease after being notified by the Tokatoka of the encroachment, the first Defendant had breached and continues to breach its fiduciary duties to the Tokatoka.
- 2.9 Particulars of breach stated on the amended statement of claim are as follows:
  - (a) That the First Defendant has failed to act in the Tokatoka's interests in accordance with provisions under the Native Lands Trust Act.
  - (b) That the First Defendant had failed to ensure through proper inspection of the site prior to the issue of any lease that Namahara, Nakauvadra and Nawauroro was not included.
  - (c) The First Defendant has failed to give due recognition and protect the

Tokatoka's beneficial interest by virtue of ownership of the sacred grounds.

- (d) That the First Defendant's inaction is in contrary to instructions by the Tokatoka supported by letters written to the former in support of a stop work order to be issued against the Second Defendants.
- (e) That the First Defendant acted in contra to or failed to act in the Tokatoka's interests protecting their traditional sacred sites of historical significance.
- (f) That the First Defendant's actions or failure to act amount to an abuse of its power as trustee.

2.10 Particulars of Mistake stated in the amended statement of claim are as follows:

- (a) Failure to carry out proper inspection of lands; Namahara, Nakauvadra and Nawauroro before issuing any lease thereto to the Second Defendants.
- (b) Failure to immediately act to prevent damage or destruction to the sacred grounds on Namahara, Nakauvadra and Nawauroro when was notified of these by the Tokatoka.
- (c) Failure to act appropriately when notified about the encroachment onto the buffer boundary by authorities.
- (d) Upon conceding to the Tokatoka of the mistake made; evidence of which will be adduced in Court.

2.11 Particulars of Loss stated in the amended statement of claim are as follows:

- a) Destruction and damages to the sacred ground to be valued.
- b) Return travelling costs to Suva and accommodation costs for the purpose of sorting attending to this matter.
- c) Legal costs incurred.

2.12 It is also stated in the amended statement of claim that works carried out by the Second Defendant and the location of their recently constructed buildings amounts to trespass.

2.13 Particulars of Trespass are mentioned are as follows:

- a) Carrying out the works on an area of 2050 square meters on Namahara which is NLC Lot 10.
- b) Carrying out the works on Nakauvadra which is NLC Lot 11.
- c) In continuing to remain on Namahara, Nakauvadra and Nawauroro despite having gained knowledge that these lands belonged to the Plaintiff.

- d) In having carried out works and continue to carry out works on Namahara and Nakuvadra comprising of native land that have not been de-reserved.
  - e) In constructing buildings and allowing the same to remain on Namahara and Nawauroro.
- 2.14 The amended statement of claim proceed to state that the 2<sup>nd</sup> Defendants have caused damages to the Tokatoka's sacred grounds as a result of committing trespass.
- 2.15 Particulars of Damages for trespass is stated as follows:
- a) Removal of moulds, burial grounds that human bones were found as a result of excavation, removal of remains of old village site, no access to beach and sea that is by right the Tokatoka's fishing grounds or "qoliqoli".
- 2.16 It is also stated that the Tokatoka has suffered loss as a result of trespass by the 2<sup>nd</sup> Defendants and that the particulars of loss has to be valued.

3. **First Defendants Statement of Defence to Amend statement of Claim**

- 3.1 The first Defendant states in the statement of Defence that the Native Titles and Fisheries Commission is the correct body that can verify the contents pleaded in the amended Statement of Claim, therefore this claim has not been brought to the correct forum.
- 3.2 That the first Defendant was contacted by the Plaintiff on the issues raised regarding the destruction and damage to the sacred grounds through Nadroga Provincial Council and the Fiji Museum and that a meeting was convened on the 29<sup>th</sup> January 2010 at Votua Baravi in which the Plaintiff, representatives of the Board and the second Defendant were present.
- 3.3 The first Defendant has expressly denied the other averments of the Plaintiffs Amended Statement of Claim and prays that the Plaintiffs claim be dismissed with costs.

4. **Statement of Defence of the Second Defendant**

- 4.1 The second Defendants denies that the Plaintiff represents the landowning unit mentioned in paragraph 1 of the Amended Statement of Claim and states that the Plaintiff has no "Locus standi" to bring this action.
- 4.2 It is admitted by the 2<sup>nd</sup> Defendants that the Native Land and Reserves is vested with the first Defendant.
- 4.3 In answer to paragraph 5 of the amended Statement of Claim the second Defendant states that save and accept for admitting that the Archaeology Department of the Fiji Museum carried out a survey of arears surrounding the subject land and the subject land the remainder of the allegations contained in the said paragraph is denied.

- 4.4 In answer to paragraph 6, the second defendant states that all execution works were done by their predecessor in title of the subject. Land sometimes on the month of May 2007.
- 4.5 It is also stated in the statement of Defence that persons unknown to them informed verbally and informally about a sacred ground.
- 4.6 Second Defendants goes on to state that they have been issued with a proper lease registered with the Registrar of Titles and issued under the provisions of the Land Transfer Act.
- 4.7 It is further stated by the 2<sup>nd</sup> Defendant that the Plaintiff does not disclose any cause of action against the second Defendants and therefore it is scandalous and abuse of the process of court.

5. **The Reply to Defence**

- 5.1 The Plaintiff join issue with the Defendants on their defence.

6. **Minutes of the Pre Trial Conference**

The following agreed facts are recorded in the Minutes of the Pre Trial Conference

- 6.1 The first Defendant is trustee to all registered native land that is controlled and administered by it pursuant to the Native Lands Trust Act Cap 134.
- 6.2 The Second Defendants have constructed a structure on the subject land.
- 6.3 The Archaeology Department of the Fiji Museum carried out a survey of the subject land and the surrounding area.
- 6.4 The First Defendant prior to the issuance of the Lease to the Second Defendant has carried out its survey for the purposes of the issuance of the lease and marking of the boundaries of the lease.
- 6.5 By issuance of the Native Lease Number 27506 it is deemed that the First Defendant has properly surveyed the boundary of the said lease and which boundary markings and pegs the Second Defendants relied on.
- 6.6 The Second Defendant purchased the native Lease Number 27506 in reliance of the issued and registered Native Lease Number 27506 in the sum of \$120,000.00 (One Hundred and Twenty Thousand Dollars).
- 6.7 The Second Defendant has built a substantial dwelling house on Native Lease number 27506 in the sum of \$1,055,500.00 (One Million Fifty Five Thousand and Five Hundred Dollars)

7. The issues to be determined by Court are recorded as follows:

- 7.1 Whether the lease issued by the First Defendant is also known as Lot 9 in the boundaries set by the Native Lands and Fisheries Commission?

- 7.2 Whether the Plaintiff is seized of leadership of the Tokatoka as chief and head. That by virtue of the named Plaintiff's current status he is responsible for dealing with all matters that concern the Tokatoka as a landowning unit.
- 7.3 Whether the First Defendant issued a lease being Native Lease No. 27506 dated 29<sup>th</sup> April, 2005 over the subject land to the Second Defendants.
- 7.4 Whether the Plaintiffs owns areas known as Namahara, Nawauroro and Nakauvadra?
- 7.5 Whether the areas indicated above contain historical sites that have been declared as such by the Fiji Museum or Archaeology Department of Fiji hence subject to protection?
- 7.6 Whether the Second Defendants had interfered with the Plaintiff's land and continued to do so after being notified of the Plaintiff's interest.
- 7.7 Whether the Defendants were notified of the Plaintiff's interest being interfered with?
- 7.8 Whether the Defendants had committed trespass.
- 7.9 Whether the lease issued by the First Defendant encroached onto the Plaintiff's land without proper consultation with the Plaintiff and without obtaining of authority to lease the said land.
- 7.10 Whether the First Defendant had breached its fiduciary duties to the Plaintiff?
- 7.11 Whether the lease was issued to the Second Defendant by mistake?
- 7.12 Whether the Plaintiff had suffered any loss and if so, at what value?
- 7.13 Is the Plaintiff entitled to the damages it claims.
- 7.14 Whether the Plaintiff is entitled to the Orders sought inclusive of interest to be calculated on any judgement sum and costs.
- 7.15 Whether the Second Defendants are entitled to be indemnified by the First Defendant in case of any liability in this matter?
- 7.16 Whether the First Defendant owes a duty to the Second Defendant to ensure that the Native Lease boundary was properly surveyed and boundaries properly marked and whether First Defendant breached this duty.
- 7.17 Whether the First Defendant is liable to pay the Second Defendant special and general damages and costs whether on indemnity basis or otherwise.

## 8. The Evidence in Brief

### Evidence of the Plaintiff

- 8.1 Plaintiffs witness No. 1 (PW 1) was an officer of iTaukei Lands Commission. He identified Register of Native Lands Vol 11 Folio 89 and 90 (Exhibit p1 and P2) and said that folio 89 gives description of Lot 11 owned by Tokatoka Bitolevu. He stated further that folio 97 gives description of Lot 10 and that the said lot is inside lot 11. He mentioned that Lot 10 is owned by extinct Mataqali Kalukalu. PW 1 also identified Vol 11 Folio 97 (P3) which gives the description of Lot 9 and stated that the said Lot is adjacent to lot 10 and 11. When letter dated 23.10.2002 sent by the chairman of Native lands and Fisheries Commission to the General Manager iTLTB (P4) was shown to PW 1 he stated that the essence of the letter is that Tribe Davutukia has selected the Plaintiff as their chief.

Under Cross examination PW 1 stated that the plans come after the survey and when a plan is drawn for the land described in folio 97 it will give a full picture to locate lot 10 and 9. He admitted that the Plaintiff does not have any customary interest on lot 9 and 10 and the only interest the Plaintiff has is in respect of lot 11. He also admitted that the Plaintiff as customary owner cannot deal with the land and the iTLTB consent is necessary to do so. In re examination he admitted that the iTLTB should consult the land owners before leasing out.

- 8.2 The Plaintiff was called as the 2<sup>nd</sup> witness. He confirmed that he was the head of the land owning unit. He stated that his parents gave lot 10 to the now extinct Mataqali Kalukalu and therefore the said lot should revert back to him. He further stated that he has written to iTaukei Commission for the land to be returned to him. (Exhibit 6)
- The Plaintiff confirmed that leased land is lot 9 and it covers lot 10 and 11 encroaching on to the other land. He said that construction was carried out by the 2 defendants on Lot 10 and part of Lot 11 and he wrote letter marked P7 to Commissioner Western after seeing this construction and also an injunction was obtained to stop work. He disclosed that Lot 10 is an old village site and a burial ground is situated in lot 10 and 11. Furthermore he alleged that the 1<sup>st</sup> Defendant iTLTB did not consult him in leasing out land to the 2<sup>nd</sup> Defendant and also failed to respect and stop damage to the Plaintiffs land. Plaintiff stated that he is claiming damages as a result of the alleged trespass by the 2<sup>nd</sup> Defendant.

In cross examination he confirmed that he is not entitled to subject land lot 10 as it is not registered to his Mataqali. He admitted that there is nothing on the documents to show that lot 10 is part of lot 11. He also admitted that the Native Land Commission has not sent a reply to his request to revert lot 10 to his Mataqali. He went on to state that 2<sup>nd</sup> Defendants predecessor Kim Waters cleared lot 9 and the 2<sup>nd</sup> Defendant cleared down to Lot 10 and 11.

- 8.3 The third witness for the Plaintiff was Surveyor Timote Rupeni (PW 3) who stated that he surveyed the land on instructions of the Native Lands Commission. He stated that buildings are sitting on lot 10 and there is a

grave yard on lot 9. He stated further that the native lease overlaps NLC lot 10. He confirmed that it was his duty to inform the iTLTB and the 2<sup>nd</sup> Defendant before the survey was done but he failed to do the same. He stated that NLC lot 10 goes over the leased land and that the lease issued to the 2<sup>nd</sup> Defendant forms part of NLC lot 10. He also admitted that the constructions were done within the lease. The survey plans of NLC lots 9 and 10 prepared by PW3 is tendered in evidence marked P8 and P9.

8.4 The fourth witness (PW4) called by the Plaintiff was Senior Surveyor of the Ministry of Lands Muni Dutt. He admitted that the witness Rupeni carried out the survey of the lands and that the surveyor General has signed the plans. Furthermore he stated that if two surveyors give different boundaries to a land its an error and in such cases the plans has to go to the Land Department on a request of the owner and the request has to come through Director of Lands or if it's a Native land through Native lands Commission.

8.5 The fifth witness (PW5) for the Plaintiff was Sepeti Matarereba a research officer of the Archaeology Department who stated that the museum carried out a survey of the leased land to see archaeological sites which require protection. He also admitted that the museum issued a stop work notice to the 2<sup>nd</sup> Defendant (P-10). A letter written by the Director, Fiji Museum to 2<sup>nd</sup> Defendant requesting him to safeguard archaeological sites on the land was produced through PW5 marked P12. Referring to the report prepared by him PW 5 stated that they were able to identify old house mounds, burial mounds and upright stones and the old fire walking place on the land. In summarising his conclusions in the report PW5 stated that the areas is important for the tribe and recommended it to be protected for Davutukia tribe. He also stated that they put a buffer zone of 60 meters to protect the site. The report prepared by Fiji Museum was marked as P14.

In cross examination PW5 admitted that he did not talk to any other stake holder in preparing the report, therefore the report is not objective and independent. He also stated that they were not aware that the 3 archaeological site were within the 2<sup>nd</sup> Defendants leased area. It was also admitted by him that according to his plans the sites are away from the house and that the Museum allowed the 2<sup>nd</sup> Defendant to complete the construction of the house as it did not damage any archaeological sites.

8.6 The last witness called by the Plaintiff (PW6) was Veremo Cagivale a registered Surveyor and a Property Resource Consultants and the proprietor of a company called "Lands Worth". He stated that he was instructed to asses compensation valuation of Native lands lot 10 and lot 11. PW 6 said in evidence that the land plus buildings value was the valuation approach he adopted in preparing the report. According to PW6 the injury to land was all work done in Lot 10 and 11, construction of roads, excavation, laying power lines, burnt out mounds and mango tree. He stated he assessed the injury to land at FJD \$250,000.00. It was also stated by him that compensation for severance was assessed as the customary land is now divided. The report prepared by PW6 was marked in evidence as P15 and it gives a total compensation value of FJD 1200,000.00.

In cross examination PW6 stated that 2/3 of the house of 2<sup>nd</sup> Defendant is on lot 10 and other part is on lot 9. He admitted that the Plaintiff cannot claim lot 10 and it is yet to be fully reverted to Plaintiff. It was admitted by him that all native lands in Fiji are vested with the iTLTB the 2<sup>nd</sup> Defendant and that the land owners cannot sell such land in open market. He admits that the native land could be sold only upon de-reservation with 60% approval of the owners and iTLTB. It was revealed in cross examination that the valuation given in report P15 is on the assumption that the subject land can be sold in market. PW6 stated that there is no access to land owners through leased land and they had to go and meet the 2<sup>nd</sup> Defendants to go through it. Furthermore, he stated that there is another access but it's a longer route.

### **Evidence of the Defendants**

- 8.7 The 1<sup>st</sup> Defendant called 1<sup>st</sup> witness from its mapping department. He stated that the Native Land Commission maps describe ownership of iTaukei lands. He stated further that the Native Lands Commission gives the description of the mounds to carry out a survey such land. He identified the Defendants survey plan for lot 9 as a registered plan.

In cross examination he stated that the native lease diagram is an accurate plan of Lot 9 and that a survey was done by Wood & Johnson to prepare it. He went on to say that P8 is not a plan for a lease or title to be issued but it only re-define the boundaries and it is not endorsed by the iTLTB. In reference to lease no. 22506 A he admitted that it has a registered plan. The registered Plan and lease was marked as Exhibit D2 (1) and D2 (2) while the witness was giving evidence.

- 8.8 The next witness called by the 1<sup>st</sup> Defendant was an Estate Assistance employed by them. In his evidence he stated that the Register of Native Land (RNL) documents show the different land owning units and parcels of land they own, lot numbers, area, the district and province. He stated further that if a land owning unit is not registered under RNL they cannot claim native land.

In cross examination he stated that any dealing of such lands is of no effect without consent from iTLTB. It was also admitted by him that all native lands are vested in iTLTB and the landowning unit is only entitled to the rent of a leased land.

- 8.9 Michael Taylor the 1<sup>st</sup> named 2<sup>nd</sup> Defendant gave evidence next. He confirmed that he had purchased the said land and that the transfer document was registered. It was revealed by him that he constructed a dwelling house on the land and had problems with the Plaintiff. Furthermore, he stated that their predecessor in title Kim Waters carried out some work, major clearing of the land. He denied that they committed any trespass or damage to any other property and stated he only worked on the leased land. He also stated that he had clearly informed his contractors not to touch or damage the burial site which is 10 meters away from the dwelling. He admitted that the villagers had used both access roads to reach the burial site, one through his land. He stated as the

holder of a proper lease all dealings were with the iTLTB and he did not stop work. It was also stated by him that a stop work order must come from iTLTB and not from the Plaintiff.

## 9. **The Laws, Analysis and Determination**

9.1 The main issue to be determined in this case is whether the Plaintiff owns NLC lot 10 and lot 11 as the head of the landowning unit, tokatoka Bitolevu, if so whether the Defendants encroached on to the Plaintiffs land.

9.2 It is evidentially proved that the Plaintiffs land owning unit does not own lot 10 of vol 11 folio 95. The Plaintiff himself admitted that Mataqali Kalukalu is the owner of lot 10. However it was his position that as lot 10 was gifted to the said Mataqali by his predecessors, therefore it should revert back to their Mataqali after the extinct of Mataqali Kalukalu. He stated that he has made a request to the Native Lands Commission to revert the said lot to them but he has not received a reply.

PW1 an employee of the iTaukei Affairs Board admitted in evidence that lot 10 does not come under the Plaintiffs authority and its still registered under extinct Mataqali.

In considering the evidence as above it is clear that the Plaintiffs land owning unit does not own NLC lot 10. As such I determine that the Plaintiff has no Locus Standi to file an action in respect of Lot 10.

10.1 I will now consider the evidence in regard to the rest of the issues on which this action is based. Evidence in regard to Issue no 1, 8 and 9 will be considered together as the said issues are linked to each other.

*Issue No. 1 Whether the lease issued by the 1<sup>st</sup> Defendant is also known as Lot 9 in the boundaries set by the Native Lands and Fisheries Commission.*

*Issue No. 8 Whether the Defendants had committed trespass*

*Issue No. 9 Whether the lease issued to the first Defendant encroached onto the Plaintiffs land and it was issued without proper consultation with the Plaintiff and without obtaining of authority to lease the said land.*

10.2 PW1 stated in evidence that the iTaukei Lands Commission Vol 11 folio 89 gives the description of Lot 11 and its owned by the tokatoka of which the Plaintiff is the head. In his evidence it was disclosed that lot 10 is inside lot 11 and that lot 9 is adjacent to lot 10 and 11.

10.3 PW 3 surveyor Rupeni in his evidence stated that buildings are sitting on lot 10 and only other building is on lot 9. Though he has once said that there are buildings on lot 11 later he admitted that lot 11 is vacant. He also stated that there is a grave yard on lot 9. When questioned about encroachments he stated that the native lease overlaps NLC lot 10 and that he cannot recall any extensions on to lot 11. He also stated that the constructions were done within the lease and confirmed that the native lease issued to the 2<sup>nd</sup> Defendants form part of lot 10.

- 10.4 PW 6 a Registered Surveyor and property resource consultant who prepared valuation report Exhibit P15 stated in evidence that 2/3 of the house built by the 2<sup>nd</sup> Defendant is on lot 10 and other part is on lot 9.
- 10.5 Though the Plaintiff states in evidence that construction was bulldozed, the Defendants were building a fence on lot 11 and power cables run through it, evidence of the other witnesses does not establish that the Defendants have encroached on to Lot 11. In analysing the evidence on this issue I find that the Plaintiff has failed to establish on balance of probabilities that there is an encroachment on to lot 11. It is evidentially clear that the 2<sup>nd</sup> Defendants construction were on part of lot 10 for which the Plaintiff cannot claim any right as decided in the above paragraph. Regarding the laying of power cables across lot 11 there is no evidence to establish that it was done by the second defendant. It was revealed by the 1<sup>st</sup> named 2<sup>nd</sup> Defendant that the underground power and Telecom lines were carried out by his predecessor. Furthermore, it is not evidently proved that the cables run through lot 11.
- 10.6 I also find that the Survey Plans lodged by the Plaintiff as exhibit 8 does not clearly reflect which Native Register the plans are related to. PW1 from iTaukei Lands Commission confirmed that the Register was presented to Court was incomplete as the survey plans supporting the same should be read together.
- 10.7 I will now consider the evidence relating to the leased land of the 2<sup>nd</sup> Defendant.
- 10.8 As mentioned above PW3 Surveyor Rupeni's evidence revealed that the native lease overlaps NLC lot 10. He also stated that the construction was done within the leased area and that there is a graveyard on lot 9. PW6 Registered Surveyor who prepared valuation report marked P15 stated in evidence that 2/3 of the house of the 2<sup>nd</sup> Defendant is on lot 10 and the other part is on lot 9.
- 10.9 First Defendant witness (1) Technical Officer of the iTLTB stated in evidence that the 1<sup>st</sup> Tenant of lot 9 was issued with Survey instructions and a registered survey has been carried out accordingly. He also stated that the title plan is attached to the lease and the lease issued by iTLTB is registered with Registrar of Lands.
- 10.10 The 1<sup>st</sup> named 2<sup>nd</sup> Defendant in his evidence stated that the survey plan for the lease was prepared by C.M. Lenz and that they have a registered lease for the land.
- 10.11 In considering the evidence given by the said witnesses I am of the view that the 2 Defendants have got a legally valid registered lease with a registered plan attached to it. There is no allegation of fraud against the registered lessee in this matter.
- 10.12 At this stage it is appropriate for me to consider the Principal of "indefeasibility of title" enshrined in Section 39 and 40 of the Land Transfer Act.

10.13 Section 40 of the land Transfer Act provides:

***"Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, onto see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."***

10.14 In **Inoke Devo Vs iTaukei Land Trust Board** and **FEA [2012] FJHC 1321 HBC 64 2012 (7 September 2012)** the High Court stated at paragraph 16 as follows;

***"Section 39 and 40 of the Land Transfer Act safeguard the registered proprietor by guaranteeing a good title upon registration. The exception of this rule is in the case of fraud. The leading Privy Council decision of Frazer v Walker (supra) stated at p.583***

***"The leading case as to the rights of a person whose name has been entered without fraud in respect of an estate or interest is the decision of this board in Assets Co. Ltd v Mere Rohi [1905] AC 176..... In each appeal their Lordship decided that registration was conclusive to confer upon the appellants a title unimpeachable respondents"***

10.15 In case of **Frazer V Walker (1967) I ALL ER 649** the privy council defined the expression "indefeasibility of title" as follows;

***"The expression 'indefeasibility of title', not used in the Act, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he***

***relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse (except as specifically admitted) may be brought against him."***

10.16 According to the principles set out by the above authorities and Section 39 and 40 of the Land Transfer Act I am of the view that the plaintiff cannot sustain a claim of trespass against the 2<sup>nd</sup> Defendant which they are occupying under registered lease. It is not evidentially proved that they have encroached on to lot 11 as decided by me earlier. Even if they have encroached on to lot 10 the plaintiff has no Locus Standi to file action as his Mataqali does not own the said lot.

10.17 Furthermore, in **Serupepeli Dakai and Others V Native Land Development Corporation 1983 29 FLR 92 at 95** it was held that under the Native Lands Act the Commission is required to initiate enquiries into the title and boundaries of all lands claimed by Mataqali or other groups of people (Section 6 (1)) Disputes as to ownership and boundaries shall be determined by the Commission, and its decision recorded (Section 6(5)) and record of the findings of the Commission or the Tribunal shall be final (Section 7)

From the above observation of the Fiji Court of Appeal it is clear that any issue of boundary or ownership of iTaukei Land should be referred to the iTaukei Lands Commission. The decision of the Commission or the Tribunal is final on such issues. Therefore I am of the view that the Plaintiff action or the claim as to trespass or that of any boundary issue should be placed before the iTaukei Land Commission and not before this Court.

10.18 The Plaintiff also alleges that they were not consulted or their consent was not obtained in granting the lease to the 2<sup>nd</sup> Defendant. It was held in **Solomoni Cavunisautu Naiduki V Native Land Trust Board and another [2000] FLR 58** as follows

***"I therefore conclude from these authorities that the 1<sup>st</sup> Defendant has no duty in law to consult with land owners before it makes any decision affecting native land held on trust for them"***

Relying on the said authority I hold that there is no legal requirement for the iTLTB to consult or get the Plaintiff consent in granting lease to the 2<sup>nd</sup> Defendant even if I assume that the Plaintiffs are the owners of the leased land.

11.1 I will next consider the issue whether any archaeological sites are situated in the 2<sup>nd</sup> Defendants land, if so whether they have damaged the sites and what should be remedy if any damage is caused as alleged by the Plaintiff.

11.2 The Plaintiff in his evidence stated that a burial ground exist in lot 10 and 11 and the old village site is on lot 10. PW3 Surveyor Rupeni stated that there is a grave yard on lot 9. PW 5 officer of the archaeological

department stated in evidence that he identified old house mounds burial mounds, upright stones and old fire walking area on the land surveyed and the report marked P14 relates to 3 archaeological sites. It was also revealed by him that they put a buffer zone of 60 meters around the site. He admitted in cross examination that they carried out work without a map and got a map after work. However he stated that they were not aware whether the 3 sites are within the Defendants leased area. It was also admitted by him that the Defendants house is far from Nakauvadra site. The 1<sup>st</sup> named 2 defendant admitted that large earth mounds with burial sites are within his boundary and they have not touched those. He also stated that he did not remove the cemetery. He stated that there is one burial site on the lease land.

- 11.3 In analysing the above evidence I find that the Plaintiff has failed to prove on balance of probabilities the fact that the 2 Defendant has damaged the archaeological sites sitting on their land. Therefore the Plaintiff cannot lay any claim on the same. It is only proved that a burial site is within the leased land.
- 11.4 Furthermore as pointed out by the Learned Counsel for the 2<sup>nd</sup> Defendant in his submissions the archaeological sites are managed under the Preservation of Objects of Archaeological and Paleontological Interest Act of which Section 8 provides;

***8.-(1) The Board may, with the sanction of the Minister, enter into a written agreement with the owner of any monument for the protection or preservation of such monument.***

***An agreement under this section may provide for all or any of the following matters:-***

- (a) The maintenance of the monument;***
- (b) The custody of the monument and the duties of any person who may be employed in connexion therewith;***
- (c) The restriction of the owner's right to destroy, remove, alter or deface the monument or to build on or near the site of the monument;***
- (d) The facilities of access to be permitted to the public or to any portion of the public and to persons deputed by the owner or the Board to inspect or to maintain the monument;***
- (e) The notice to be given to the Board in case the land on which the monument is situated is offered for sale by the owner, and the right to be reserved to the Board to purchase such land or any specified portion of such land at its market value;***
- (f) The payment of any expenses incurred by the owner or by the Board in connexion with the protection or preservation of the monument;***

- (g) *The procedure relating to the settlement of any dispute arising out of the agreement;*
- (h) *Any matter connected with the preservation of the monument which is a proper subject of agreement between the owner and the authority; and*
- (i) *The removal subject to the provisions of this Act of the monument to a place of safe custody.*

11.5 Due to the provisions set out in the said act it is my view that the Plaintiff or a landowning unit cannot claim any interest over archaeological sites. The act provides that the government is empowered to take steps to preserve a site which is found to be an archaeological site and charge any person who damages such a site. As such even if I assume that the 2<sup>nd</sup> Defendants has damaged any archaeological site in my view the Plaintiff or a land owning unit will not be entitled to claim damages from him. Its only the government that could take legal action for such acts.

11.6 It was also contended by the counsel for the 2<sup>nd</sup> Defendant that the members of Mataqali are only entitled to the rental monies of iTaukei lands and that its only the iTLTB which can bring an action for trespass as the trustee of such lands. Mr Singh relied on the decision of Serupepeli Dakai (Supra) in support of his argument.

11.7 In **Serupepeli Dakai (Supra)** the Court of Appeal agreed with the following observation of Justice Kermode be made when he stated in lower court that;

***"That Board, while it is given with powers under the provisions of the native Land Trust Act, is a trustee charged with specific duties. From the rent and purchase money it collects from native land it can legally deduct only up to 25% of rent and premia "for the expenses of collection and administration". The balance has to be distributed in the manner provided to those entitled to it".***

11.8 According to the said decision it is clear that the members of a Mataqali are only entitled to the 75% of the rental monies of the iTaukei lands which will be distributed among them by the iTLTB as the Trustee charged with the duty of collecting rent and purchase money. Therefore I am of the view that the members of a Mataqali cannot bring an action for damages on the grounds of trespass as they are only entitled to the rental money paid to them by the iTLTB. Accordingly, I agree with Mr Singhs argument that its only the iTLTB which can bring any action for trespass on to iTaukei land as the trustee of such lands.

11.9 It is also clear from the evidence led that there is no fraud involved in granting the lease to the 2<sup>nd</sup> Defendant. As decided above there is no

fiduciary duty cast upon the iTLTB to consult the owners of iTaukei land before giving a lease. Furthermore, no evidence was led by the Plaintiff in support of the allegation of fiduciary duty by the 1<sup>st</sup> Defendant. The Plaintiff also alleged in the Amendment Statement of Claim that the issuance of the lease was by mistake. If so there cannot be a breach of fiduciary duty even one exists.

11.10 In considering all of the above, I hold that the Plaintiff is not entitled maintain an action or claim for damages for trespass over iTaukei land and that the 1<sup>st</sup> defendant is not in breach of any fiduciary duties to him.

12

**Conclusion**

12.1 In view of the above findings and determinations, I hold that the Plaintiff has failed to prove his case on the balance of probabilities and therefore I conclude that the Plaintiff is not entitled to any of the reliefs prayed for in his amended Statement of Claim. Accordingly, I make the following orders.

12.2 **Final Orders**

- (i) The Plaintiff prayer for the 1<sup>st</sup> Defendant to forthwith suspend the operations of lease no. 27506A by withdrawing the same is refused.
- (ii) The Plaintiff prayer for an order that the 1<sup>st</sup> defendant revises by amending the area covered under Native Lease no 27506A by excluding from such lease the Plaintiffs land is refused.
- (iii) The Plaintiffs claim for special damages, general damages and interest declined.
- (iv) The Plaintiff to pay the Defendants (1<sup>st</sup> and 2<sup>nd</sup>) costs summarily assessed in a sum of \$2,500.00 each.



**Lal S. Abeygunaratne**

**Judge**

**27 /10/2014**

