IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 127 of 2016

BETWEEN: **JOSUA MALINAVITILEVU NAULIVOU,** company director of Namara Village Vuda suing in his personal capacity as a member of the Yavusa Sabutoyatoya of Wayasewa in Yasawa and in a representative capacity for and on behalf of the Yasawa Sabutoyatoya of Wayasewa.

Plaintiff

AND: **RATU KITIONE EPARAMA TAVAIQIA,** on behalf of the Yasawa Sabutoyatoya of Viseisei Vuda.

1st Defendant

iTAUKEI LAND TRUST BOARD a body corporate of Victoria Parade, Suva.

2nd Defendant

REGISTRAR OF TITLE of Suvavou House, Victoria Parade, Suva.

3rd Defendant

Before : Master U.L. Mohamed Azhar

Counsels: Mr. Isireli Tuifua Fa for the Plaintiff
Ms. Pulekaria Maibatiki Low for the 1st Defendant

Date of Ruling: 27th July 2018

RULING

(On *res judicata* and striking out under O 18, r 18)

Introduction

01. This is the summons filed by the 1st defendant on 24.10.2016 pursuant to Order 18 rule 18 of the High Court Rules and the inherent power of the Court. The summons is

supported by an affidavit sworn by one Jeremaia Natoka. The first defendant seeks the following orders in his summons.

1. *An Order that the Plaintiff's Statement of Claim dated the 28th day of June 2016 filed on the 28th of June 2016 be struck out under the High Court Rules 1988 and under the inherent jurisdiction on the ground that*

   (i) It is an abuse of the process of the court;

   And that the Plaintiff's action against the First Defendant be dismissed;

2. *An Order that the Plaintiff pays the First Defendant's cost of defending the action on an indemnity basis together with the costs of and incidental to this application.*

02. The plaintiff objected the summons and filled the affidavit sworn by Rusiate Naulivou and the first defendant then filed his affidavit in reply sworn by the same person who deposed the affidavit supporting the summons.

03. The plaintiff's claim revolves around the ownership of the island of Vomo situated 22 kilometers off Lautoka. The plaintiff traces the ownership of the said island to his predecessors back to 1899. Briefly, sometimes in about 1871, the island of Vomo was owned by one George Winter pursuant to a Crown Grant No. 850. Upon the death of George Winter the ownership of Vomo Island was passed to his son Francis Pratt Winter pursuant to Transmission by death. On or about the 25th of February 1899 Francis Pratt Winter was the registered proprietor of Certificate of Title Volume 12 Folio 1019 being the Certificate of title to Vomo Island comprising approximately 109 hectares who transferred the island to the Mataqali Sabutoyatoya of Yasawa Province for a consideration of 60 pounds. Therefore the Mataqali Sabutoyatoya became the registered proprietor of Vomo Island. Upon the acquisition of Vomo Island by the Mataqali Sabutoyatoya of Yasawa Province, the Plaintiff and his forefathers have used and occupied Vomo Island for farming purposes and for food and sustenance.

04. The plaintiff further stated that, since the purchase of Vomo Island by the Mataqali Sabutoyatoya of the Province of Yasawa, the 1st Defendant and his predecessors claimed ownership to Vomo Island through custom and tradition of the Defendant and also claimed to the financial benefits of the leasing of Vomo Island. The plaintiff claims that, the 2nd Defendant too treated Vomo Island as Native land and has administered the island pursuant to section 4 of the Native Land Trust Act. Accordingly, the 2nd Defendant issued leases over Vomo Island and authorized the carrying out of developments on the island. However, the Plaintiff claims that Vomo Island since 1899 been a freehold land

with a certificate of title governed and administered under the principles of the Torrens Systems of title registration. Therefore, the plaintiff seeks the following reliefs from the court;

1. *A Declaration that the Mataqali Sabutoyatoya of Yasawa is the registered proprietor of Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island comprising 109 hectares.*

2. *A Declaration that the Mataqali Sabutoyatoya of Yasawa is one and the same as the Yavusa Sabutoyatoya of Wayasewa in Yasawa.*

3. *That the Yavusa Sabutoyatoya of Wayasewa in Yasawa is entitled to a vesting order pursuant to section 78 of the Land Transfer Act that Certificate of Title of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo island comprising 109 hectares.*

4. *A Declaration that the Yavusa Sabutoyatoya of Viseisei Vuda represented by the 1st Defendant is not the registered proprietor of Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo island comprising 109 hectatres.*

5. *A declaration that the Yavusa Sabutoyatoya of Viseisei Vuda is not entitled to any monies that arises from the granting of any lease, license or alienation of land on Vomo Island.*

6. *A Declaration that the 2nd Defendant is not authorized by law to administer Vomo Island as a native land and to issue leases, licenses or alienates land on Vomo Island in any manner or farm.*

7. *A Declaration that all leases and licenses issued or granted by the 2nd Defendant on Vomo Island to 3rd parties or any instrument to alienate land or create any tenancy over land on Vomo Island is null and void and of no effect.*

8. *That the 2nd Defendant provide a Statement of Account to the Plaintiff for all monies that it has received from:*

(i) *The granting of any lease or license to 3rd arties of land on Vomo Island*

(ii) *The granting of any instrument to 3rd parties to alienate land or the creation of any tenancies over land on Vomo Island.*

9. *An order for costs.*

10. *Any other relief that this honourable court may deem just.*

05. The argument of the first defendant, in support of his summons before me, is based on the doctrine of *Res Judicata* and estoppel. To support his argument, the first defendant stated that, the father of the plaintiff brought the case **Naulivou v Native Land Trust Board** [2003] FJHC 341; HBC0069.1994L, decided on 12 November 2003 in the same capacity as the present plaintiff did in the instant case. The counsel for the first defendant in fact cited the decisions of High Court, Court of Appeal and the Supreme Court and argued that, the matter had already been adjudged and the plaintiff is estopped from bringing this action again. It would be prudent to consider the doctrine of *res judicata* before analyzing the submissions of both counsels and the plaintiff's claim.

Res Judicata

06. The term *Res Judicata* is Latin term which means "a matter adjudged"; "a thing judicially acted upon or decided"; "a matter or a thing settled by judgment" etc. The full Latin maxim reads as "***Res judicata pro veritate accipitur***" which means *'a thing adjudged must be taken for truth'* and over a period of time it shrunk to mere *"Res Judicata"*. This doctrine is based on two Latin maxims. The first one is ***"Nemo bebet big vexam pro una et eadem causa"*** and it means that ***"No one ought to be twice vexed for one and the same cause".*** The second one is ***"Interest rei publicae ut sit finis litium,"*** and it means that ***"it is for common good that there be an end to litigation".*** The effect of this doctrine is that, it estopps a party from later controverting any issue or question that had already been decided by a court and also prevents a party from obtaining same relief for the second time from the same party. A passage considered being the best known or most authoritative on this doctrine is found in the judgment of **Sir James Wigram VC** in **Hendersen v. Hendersen** (1843) Hare 100. It was held at page 115 as follows;

> *"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

07. The above authority sets a general rule that, the courts require the litigants to bring forward the entire case for adjudication. This requirement is not limited to issues or the points upon which the courts may form their opinion and pronounce the judgement, but it

extends to each and every point which properly belonged to the subject of the litigation, and which the litigants exercising reasonable diligence and care might have brought forward at the time of adjudication. It is expected from a litigant to bring all the issues that a litigant exercising reasonable diligence and care might have brought. Thus, it involves the application of an objective test in which the conduct of the litigant is compared to that of a reasonable person under similar circumstances. The rationale is that, all the aspects of a matter will be finally decided by a court of law and in that sense, it is based on the public policy that the litigation should not drag on forever and the defendant should be protected from the successive oppressions by the multiple suits. This proposition was upheld by the English Court of Appeal in **Barrow v. Bankside Agency Ltd** [1996] 1 All ER 981. **Lord Justice Sir Thomas Bingham MR** with whom **Peter Gibson** and **Saville L JJ** agreeing held at page 983 that;

> *"The rule in Hendersen v Hendersen (1843) 3 Hare 100, [1843-60] All ER Rep 378 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.*

08. The examination of the successive decisions after **Hendersen v Hendersen** (supra) reveals that, the courts have gone to the extent to declare any such new issues, which the litigants could have put forward for decision on the first occasion but failed to raise, being brought, as an abuse of the process of the court. There is plethora of cases which is evident to that proposition and of which below are some which reflect the trend of the English court after the rule in **Hendersen v Hendersen**.

09. **Somervell LJ** in **Greenhalgh v Mallard** [1947] 2 ALL ER 255 at 257 held that;

> *'issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them'*

10. In **Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd** a claimant, who had unsuccessfully sued a bank on one ground, brought a further action against the same bank and another party on a different ground, shortly after the first case. Giving the advice of the Judicial Committee of the Privy Council, Lord Kilbrandon said (See [1975] AC 581 at 589 – 590, [1975] 2 WLR 690 at 696.):

"The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMulin J, that the true doctrine in its narrower sense cannot be discerned in the present series of action, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings." (emphasis added)

11. However, the recent cases on this area have shown that the English courts have diverged from the earlier view of abuse of process and turned to distinguish between the *Res Judicata* and abuse of process not qualifying a *Res Judicata*. Reference need not be made to all of them except the following case **Bradford & Bingley Building Society v Seddon (Hancock and ors, t/a Hancocks (a firm), third parties)** [1999] 4 ALL ER 217, [1999] 1 WLR 1482 which was decided by the Court of Appeal. **Auld LJ** with whom **Nourse** and **Ward LJJ** agreeing, said:

'In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the court's subsequent application of the above dictum. The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in "special cases" or special circumstances'. See Thoday v Thoday [1964] 1 ALL ER 341 at 352, [1964] P 181 at 197 – 198 per Diplock LJ and Arnold v National Westminster Bank plc[1991] 3 ALL ER 41, [1991] 2 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter. Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because of the parties or the issue are different) for example where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue". (See [1999] 4 ALL ER 217 at 225, [1999] 1 WLR 1482 at 149.)

Auld LJ continued:

"In my judgment, mere "re'litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim, which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be

regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose. As Kerr LJ and Sir David Cairns emphasized in Bragg's case [1982] 2 Lloyd's Rep 132 at 137 and 138 – 139 respectively, the court should not attempt to define or categorize fully what may amount to an abuse of process; see also per Stuart Smith LJ in Ashmore v British Coal Corp [1990] 2 ALL ER 981 at 988, [1990] 2 QB 338 at 352. Bingham MR underlined this in Barrow v Bankside Members Agency Ltd [1996] 1 ALL ER 981 at 986, [1996] 1 WLR 257 at 263, stating that the doctrine should not be "circumscribed by unnecessary restrictive rules" since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also [1996] 1 ALL ER 981 at 989, [1966] 1 WLR 257 at 266 per Saville LJ. Some additional element is required, such as a collateral attack on a previous decision (see eg Hunter v Chief of Constable of West Midlands [1981] 3 ALL ER 727, [1982] AC 529, Bragg's case [1982] 2 Lloyd's Rep 132 at 137 and 139 per Kerr LJ and Sir David Cairns respectively and Ashmore v British Coal Corp) some dishonesty (see eg Bragg's case at 139 per Stephenson LJ and Morris v Wentworth Stanley [1999] 2 WLR 470 at 480 and 481 per Potter LJ) or successive actions amounting to unjust harassment (see e.g. Manson v Vooght [1999] BPIR 376") (See [1999] 4 ALL ER 217 at 227 – 228, [1999] 1 WLR 1482 at 1492.)

12. Having extensively considered the path on which the rule in **Henderson v Henderson** (supra) passed through over period of time, the House of Lords had an opportunity in **Johnson v. Gore Wood & Co (a firm)** [2001] 1 All ER 481 to discuss a plethora of cases on the subject matter. In that case the House of Lords re-stated the rule in **Henderson v Henderson** and held that:

"what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis or efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of

abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether , on given facts, abuse is to be found or not. Thus while I would accept that lack of funds, would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice".

13. It seems that, the House of Lord has encouraged a very balanced view for the courts to adopt when applying the doctrine of Res Judicata set out in **Henderson**. Thus, bringing of a claim or the raising of a defence in later proceedings may amount to abuse if the court is satisfied that the claim or defence should have been raised in the earlier proceedings, if it was to be raised at all. However, it is necessary to identify any additional element such as collateral attack on a previous decision or some dishonesty, before abuse may be found, but where those elements are present the later proceedings will be much more obviously abusive. Moreover, there will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party. It always better for the court to ask whether, in all circumstances of the case, the conduct of a party is an abuse and if it is so, then to ask whether such abuse is excused or justified by special circumstances or not. The overriding factor, however, should be the interest of justice. The Court of Appeal in **Barrow v. Bankside Members Agency and another** [1996] 1 All ER 981 held at page 989 that:

"The object of the rule of res judicata was said by Lord Blackburn in Lockyer v Ferryman (1872) 2 App Cas 519 at 530 to be put on two grounds – the one public policy, that it is in the interest of the state that there should be an end to litigation, and the other, the hardship on the individual that he should be vexed

twice for the same cause. Thus, as Somervell LJ stated in Greenhalgh v Mallard [1947] 2 ALL ER 255 AT 257, the principle covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. In Brisbane City Council v A-g for Queensland [1978] ALL ER 30 at 36, [1979] AC 411 at 425 Lord Wilberforce described 'abuse of process' as the true basis of the doctrine, a description approved by Lord Keith in the House of Lords in Arnold Westminster Bank plc [1991] 3 ALL ER 41 at 48, [1991] 2 AC 93 at 107. What this and other cases have emphasized, of course, is that the rule does not apply to all circumstances. As Lord Keith observed in Arnold [1991] 3 ALL ER 41 at 50, [1991] 2 AC 93 at 109, one of the purposes of estoppel being to work justice between the parties, it is open to the courts to recognize that in special circumstances inflexible application of it may have the opposite result. The existence of special circumstances excluding the application of the rule was, of course, recognized by Wigram V-C himself in the passage I have quoted".

14. Later in 2003, Lord Justice Clarke in **Dexter Ltd v. Vieland Boddy** [2003] EWCA Civ 14 having examined the authorities starting from **Henderson** to **Johnson v Gore Wood & Co** summarized in a very simple and classic way the principles that derived from those authorities. This manifestly demonstrates that, the rule in **Henderson** since its being expressly adopted till **Johnson v Gore Wood & Co** has been developed to what is now referred to as an *'Extended Doctrine of Res Judicata'* by the broad merit based approach of the English court, which intended the protection of interest of justice. Lord Justice Clarke said in para 49 and 50 that:

*"The principles to be derived from the authorities, of which by far the most important is **Johnson v Gore Wood & Co [2002] 2 AC 1**, can be summarized as follows:*

i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.

ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.

iii) The burden of establishing abuse of process is on B or C or as the case may be

iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive

v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process

vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C

Proposition ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B,C , D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others".

15. **Port of Melbourne Authority –v- Anshun Proprietary Limited** [1981] HCA 45; [1981] 147 CLR 589 is the most celebrated case decided by the High Court of Australia, which analyzed the rule in **Henderson**. Whilst affirming the rule in **Henderson**, the High Court of Australia has extended it to the *'reasonableness'*. Since the pronouncement of this judgment by the High Court, this doctrine is now known in Australia as "*Anshun Estoppel*". It was held in that case that:

"In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual litigation to mention but a few. See the illustrations given in Cromwell v County of Sac. (1876) 94 US (24 Law Ed, at p 199) (at p603)

It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment. In this respect the discussion in Brewer v Brewer [1953] HCA 19; (1953) 88 CLR 1 is illuminating. (at p603)".

16. This modern extended doctrine was briefly explained by ***Spencer, Bower, Turner and Handley*** in ***'The Doctrine of Res judicata***, (3rd edition) ***1996,*** after analyzing all the cases from **Hendersen v. Hendersen** (per, Wigram VC), **Greenhalgh -v- Mallard** [1974] 2 ALLER 255 (per Somervelle), to **Port of Melbourne Authority -v- Anshun Proprietary Limited** (per Gibbs CJ, Mason and Aickin JJ). It reads that:

"In 1843 Wigram VC referred in Henderson to "points which properly belonged to the subject matter of litigation in earlier proceedings". Somervell LJ ('part of the subject matter of the litigation") and the Full Court of Hong Kong ("necessary and proper") echoed this approach in slightly different language. The test of reasonableness in Anshun attempted to work out the underlying principle. It can be seen to be derived from the requirement in Henderson that the point should "properly belong" to the earlier litigation coupled with the concept of vexatious and unreasonable conduct central to the exercise of the court's powers to prevent abuse of its process.

It is therefore suggested that the extended doctrine does not prevent a party bringing forward in later litigation a cause of action not previously adjudicated upon, provided it is not substantially the same as one that has been, unless success in the new proceedings would result in inconsistent judgments".

17. It is evident from some decisions that, the extended doctrine of res judicata has influenced the courts in Fiji too. The Fiji Court of Appeal endorsed the extended doctrine of res judicata in **Reserve Bank of Fiji –v- Gallagher** Civil Appeal No. ABU 0030, ABU 0031, ABU 0032/2005 (14th July, 2006) and was guided by it. Their Lordships Ward P and Baker JA and Henry JA said as follows at paragraph 70 of their judgment in that case, when the counsel referred to many manifestations of applications of the rule in **Henderson**:

> "Counsel referred us to many manifestations of applications of the ***Henderson*** rule. We find it unhelpful to review them all since we are attracted by the non-dogmatic approach in ***Johnson v. Gore Woods*** and the reasonableness approach in ***Anshun***".

Analysis

18. In the instant case, as mentioned above, the first defendant's counsel cited the case filed by the father of the plaintiff and all decisions of High Court, Court of Appeal and the Supreme Court. The Counsel for the plaintiff did not dispute the fact that, the father of the plaintiff brought the above mentioned action and it went up to the Supreme Court. However, he argued that, the High Court in that case had determined an issue that, neither the plaintiff nor the defendant placed before the court and therefore, the court by its judgement prevented the plaintiff from asserting the sole ownership of Vomo island.

19. Apparently, the father of the plaintiff, Timoci Nagaga Naulivou brought the above action **Naulivou v Native Land Trust Board** (supra) in this court and fortunately, the original file is still available for perusal. He sued the Native Land Trust Board in his personal capacity, as the member of Yavusa Sabutoyatoya and its constituent Tokatoka of

Wayasewa, as the plaintiff did in the case before me. On perusal of the amended writ filed by the plaintiff in that case, it reveal that, the following reliefs were sought;

> ***WHEREFORE*** *the Plaintiff claims for the Yavusa, its Tokatokas and members the following orders*
>
> *a) For a declaration that Tokatokas Natabale, Natabataka, Lotuma, Waributa and Veto of Yavusa Sabutoyatoya of Namara in the tikina of Waya are collectively entitled to half share of premium and lease money distributable as landowners share received by the Native Land Trust Board on lease of the islands of Vomo Levu and Vomo Lailai fromt eh 12th day of March 1989 till expiry of lease;*
>
> *b) For an Order that the Native Land Trust Board pay to Tokatokas Natabale, Natabataka, Lotuma, Waributa and Veto of Yavusa Sabutoyatoya of Namara in the tikina of Waya half a premium and lease monies distributable to the landowning units being owners of Vomo Levu and Vomo Lailai from 12th day of March 1989 till date of Order;*
>
> *c) General Damages*
> *d) Any other order the Court deems just*
> e) *Costs of this action*

20. Basically, the father of the plaintiff sought the half share of the premium and the lease money that was generated from the Vomo Island. In order to determine his claim of half share, the court was to decide the nature of land (Vomo Island) involved and the owners of the land. This was the decision in that case. His Lordship the Chief Justice Anthony Gates (as His Lordship then was), having carefully analyzing the history of the ownership of the said island and the demands of different group of people claimed to be part of Yavusa Sabutoyatoya, delivered the judgement in that case and made the following determinations;

> *1. CT Register 12 Folio 1019, the land title to Vomo Island, which includes the islands of Vomolevu and Vomolailai is a freehold.*
>
> *2. The subject freehold is owned by the two yavusas, Sabutoyatoya [Viseisei] and Sabutoyatoya [Wayasewa] as owners in common.*
>
> *3. The two yavusas are separate yavusas.*

4. *The income from the subject freehold is to be distributed on the basis of 50% of the income to each yavusa.*

5. *With the two yavusas, distribution should follow the distribution as laid down in Regulation 11 of the Native Land Trust (Leases and Licences) Regulations Cap. 134.*

6. *Liberty to the parties to apply for directions on Trusteeship, distribution or correction of title matters.*

21. There was an appeal against the above decision to the Court of Appeal, however by the substituted plaintiff, who was the brother of the original plaintiff and the uncle of the present plaintiff. It seems from the judgment of the Court of Appeal, as it was confirmed by the Supreme Court too, that the substituted plaintiff attempted to raise on appeal an entirely new case inconsistent with what was presented to the High Court. However, the Court of Appeal did not allow it and held at paragraph 26 that,

> *In our view, the Plaintiff is now attempting to raise on appeal an entirely new case inconsistent with that presented to the High Court. It is however established law that such a course is not open to it (see ex parte Reddish, in re Walton (1877) 5 Ch D 882). This ground of appeal fails.*

22. The Court of Appeal, having made the above observation, finally made the following determination on appeal;

> *[1]. Orders 1, 3 and 6 of the High Court, not being the subject of appeal are confirmed.*
>
> *[2]. The appeal against Order 2 is dismissed.*
>
> *[3]. Orders 4 and 5 are set aside. Profits derived from the lease are to be distributed equally to all registered members of the two co-owning yavusas.*
>
> *[4]. There will be no Order as to costs.*

23. The Court of Appeal only varied the orders 4 and 5 of the High Court and ordered to equally distribute the profit on lease to all registered members of two co-owning Yavusas, namely, the Yavusa represented by the plaintiff and the Yavusa represented by the first defendant in the instant case. Thereafter, an abortive attempt was made to obtain special leave to appeal to the Supreme Court. The plaintiff in that application tried to

bring the new issue of indefeasibility of title. However, the court rejected the application and clearly held that;

> *"……..The issue of indefeasibility of title was not pleaded before the Trial Judge at first instance. An attempt was made to do this in the Court of Appeal but rejected by that Court which on page 11 of its judgment ruled that,: "The Plaintiff is now attempting to raise on appeal an entirely new case inconsistent with that presented to the High Court. It is however established law that such a course is not open to it. (see ex parte Reddish, in re Walton (1877) 5 Ch D 882)".*

24. It manifestly reveals that, the original plaintiff only sought the half share on the premium and the lease money of the Vomo Island. However, the substituted plaintiff tried to deviate from what was pleaded by the original plaintiff in the High Court and attempted to bring the issue of indefeasibility of title, which was rejected by both the Court of Appeal and the Supreme Court. The current plaintiff in the case before me is doing what the substituted plaintiff attempted to do in both the Court of Appeal and the Supreme Court and what he failed to achieve in both appellant courts. He (the current plaintiff) brings the issue of indefeasibility in the present case and tries to shut out the Yavusa represented by the first defendant from co-owning the disputed island and getting the shared income generated from that island. If this court grants the reliefs sought by the present plaintiff in this case, the court will not only reverse the determination of High Court in the previous case, but also will grant the relief, which both the Court of Appeal and the Supreme Court refused to grant.

25. It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment ***(see: Brewer v Brewer [1953] HCA 19; (1953) 88 CLR 1)***. Furthermore, the conduct of the plaintiff in the instant case is not only an abuse, but also a real harassment and oppression of the first defendant who is entitled to the half share of the lease money from the said Vomo Island, by virtue of the judgment of High Court in the previous case. It has been held in several cases that, the successive actions amount to unjust harassment ***(see e.g. Manson v Vooght [1999] BPIR 376") (See [1999] 4 ALL ER 217 at 227 – 228, [1999] 1 WLR 1482 at 1492.)***. For the above reason I hold that, the doctrine of *Res Judicata* applies to instant case and the plaintiff is estopped from bring this action seeking the court to decide the matter that had already been adjudged by the High Court and affirmed by both the Court of Appeal and the Supreme Court. On this ground itself, without examining the striking out principle under the Order 18 rule 18, the instant case ought to be dismissed with the substantial amount of cost, considering the conducts of the plaintiff. However, for completeness I now turn to discuss the principles of striking out under Order 18 rule 18 of the High Court Rules.

Striking out for abuse of the process

26. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule read:

> *18 (1) The Court **may** at any stage of the proceedings **order to be struck out or amend** any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
>
> *(a) It discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) It is scandalous, frivolous or vexatious; or*
>
> *(c) It may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d) It is otherwise an abuse of the process of the court;*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *(2) No evidence shall be admissible on an application under paragraph (1)(a).*
>
> *(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading* (emphasis added)

27. At a glance, this rule gives two basic messages and both are salutary for the interest of justice and encourage the access to justice which should not be denied by the glib use of summery procedure of pre-emptory striking out. Firstly, the power given under this rule is *permissive* which is indicated in the word "may" used at the beginning of this rule as opposed to *mandatory*. It is a *"may do"* provision contrary to *"must do"* provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not ***necessarily*** be struck out as the court can, still, order for amendment. In ***Carl Zeiss Stiftung v Rayner & Keeler Ltd*** *(No 3) [1970] Ch. 506*. It was held that the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea. **MARSACK J.A.** giving concurring judgment of the Court of Appeal in ***Attorney General v Halka*** ***[1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972)*** held that:

> *"Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".*

28. Though four grounds are mentioned in the above rule, the summons filed by the first defendant is based on the fourth ground, which is the abuse of process of the court. Other three grounds need no discussion in this case and the emphasis is made only to the fourth ground, which is material to this case. The rule of law and the natural justice require that, every person has access to the justice and has fundamental right to have their disputes determined by an independent and impartial court or tribunal. However, this access should be used with the good faith and the motive untainted with the malice. If any action is prosecuted with the ulterior purposes or the machinery of the court is used as a mean of vexatious or oppression, it is an abuse of the process. Likewise the subsequent action after dismissal of previous action too, is an abuse of the process. The courts have inherent power to combat any form of such abuse.

29. Halsbury's Laws of England (4th Ed) Vol. 37 explains the abuse of process in para 434 which reads:

> *"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."*

30. His Lordship the Chief Justice A.H.C.T. GATES in ***Razak v Fiji Sugar Corporation Ltd*** (supra) held that:

> *"It would be an abuse of process for the plaintiff to bring a second action for the same cause of action after disobedience of peremptory orders had resulted in the dismissal of the first action: Janov v Morris [1981] 3 All ER 780. It is said the process is misused thereby. Re-litigating a question, even though the matter is not strictly res judicata has been held to be an abuse of process: Stephenson v Garnett [1898] 1 QB 677 CA. In that case the suitor was the same person and he sought to re-open a matter already decided against him".*

31. In the case of **Goldsmith v Sperrings Ltd [1977] 2 All ER 566**, Lord Denning said as follows at 574:

> *"In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and*

will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer".

32. The present plaintiff, by bringing the present case, has invoked the legal process to vindicate the rights and the claims that, the courts had already adjudged and tried to re-litigate the issue that had already been determined. He never mentioned about the case filed by his father and later taken up to the Supreme Court by his uncle in the same capacity. When the previous case was mentioned by the first defendant, the plaintiff's counsel stated that, plaintiff's case navigates the difficulty created by decision of His Lordship Justice Gates. At this point, I identify some additional elements such as a collateral attack on the previous judgement and dishonestly of concealing the previous judgment. Both elements present in this case, make it something more than an obvious abuse. He seeks from this court the reliefs that, both the Court of Appeal and the Supreme Court refused to grant. He tries to use the process of the court as the means of vexation or oppression with malicious intention of preventing the Yavusa represented by the first defendant from the enjoying the rights and the entitlements which the apex court of this country affirmed. This is clear abuse of the process of the court which cannot be condoned.

Conclusion

33. For the reasons adumbrated above, I am of the view that, the doctrine of *Res Judicata* applies in this case and the plaintiff is estopped from bringing this action against the defendants. The plaintiff clearly abused the process of the court, which is supposed to be invoked for the vindication of men's rights or the enforcement of just claims, and thereby tried to oppress the first defendant and all the members of Yavusa Sabutoyatoya of Viseisei. This attempt of abuse should not be taken lightly, but should be punished with the substantial cost.

34. In result, I make the following the final orders;

a. The plaintiff's action is dismissed as it is an abuse of process of the court, and

b. The plaintiff is ordered to pay a summarily assessed cost of $ 2,000.00 to the first defendant within a month from today.

HIGH COURT OF FIJI LAUTOKA

U.L Mohamed Azhar
Master of the High Court

At Lautoka
27.07.2018