

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 287 of 2016

BETWEEN : **ANARE SOVU** of Namalata Village, in the District of Tavuki in the Province of Kadavu, Farmer, suing in his personal capacity as a member of the Mataqali Valewai and in a representative capacity for and on behalf of the majority members of the Mataqali Valewai of Namalata Village, in the District of Tavuki in the Province of Kadavu.

PLAINTIFF

AND : **SIRELI WATISOKO, SEMISI KETENALAGI, SAMUELA SAUTAMATA, MATAIASI VERETAYACO, JALESI MARA, AMINIASI CULA** and **ULAIASI RABESA SOVU** of Namalata Village, in the District of Tavuki in the Province of Kadavu as Trustees of the **MATAQALI VALEWAI TRUST**.

DEFENDANTS

Counsel : Ms. Jackson L for the Plaintiff

Mr. Naco A for the Defendants

Dates of Hearing : 23rd January, 2017

Date of Judgment : 31st January, 2017

JUDGMENT

INTRODUCTION

1. The Plaintiffs are seeking injunction restraining the Defendants from acting as trustees of the Mataqali Valewai thus restraining them from dealing with the properties belonging to the trust and also preventing them from dealing with the accounts belonging to the trust. The Plaintiff had filed this application by way of ex-parte motion, but it was converted in to *inter partes* motion and the Defendant was given an opportunity to file their objections but they have failed to do so. So at the time of the hearing the statement of claim and affidavit in support and written submission of the Plaintiffs were available for consideration of this decision. The counsel for the Defendants objected to the

application mainly on the grounds of inadequacy of the security for damages and availability of the dispute resolution clause in the Trust Deed.

ANALYSIS

2. The Plaintiff instituted this action in his personal capacity as well as member of the Mataqali Valewai in representative capacity for majority of the members of the Mataqali Valewai. The Defendants are the trustees of the Mataqali Valewai Trust.
3. In the *Inter Partes* motion following orders are sought by the Plaintiffs
 1. *An injunction restraining the Defendants from acting in their capacity as Trustees of the Mataqali Valewai Trust and/ or from dealing with or representing the Mataqali Valewai Trust in manner or form whatsoever until the final determination of the Plaintiff's claim herein, save as to provide an account of monies deposited in and withdrawn from BSP Account Number 482812 or any other bank account under the name of the Mataqali Valewai to the Plaintiff and the Mataqali Valewai on the accounts of the Mataqali Valewai Trust;*
 2. *An injunction restraining the Defendants from dealing with any Mataqali Valewai Trust properties or monies held in the Mataqali Valewai BSP Bank Account No 462812 or any other bank account under the name of the Mataqali Valewai'.*
4. The Plaintiffs have filed a statement of claim along with the writ of summons and the Motion seeking injunction supported by an affidavit. The Defendant had not filed a Statement of Defence and or affidavit in opposition.
5. The allegation against the trustees of the Mataqali Valewai Trust are made on the basis of alleged breaches of Mataqali Valewai Trust Deed. The Plaintiff is alleging that the trustees did not submit the accounts of the trust and had also made substantial withdrawals from the trust account.
6. According to the affidavit in support (the affidavit), 'all decisions in respect of the Mataqali Valewai Trust, were required to have due regard "to the cultural protocols and

practices” acknowledged and observed by the members of the Mataqali Valewai, which included consulting’ the Plaintiff as the Turaga ni Mataqali on all decisions and matters pertaining to the Mataqali Valewai Trust, namely the utilization of the lands and funds. (See paragraph 13 of the affidavit).

7. The Plaintiff allege that neither he nor the members were consulted and or informed of the disposition of the land for commercial purposes and the proceeds of the said disposition were not properly accounted as required by the Trust Deed of Mataqali Valewai Trust
8. The Plaintiff had submitted the account of Mataqali Valewai BSP Account No 482812 and according to the affidavit in support it was operated by the trustees of the Mataqali Valewai Trust.
9. According to the Trust Deed of Mataqali Valewai Trust, the trustees are obliged to report to the members of the finances of the Trust on **six monthly basis**. There is no evidence of that being done every six months for more than 2 years. The period of the trust deed is 3 years and it need not be emphasized the importance of adherence to such timely reporting of the financial status to the members, who are appointed for a fixed term.
10. The Plaintiff also alleges that the disposition of the Mataqali Valewai Trust property to a commercial entity was also not done in accordance with the law. The Plaintiff had submitted relevant evidence but I do not wish to analyse them now.
11. The Plaintiff in his statement of claim seeks removal of the trustees and also appointment of new trustees.
12. The law relating injunction is contained in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 and needs no elaboration.

13. The counsel for the Defendants at the hearing raised two objections to this application they can be summarized as follows
- i. The Plaintiff had not explored the dispute settlement under the Mataqali Valewai Trust Deed, namely Clause 8 of Trust Deed.
 - ii. There is no appropriate undertaking for Damages.
14. The first objection is based on the Clause 8 of the Mataqali Valewai Trust Deed. The Clause 8 reads as follows
- 'In the event of any protected dispute on any matters arising out of the Trust, a special Counsel constituting of elderly members of Mataqali Valewai including the Turaga ni Mataqali must decide in a culturally appropriate way to MataqaliValewai, with the concurrent of the rest of the Mataqali members, how best to resolve the issue (as in the interest of all members) before any further legal action.'*
15. To my mind such a clause will not hinder any party making an urgent application to the court, such as injunction. These are discretionary remedies and even when there are alternate remedies the court is not precluded from exercising its power to grant injunction as an equitable remedy. So the Clause 8 would not per se preclude a member of Mataqali Valewai seeking an urgent remedy such as injunction from the courts.
16. Apart from this, the dispute resolution contained in Clause 8 of the Mataqali Valewai Trust , the resort to such mechanism will be unsuitable for the present purpose as the Plaintiff is one of the named person who would constitute the 'Special Counsel' for dispute resolution in terms of the said clause. The Plaintiff who is seeking relief cannot impartially sit as 'Special Counsel', and this would also be an additional ground for seeking court's intervention.
17. The Second objection is regarding the inadequacy of the assurance for damages. The Plaintiff in the affidavit in support at paragraph 27 state as follows
- 'As the Turaga ni Mataqali of the Mataqali Valewai , I am in a position to call for a meeting of the Mataqali Valeiwai in order to raise the necessary funds to satisfy the requirement for the usual undertaking as to damages. Further the Mataqali Valewai are the beneficial owners of the funds contained in the Mataqali Valeiwai BSP Account Number 482812 which currently contains approximately 40,000'*

18. He further stated that as the Turaga ni Mataqali of the Mataqali Valewai is in a position to obtain necessary approval from the members of the said fund if there is a need. Having said the reasons and means the Plaintiff had given the undertaking as to the damages.
19. The undertaking as to the damage is a requirement for an injunction, in terms with *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504.
20. In terms determination of Lord Diplock, in *American Cyanamid Co v Ethicon Ltd*[1975] 1 All ER 504. The first consideration is serious question to be tried. The claim of the Plaintiff should not be vexatious or frivolous. The Plaintiffs claim is not frivolous on the undisputed material before me.
21. *American Cyanamid Co v Ethicon Ltd*[1975] 1 All ER 504 at p 510 Lord Diplock held,

'As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction. (emphasis added)

22. The Plaintiff had alleged serious breaches on the part of the Defendants as trustees. The Defendants did not even dispute the said serious violations that include financial mismanagement as well as illegal disposition of land belonging to the members of Mataqali Valewai.
23. These are serious questions to be tried at the hearing. He had also given a personal undertaking and this action is instituted on behalf of majority members of the Mataqali Valewai. In the circumstances of the case, in the exercise of my discretion I find that the undertaking as to damage by the Plaintiff is adequate.
24. The balance of convenience is also favouring the grant of injunction against the trustees of the Mataqali Valewai Trust. A considerable time had lapsed and the trustees failed to submit timely financial status of the Mataqali Valewai Trust to the members, in accordance with the Mataqali Valewai Trust Deed. This is a continuous violation from the time of appointment of the present trustees. They are also required to follow the cultural protocols and practices too, but Plaintiff alleges that that was also neglected by them.
25. In the circumstances the discretion of the court is to be exercised in favour of motion seeking injunction.

FINAL ORDERS

1. An injunction restraining the Defendants from acting in their capacity as Trustees of the Mataqali Valewai Trust and/ or from dealing with or representing the Mataqali Valeiwai Trust in manner or form whatsoever until the final determination of the Plaintiff's claim herein, save as to provide an account of monies deposited in and withdrawn from BSP Account Number 482812 or any other bank account under the name of the MataqaliValewai to the Plaintiff and the Mataqali Valewai on the accounts of the Mataqali Valewai Trust.

2. An injunction restraining the Defendants from dealing with any Mataqali Valewai Trust properties or monies held in the Mataqali Valewai BSP Bank Account No 462812 or any other bank account under the name of the Mataqali Valewai.
3. The cost of this application is cost in the cause.
4. The matter is to be listed before the Master for directions to expedite the hearing of the action.

Dated at Suva this 31st day of January, 2017



.....
Justice Deepthi Amaratunga
High Court, Suva