

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 40 of 2013

<u>BETWEEN</u>	<u>: ELENOA KETENILAGI</u>	<u>Plaintiff</u>
<u>AND</u>	<u>: RATU TIMOCI KOLIKATA</u>	<u>1st Defendant</u>
<u>AND</u>	<u>: ILAMI NABIAU</u>	<u>2nd Defendant</u>
<u>AND</u>	<u>: NAPOLIONI NALOGA</u>	<u>3rd Defendant</u>
<u>AND</u>	<u>: KITIONE QOROVAKARUA QAINIUCI</u>	<u>4th Defendant</u>
<u>AND</u>	<u>: INOKE NEINUNU</u>	<u>5th Defendant</u>
<u>AND</u>	<u>: THE TRUSTEES OF VANUA NAHOQO TRUST</u>	<u>6th Defendant</u>
<u>AND</u>	<u>: THE NATIVE LANDS & FISHERIES COMMISSION</u>	<u>7th Defendant</u>
<u>AND</u>	<u>: THE DIRECTOR OF LANDS</u>	<u>8th Defendant</u>
<u>AND</u>	<u>: THE ATTORNEY-GENERAL OF FIJI</u>	<u>9th Defendant</u>
Counsel	<u>: Mr. Valenitabua for Applicant</u> <u>N/A for the 1st to 6th Defendants</u> <u>: Mr J. Lewaravu for the 7th, 8th and 9th Defendants.</u>	

R U L I N G

INTRODUCTION

1. The plaintiff is the head of *mataqali* Lewe-i-kei and *yavusa* Tabanivono. She asserts that her *mataqali* was the holder of native title on all that piece of land known as "IOSUNA". In saying this, she is asserting also that the *mataqali* of which the 1st to 6th defendants are descendants, was never the holder of the native title to "IOSUNA".
2. "IOSUNA" comprises a portion of all that land on which the InterContinental Fiji Golf Resort & Spa is built and on which it operates its business.
3. The plaintiff acknowledges that, apart from "IOSUNA, the 1st to 6th defendants were the true native owners of all that other portion of the land on which the InterContinental Fiji Golf Resort & Spa stands.

4. "Iosuna" is now registered in the Registrar of Titles Office in Book F Folio 1055 and comprises some 94 acres of land. It was purchased from the plaintiff's *yavusa* Tabanivono and *mataqali* lewe-i-kei on 29 July 1871 by a Mr. Daniel McInnes. The consideration for that transaction was 8 guns, 3 rolls lead, a large canister of tin powder and 4 boxes of caps or hats, all equivalent to one shilling.
5. On 11 October 1910, "Iosuna" was transferred to CSR by McInnes for 3000 pounds. Later, on 29 July 1974, "Iosuna" was transferred by the CSR to the Director of Lands for an undisclosed sum. That transaction was carried out pursuant to an Agreement dated 03 May 1971. After that sale, "Iosuna" would become known as Crown Grant No. 1055.
6. However, on 05 February 1975, Crown Grant No. 1055 was cancelled by the Director of Lands by Memorandum registered with the Registrar of Titles on 05 February 1975. The effect of this action would render Crown Grant No. 1055 a State Land Without Title D136321".
7. Government later developed the land for public recreation, for tourism and also for agriculture.
8. Of course, in 2007, the Fiji Government in conjunction with the iTLTB, the FNPF, the FNPF Investments Limited and the Natadola Bay Resort Limited, would spearhead the development of the land into what it has become today, namely, the InterContinental Fiji Golf Resort & Spa.

APPLICATION

9. Before me is an Originating Summons dated 08 March 2013 and amended on 14 August 2013 seeking the following:
 - (i) A DECLARATION that the Plaintiff's Yavusa Tabanivono and Mataqali Lewe-i-kei at all material times had native title on all that piece of land known as "IOSUNA" situated in the District of Malomalo in the Province of Nadroga/Navosa, that is:-
 - (a) before or prior to 29th July 1871 when "Iosuna" was sold to Daniel McInnes and/or before or prior to April '884 when title was subsequently issued to Daniel McInnes by the order of the Governor of Fiji at all material times.
 - (b) before or prior to 11th October 1910 when "Iosuna" was subsequently transferred from Daniel McInnes to the Colonial Sugar Refining Company Limited ["CSR"]
 - (c) before or prior to 29th July 1974 when "Iosuna" was transferred from the CSR to the Director of Lands on behalf of the Government of Fiji.
 - (d) before or prior to 5th February 1975 when "Iosuna" was converted from being Crown Grant 1055 to be State Land without title.

- (ii) A DECLARATION that the 1st to 5th Defendants by themselves, their different Yavusas and Mataqalis within the Yavusas, severally and/or collectively, and their respective members did not have native title to "Iosuna" before or prior to 29th July 1871 when it was sold to Daniel McInnes and before or prior to April 1884 when title was subsequently issued to Daniel McInnes and before or prior to 11th October 1910 when title was transferred to the CSR and before or prior to 29th July 1974 when title was transferred to the Director of Lands.
- (iii) AN ORDER by permanent injunction that the 1st to 5th Defendants by themselves, their Yavusas and Mataqalis within their respective Yavusas and their members cease or refrain to do as follows:
 - (a) To hold themselves out to be native owners of "Iosuna" by themselves, their servants and/or agents.
 - (b) To enter into agreements, contracts, understandings, and memorandums with the Government of Fiji and/or the Director of Lands, the i-Taukei Land Trust Board, the Fiji National Provident Fund and/or the FPNP Investments Limited, the Natadola Bay Resort Limited over the use and development of "Iosuna" only as part of the Natadola Project, including but not limited to the Intercontinental Hotel.
- (iv) A DECLARATION that the 1st to 5th Defendants by themselves, their different Yavusas and mataqalis within the Yavusas, severally and/or collectively, and their respective members, have held and continue to hold on constructive trust for the benefit of the Plaintiff's Yavusa Tabanivono and Mataqali Lewe-i-kei who are the true native owners of "Iosuna, all benefits, funds, lease payments, lump sum, settlement, royalties, chattels, goods, grants and other things they may have benefitted from or received from the iTLTB, FPNP, FPNP Investment and NBRL over the use and development of "Iosuna" as part of the Natadola Project, including but not limited to the Intercontinental Hotel, during the period they held themselves out to be true native owners of "Iosuna" up to the hearing and determination of these proceedings.
- (v) AN ORDER that the Defendants by themselves, their different Yavusas and Mataqalis within Yavusas, severally and/or collectively, and their respective members, do transfer all benefits, funds, lease payments, lump sum settlements, royalties, chattels, goods, grants and other things they may benefit from in the future from the TLTB, FPNP, FPNP Investment and NBRL over the use and development of "Iosuna" as part of the Natadola Project including, but not limited to the Intercontinental Hotel, to the Plaintiff's Yavusa Tabanivono and Mataqali Lewe-i-iosuna for the exclusive benefit of their members.
- (vi) That costs of this Application be paid by the 1st to 5th Defendants by themselves, their different Yavusas, and Mataqalis within Yavusas, severally and/or collectively, and their respective members.
- (vii) And for any other Order or Relief which this Honourable Court may deem just.

10. The application is supported by an affidavit of Elenoa Ketenilagi sworn on the 07th day of March 2013 and filed on 08 March 2013. The Respondents have not filed any affidavit in opposition.

PLAINTIFF'S GRIEVANCE

11. The plaintiff is aggrieved that, ever since the project began on Natadola Bay, the 1st to 6th defendants have been falsely representing themselves to the Fiji Government and all other stakeholders that they are the true native owners of "Iosuna".

COMMENTS

12. Neither of the defendants have filed any affidavit or submissions. The 1st to 6th defendants have not at all participated in these proceedings, although there is evidence that they were duly served with the originating process plus supportive affidavits.
13. The 7th to 9th defendants appeared by their counsel Mr. Lewaravu who made substantive submissions as to why the current originating process is not sustainable.
14. I agree with Mr. Lewaravu's submissions.
15. The plaintiff's entire case is built on the basic assertion that her *mataqali* is the true owner of all that land known as "Iosuna" which comprises a portion of the site upon which the InterContinental Fiji Golf Resort & Spa is built.
16. In **Native Land Trust Board v Kaukimoce** [2012] FJCA 17; ABU0043.2008 (21 March 2012), the Fiji Court of Appeal was dealing with an appeal of a decision of the High Court which concluded that a certain *mataqali* was not extinct and continued to exist to the present day. Essentially, the issue was about the correcting of records on the Native Lands Commission.
17. One of the grounds of appeal was that the learned Judge erred by usurping the jurisdiction vested exclusively in the Native Lands Commission under the Act.
18. The FCA examined sections 4,6,8, 9, 10, 16 and 17 of the Native Lands Act¹. It then observed that when the Act is read as a whole it is quite clear that it was

¹ Under section 4 of the Act the Native (iTaukei) Lands Commission (the Commission) is appointed by the Minister and is charged with the duty of ascertaining what lands in each province are the property of native owners. In other words what lands are native lands and whether the same are held by *mataqali* or some other division or sub-division of the people. Pursuant to section 6 of the Act the Commission shall inquire into the title of all lands claimed by *mataqali* or other divisions or sub-divisions of the people (i.e. the title to all native land) and shall describe in writing (1) the boundaries and situations of such lands and (2) the names of the members of the respective communities claiming to be owners of the land so described and situated. Section 8 of the Act requires the Commission to establish a Register of Native Lands (the Register), in which the Commission is required to record the boundaries and situation of lands that have been ascertained as native lands. Section 9 requires the Commission to record in the Register the boundaries of land the ownership of which has been decided and also to record in the Register the names of persons comprising the land owning unit of that land. Section 10 is of particular relevance to this appeal and as a result its terms are stated in full:

the intention of the legislature that the statutory functions that in the above sections should be performed by the Commission being the statutory body that was established by section 4 of the Act.

19. The FCA held that the jurisdiction to consider a submission that an error has been made is not given to the Court. The learned judge has exercised a jurisdiction that is vested in the Commission.
20. In **Namatua v Native Lands and Fisheries Commission** [2005] FJCA 85; ABU0020.2004S (4 March 2005), two mataqalis were fighting over the issue of a lease for a resort in Tokoriki Island. The Fiji Court of Appeal said:

[31] In our view, the originating summons is misconceived because the High Court has no jurisdiction to deal with a dispute that may arise under s 16 or on appeal to an Appeals Tribunal under s 7 of NLA. A decision of the Appeals Tribunal is final unless the provisions under s 7 of NLA are not complied with. That is not the complaint in this case.

[32] The High Court has no jurisdiction to deal with the dispute.

[33] Consequently, there can be no cause of action to be tried in the High Court.

ORDERS

21. The Originating Summons is dismissed. Costs to the 7th, 8th and 9th defendants which I summarily assess at \$500-00 (five hundred dollars only).



Anare Tuilevuka
JUDGE
16 May 2016

"10 (1) The volumes of such register according to the provinces, tikinas, towns or in whatever way the Commissioner may determine shall from time to time be transmitted to the Registrar of Titles who shall preserve the Register of Native Lands with the same care as the registers of land granted by the Crown.

(2) When it is found that an error has been made in the preparation of such register or that any Fijian has been recorded and registered in any proprietary unit other than the proper unit or that the name of any Fijian has been inadvertently omitted from the Register recording the proper unit of such Fijian, it shall be lawful for the Registrar of Titles on the receipt of an order under the hand of the chairman of the Native Lands Commission to correct the same or delete or add the names of such persons as the case may be."

Sections 16 and 17 of the Act also make provision for the performance of certain functions by the Commission in the case of a dispute arising (a) in connection with land and (b) in connection with the headship of any division or sub-division of the people having the customary right to occupy and use native lands.