

IN THE HIGH COURT OF FIJI  
AT LABASA  
CIVIL JURISDICTION

Civil Action No. HBC 36 of 2018

**BETWEEN:** MEREONI NABEWA for and on her behalf and on behalf of the following Individuals who have duly authorized her to bring this action under a representative capacity, that is to say; SALANIETA VUKIVUKI, JOSEFA RAITALA, JOSEVA RAITALA JNR, RT NEMANI GAUNAVINAKA RAITALA CAGILABA, MELI COKANACAGI RAITALA, SUNIA TUBOU VOSIKATA, ESALA TUBAILAGI, PAULA RADINIONO, RT. NEMANI GACEVI, RT RALULU GARTH, SALESITINO RANAMA, NUNIA YADRACA, LUSIANA RAITALA, LUSIANA JACQUELINE TIKOMAIMERIKA RAITALA, RATU MAIKA MURITOVO, SALANIELTA QOLIKORO all members of Tokatoka 931 (Agnate descendants of Ratu Nemani Kavuru) and Tokatoka 936 (Agnate descendants of Ratu Apenisa Ralulu) all of Nasarata, Somosomo, Taveuni.

**PLAINTIFFS**

**AND:** I-TAUKEI LAND TRUST BOARD a statutory body established under the I-taukei Land Trust Act of Victoria Parade, Suva.

**FIRST DEFENDANT**

**AND:** NEMANI KAVURU CAGILABA aka NEMANI DOVIA, SAVENACA SENILOLI, JONE SALELE and ALISI FUGAWAI as TRUSTEES OF NASARATA BOLETAGANE TRUST all of Nasarata, Somosomo, Taveuni.

**SECOND DEFENDANT**

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr N. Nawaikula for the Plaintiffs  
: Mr K. Ratule for the First Defendant

Date of Hearing : 21 February 2019  
Date of Judgment : 25 April 2019

## JUDGMENT

1. This is the Plaintiff's Originating Summons (OS) whereby they seek the following:
  - (1) A Declaration that in 2015 the First Defendant made at least 3 payments to the members of the native land owning units of Tokatoka Numbers 931 and 936 with a sum total of \$221,000 (the sum).
  - (2) A Declaration that by virtue of the Native Land Trust (Leases and Licences) (Amendment) Regulations 2010 (the Regulations), the Plaintiffs and other members of the said Tokatokas are entitled to equal shares of the sum paid by the ITLTB.
  - (3) A Declaration that the First Defendant paid the sum to the Second Defendant unlawfully and contrary to its powers and responsibility under the Act.
  - (4) An Order that the First Defendant pay to the Plaintiffs their lawful shares of income in equal shares.
  
2. The OS is supported by the affidavit of Mereoni Nabewa (Nabewa) sworn on 12 July 2018 who deposed as follows:
  - (1) She brings the action in a representative capacity on behalf of herself and the members of the 2 Tokatokas who have authorized her to bring this action on their behalf.
  - (2) The sum was paid in 3 installments in 2015.
  - (3) She is seeking a declaration that such payment was unlawful and an order that the First Defendant account for and pay to the Plaintiffs their equal entitlement in accordance with the Regulations.
  - (4) Circa 2015, a development was made and the First Defendant collected rent and premium on behalf of the native owners as trustees and in accordance with the Act.
  - (5) The First Defendant instead of dividing what it collected in equal shares paid all sums to the Second Defendant.
  - (6) She believes the payments were unlawful and the First Defendant acted unlawfully in not paying direct to them.
  
3. The First Defendant's affidavit in opposition is sworn by Nemani Tamani (Tamani) on 11 October 2018 who deposed as follows:



- (1) Except for the payment of the sum by way of 3 installments, the payments by the First Defendant (the Board) were lawfully made and did not contravene the Regulations.
  - (2) The Plaintiff's Tokatoka requested for the assignment of its monies to its trust account rather than to be equally distributed.
  - (3) The Board acted lawfully by assigning the monies as per the wishes of both Tokatokas. The Board cannot now repay the monies paid to the Second Defendant.
4. In the First Defendant's supplementary affidavit in opposition sworn by Josaia Waqairatu (Josaia) on 24 October 2018 he says by the attached authority from the members of the 2 Tokatokas they authorized the First Defendant to assign their monies to their nominated bank account rather than apportioning the same individually. This is in compliance with the 2010 amendment of the Regulation.
5. Nabewa in her affidavit in reply to the above 2 affidavits sworn on 22 November 2018 deposes as follows:
- (1) The 17 members at the unit who are Plaintiffs have never given any authority to the First Defendant to pay their money to the Second Defendant and are still waiting to be paid their equal portion of the sum.
  - (2) Under the Regulation, only an individual can decide or authorize how the portion is to be used and the majority of the Tokatoka has no authority over it.
  - (3) She denies the majority of the members of a proprietary unit can authorize the First Defendant to deal with the money of an individual member who disagrees with the majority decision.
6. In the answering affidavit of Savenaca Seniloli (Seniloli) sworn on 30 November 2018, he deposes as follows:
- (1) He is authorized by the Second Defendant (the Trust).
  - (2) The members of the 2 Tokatokas are the same persons, and include all the Plaintiffs.
  - (3) Only Nabewa did not sign the assignment forms, all the other Plaintiffs did.
  - (4) The Trust allocated and paid the Plaintiffs their monies. All monies have been paid within the ambit and at the request of the members of the Trust.
7. Nabewa in her affidavit in reply to the affidavit of Seniloli sworn on 20 February 2019 deposes as follows:



1. She and 6 of the Plaintiffs say they did not sign the letter of authority to assign members shares.
  2. She denies the contention that their share was given to each of them and she then went to take the money away.
8. The Hearing commenced with Mr Nawaikula submitting that he is specifying an amount for each of the 17 claimants. He referred to Regulation 11 and Section 14 (e) of the Act.
9. Mr Ratule then submitted. He said names of the 17 Plaintiffs are the same for both Tokatokas. The Board has to comply with S.14 (1) and (3) of the Act. It is only deducting 10%. The Board paid to the trustees, the Second Defendant, under the trust deed. \$221,000 was not paid to the Second Defendant. What was actually paid was (1) For Tokatoka 936 - \$68,772.45. (2) For Tokatoka 931 - \$20,313.70. For the above (1) 61% and for the above (2) 63% were the respective majorities. Regulation 11 (1) says the balance after 2 deductions made is then equally distributed. There is no money for the Board to pay the Plaintiffs. The Board paid the Second Defendant the proceeds of the rent because they knew the Second Defendant were legally entitled to receive the money.
10. Mr Nawaikula in his reply said the Board was entitled to make the deductions but it should pay his clients.
11. At the conclusion of arguments, I said I would take time for consideration. Having done so and in the process perused the written submissions of both Counsel and the authorities cited, I shall now deliver my decision.
12. To my mind the pivotal issue by this. Can the Board pay the balance, after the requisite deductions, to the Trustees or must it by law pay the same to the members directly in equal shares?
13. I start by perusing Regulation 11. ***“Distribution of balance of rents and purchase-monies.***

*(1) After deduction of any sums in accordance with section 14 of the Act, the balance of any monies received by the Board by way of rents and premiums in respect of iTaukei land, including any monies received by the Board but not yet distributed at date of commencement of the iTaukei Land Trust (Leases and Licenses) (Amendment) Regulations 2010, shall be distributed by the Board to all the living members of the proprietary unit, registered*



*in the Register of iTaukei Landowners also known as Vola ni Kawa Bula, in equal proportion”.*

14. I now turn to Section 14 of the Act. **“Distribution of rents and purchase money.**

*(1) Subject to the other provisions of this section, rents and premiums received in respect of leases or licenses in respect of iTaukei land shall be subject to a deduction of such amount as the Board may from time to time determine not exceeding 25% of such rent or premium, which shall be payable to the Board as and for the expenses of collection and administration, and the balance thereof shall be distributed in the manner prescribed.*

*(3) Before any balance shall be distributed pursuant to the provisions of subsections (1) and (2) the Board shall discharge out of the moneys received -*

*(e) with the consent of the iTaukei owners whether given before or after 4 December 1970 which consent shall operate as an assignment of rents irrevocable until the total amount is paid, any amount due and unpaid in connection with any scheme approved by the Minister for the benefit of the iTaukei owners”.*

15. I finally turn to consider the letters of authority to assign members shares. I think it is a red herring to consider whether a majority of the members in each Tokatoka agreed to such assignment. A perusal of each letter shows quite clearly it is a bare assignment of monies by the persons entitled to receive them for no apparent reason or objective. It most certainly has not been assigned in accordance with S.14 (3) (e) of the Act - any scheme approved by the Minister.


16. Consequently, Regulation 11(1) comes into play. The operative word here is “shall”. According to the Concise Oxford English Dictionary, 12<sup>th</sup> edition, “shall” is defined as “expressing an instruction or command”.

17. In my view this must necessarily mean the Board has no option or discretion as to what it may do with the money via an assignment by the majority of the members. I do not think that even the unanimous decision of all the members could have prevailed. The unequivocal intention of the draftsman has to be effected and if the Board has failed to do so then it falls to this Court to do that.

18. I am therefore of opinion that the Board is obliged to and must pay all the living members of Tokatokas 931 and 936 the balance of the monies in equal proportion.
19. I note from the Plaintiffs' supplementary submission that they have abandoned their claim for \$221,000.00 and have now accepted a sum of about \$89,000.00 is the amount claimed. I think this is correct.
20. I also think it necessary to record that if the Board can show that any Plaintiff has received the whole or any part of the said balance then that falls to be deducted from the judgment sum I am now going to order to be paid.
21. In the result, I order:
- (1) The First Defendant to pay the Plaintiffs the sum of \$89,086.15 in equal proportion.
  - (2) The equal share of each Plaintiff is to have deducted from it any part of the above sum already received by him/her.
  - (3) There shall be no interest on the sum.
  - (4) The First Defendant shall pay costs summarily assessed in the sum of \$1,000.00 to the Plaintiffs.
  - (5) There shall be no order as to costs for the Second Defendant.

Delivered at Suva this 25<sup>th</sup> day of April 2019.



  
David Alfred  
JUDGE  
High Court of Fiji