

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 92 OF 2018**

**BETWEEN** : **TOKATOKA NAMARA TRUST** on behalf of **MATAQALI NAMARA**, the landowning unit of the Native Land known as Nasou (Part of); District of Sikituru, Moala Village, Nadi.

**PLAINTIFF**

**AND** : **SK DAVEY LIMITED**, registered office located at Lot 47, Narewa Road, Nadi, Fiji Islands.

**1<sup>ST</sup> DEFENDANT**

**AND** : **KINI MOMO**, Moala Village, Nadi.

**2<sup>ND</sup> DEFENDANT**

**Appearances** : Ms A. Durutalo for the plaintiff  
No appearance for the first defendant  
Mr S. Lutumailagi with Ms P. Mataika for the second defendant

**Date of Hearing** : 12 July 2018

**Date of Ruling** : 13 August 2018

**R U L I N G**

[on interim injunction]

**Introduction**

[01] This is an *inter parte* notice of motion to seek an interim injunction against the defendants until the final determination of the substantive matter (*'the application'*).

[02] By means of his application filed 4 May 2018, in conjunction with an affidavit sworn by the trustees of Mataqali Namara, the landowning unit on 3 May 2018,

in support of the application, the plaintiff seeks the following injunctive orders against the defendants:

1. *An injunction restraining the defendants and/or its servants agents or howsoever from continuing with extraction of gravel works immediately at TLTB File Ref No. 10/42205 described as Nasou (Part of); District of Sikituru Area with 6.0702 ha (hereinafter referred to as "the said land").*
2. *An injunction restraining the defendants and/or his servants, and/or agents or any other persons intimidating the plaintiff and interfering with the said land in any manner.*
3. *An injunction restraining the defendants and/or his servants, and/or agents immediate cessation of works and immediate removal of equipment, machinery and other chattels from the said land.*
4. *The Police is to assist in serving the Order and documents on the first and second defendants.*

[03] The application is made pursuant to Order 29, Rules 1 & 2 of the High Court Rules 1988, as amended ('HCR').

[04] Only the second defendant opposes this application. He filed an affidavit of Kiniviliame Momo, the second defendant sworn on 4 June 2018, in opposition.

[05] The first defendant did not participate in this proceeding, albeit the application was duly served on them. The plaintiff has filed an affidavit of service of Ramanjula Naiker sworn on 16 May 2018, in proof thereof.

[06] On 4 May 2018, having considered the *ex parte* application and the supporting affidavit and having heard the submission advanced by Ms Durutalo of counsel

for the plaintiff, I issued an injunction on *ex parte* basis to be valid until hearing of the application *inter partes* on 24 May 2018. On 24 May 2018, Mr Lutumailagi appeared for the second defendant and applied to the court for the vacation of the hearing on the ground that the second defendant could not file his objection. Accordingly, the vacated the hearing with the view to allow the second defendant to file his objection and adjourned the same till 12 July 2018 (9.30 am) and at the same time the court extended the *ex parte* orders until determination of the application for interim injunction. There was no appearance for the first defendant.

[07] At the hearing, which took place on 12 July 2018, both parties orally argued the matter and filed their respective submissions.

### **The background**

[08] MATAQALI NAMARA is the landowning unit of the Native Land known as Nasou (Part of); District of Sikituru, Moala Village, Nadi with an area of 6.0702ha (*'the land'*). TOKATOKA NAMARA TRUST, the plaintiff (*'the plaintiff'*) is suing on behalf of the landowning unit. The action arises out of Mr Kini Momo's (*'the second defendant'*) engagement of the services of SK Davey Limited (*'the first defendant'*) to extract gravel from the land.

[09] The Tokotoka of Namara had allocated land to the second defendant and his family as per his "*i-kanakana*" which, according to the plaintiff, for the purpose of residential and not commercial purposes.

[10] The plaintiff states that the second defendant is using the land for industrial purposes and engaged the first defendant to extract gravel in exchange for financial gain, without permission of the Mataqali of Namara.

- [11] The plaintiff seeks interim injunction to restrain the defendants from extracting gravel from the land, pending determination of the substantive claim.

### **The Law**

- [12] The law that is applicable to an application for interim injunction is found in Order 29 of the HCR, which states:

#### *“Application for injunction (O 29, R 1)*

*1 (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party’s writ, originating summons, counterclaim or third party notice, as the case may be.*

*(2) Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as aforesaid such application must be made by notice of motion or summons.*

*(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.”*

### **The governing principles**

- [13] The proper approach to the exercise of the jurisdiction to grant injunctions was outlined by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 which set out the following test:

- a) *Is there a serious question to be tried?*
- b) *Are damages an adequate remedy?*
- c) *Who does the balance of convenience favour?*
- d) *Are there any special factors?*

[14] Fiji courts have repeatedly used these guidelines in a number of cases such as: *Vivorass Development Ltd v Fiji National Provident Fund* [2001] FJLawRp 67; [2001] 1 FLR 260 (10 August 2001) and *Digicel (Fiji) Ltd v Fiji Rugby Union*, Civil Action No.: HBC 30 OF 2014S.

### **The discussion**

[15] Before the trial, the plaintiff makes an application for an interim injunction against the defendants. The claim for injunction is not included in the plaintiff's writ. An application for interim injunction may be made by any party to the action before or after the trial of the action whether or not a claim for the injunction was included in that party's pleadings (see O 29, R 1). The plaintiff is entitled to make an application for an interim injunction even though his claim does not include injunction.

[16] In this discussion, I will consider the test as applicable to this application.

- a) *Is there a serious question to be tried?*

[17] At this stage, without attempting to resolve the conflict of evidence on facts and question of law which might call for detailed oral evidence and argument, I would only look at the pleadings to find out whether or not there is a serious question to be tried.

[18] The plaintiff states that the second defendant was given the land in dispute for "*i-kanakana*" use only, but the second defendant is using it for industrial purpose

and gaining financial benefit by engaging the first defendant to extract gravel from the land for which he has not obtained the written consent or permission of the Mataqali. It is also the plaintiff's position that the second defendant is extracting gravel without a permit for that purpose.

[19] The defendant argues that the Tokatoka Namara has been given exclusive right to live from the land therefore requirement from the Mataqali to consent in how the family makes its living is not an issue and therefore there is no serious issue to be tried.

[20] I am declined to agree with the second defendant's submission that there is no serious issue to be tried at the trial.

[21] In my view, two issues emerge from the pleadings. First, whether or not kanakana right extends to the extraction of gravel from the land for commercial purpose. Second, if it does, whether the second defendant can do so without a permit for that purpose.

[22] In *Neivalu v Lutumailagi* [2017] FJHC 355; HBC99.2013 (2 May 2017), I, judging from the accepted definition of 'danudanu' ('kanakana'), held that 'danudanu' right includes only planting and eating and nothing else.

[23] The second defendant is extracting gravel from the land without a licence. A licence would be required to remove sand from the land. This raises a legal issue.

[24] I find that there is a serious question to be tried at the trial, especially whether or not the kanakana right the second defendant holding on the land extends to the

extraction of sand or gravel from the land for commercial purpose without a licence and/or consent of the Mataqali. This takes me to the second test whether damages are an adequate remedy.

b) *Are damages an adequate remedy?*

- [25] If damages would not adequately compensate the plaintiff for the temporary damage, and he is in a financial position to give a satisfactory undertaking as to damages, and award of damages pursuant to that undertaking would adequately compensate the defendant in the event the defendant succeeding at trial, an interlocutory injunction may be granted. If the plaintiff is not in a financial position to honour his undertaking as to damages, and an appreciable damage to the defendant is likely, an injunction will usually be refused (*Morning Star Co-operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113).
- [26] It is submitted on behalf of the second defendant that damages in this instance are an adequate remedy; there is no continuous interference from the second defendant on the land as all work has ceased and the undertaking given by the plaintiff (Lot 8H-39 acres) also includes the second defendant's 'danudanu' area.
- [27] It is true that the plaintiff claims among other things compensation in the sum of \$750,000.00 for unjust enrichment.
- [28] I am of the opinion that the damages would not adequately compensate the plaintiff the damage that would be caused to the land by the second defendant's illegal extraction of dredges of soil from the land. The plaintiff is in a financial position to give undertaking as to damages. The plaintiff says they are the landowning unit of the land and they will abide by any order the court may make as to damages suffered by the second defendant as a result of the interim injunction. The plaintiff has annexed a document to their affidavit in support which indicates that they own 39 acres of land including the land in dispute ('TNT 9'). The undertaking as to damages given by the plaintiff is sufficient even after excluding the land in dispute, which is approximately 15 acres. I am satisfied with the undertaking as to damages given by the plaintiff. An award of

damages pursuant to that undertaking would adequately compensate the defendant in the event the second defendant succeeding at the trial. The second defendant submits that damages would be an adequate remedy for the plaintiff in this case. However, he does not give a sufficient cross-undertaking to adequately compensate the plaintiff in the event he fails at the trial. In the circumstances, I would grant an interim injunction in favour of the plaintiff.

*c) Who does the balance of convenience favour*

[29] The question of balance of convenience arises where there is doubt as to the adequacy of remedies in damages available to either party.

[30] The balance of convenience comes to play where there is doubt as to the adequacy of remedies in damages available to either party. Lord Diplock at para 408E said:

*'It is where there is doubt as to the adequacy of remedies in damages available to either party or to both, the question of balance of convenience arises' (at 408E, American Cyanamid case).*

[31] In this case, I have found that damages would not be adequate remedy to the plaintiff, for the question of balance of convenience does not arise.

*c) Are there any special factors?*

[32] Neither party addresses this issue. I do not see any special factors for refusing an interim injunction.

**Conclusion**

[33] For the foregoing reasons, I would grant an interim injunction in favour of the plaintiff as sought until the final determination of the substantive matter. The plaintiff is entitled to costs of these proceedings. I award costs of \$1,000.00 to the plaintiff.

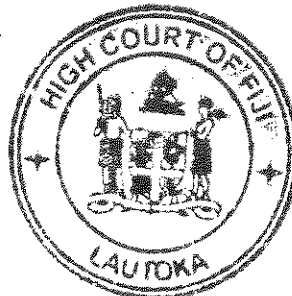


## The Result

1. Interim injunction is granted in favour of the plaintiff to be valid until the final determination of the substantive matter.
2. The second defendant and/or its servants agents or howsoever shall be restrained from extraction of gravel at the land particularized in **TLTB File Ref No. 10/42205** described as Nasou (Part of); District of Sikituru Area with 6.0702 ha.
3. The second defendant and/or its servants agents or any other persons shall be restrained from intimidating the plaintiff and interfering with the land particularized in **TLTB File Ref No. 10/42205** described as Nasou (Part of); District of Sikituru Area with 6.0702 ha.
4. The second defendant and/or his servants, and/or agents shall with immediate effect cease work and remove the equipment, machinery and other chattels from the land particularized in **TLTB File Ref No. 10/42205** described as Nasou (Part of); District of Sikituru Area with 6.0702 ha.
5. The plaintiff may seek police assistance for service of the order and documents on the second defendant.
6. The second defendant shall pay summarily assessed costs of \$1,000.00 to the plaintiff in 21 days.

*M.H. Mohamed Ajmeer*  
13/8/18

M.H. Mohamed Ajmeer  
**JUDGE**



At Lautoka  
13 August 2018

### Solicitors:

For the plaintiff/applicant: M/s Durutalo Lawyers, Barristers & Solicitors

For the second defendant/respondent: M/s Vuataki Law, Barrister & Solicitor