

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 77 Of 2016

BETWEEN : PETERO TAKEA, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi, **the substituted Plaintiff in place of the Late Daniele Vakatawabai.**

PLAINTIFF

AND : VENASIO TOKATOKA VANUA NO.II, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi.

1st DEFENDANT

: VIANI SAUDUADUA, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

2nd DEFENDANT

: LARIO RAICAMA, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

3rd DEFENDANT

: IONA NAIKAUSAU, NO.I, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

4th DEFENDANT

: PIO VISESIO NO.2, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

5th DEFENDANT

: LASARO DAU NO.I, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

6th DEFENDANT

: ULIANO TOGAMALO, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi.

7th DEFENDANT

: LASARO DAU NO.I, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

8th DEFENDANT

: KOSITINO LEBAIVALU, NO.I, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

9th DEFENDANT

: IOWANE TAUKEISALILI NO.II, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

10th DEFENDANT

: IONA NAQAMU, NO.I, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

11th DEFENDANT

: DANIELE TABUAKURU NO.II, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

12th DEFENDANT

: PIO TABUASEI, NO.II, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

13th DEFENDANT

: LARIO RAICAMA, Villager of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village, Namosi

14th DEFENDANT

CORAM : Justice M. Javed Mansoor

COUNSEL : Mr Fa for the Plaintiff

: No Appearance for the Defendants

Date of Hearing : 3 May 2019

Date of Judgment : 17 May 2019

JUDGMENT

1. This action was instituted on 11 April 2016 by Daniele Vakatawabai, the original Plaintiff, who was the leader of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi Village. Upon the death of the original Plaintiff, his brother, Petero Takea, was substituted as the Plaintiff. An Amended Statement of Claim was filed on 21 August 2018, and an amended summons was served on all Defendants except the 8th Defendant, who was reported as being overseas, on whom substituted service by way of newspaper advertisement was ordered by Court. However, none of the 14 Defendants acknowledged service of summons or declared an intention to defend the action. The cause was thereafter set for formal proof on 3 May 2019.
2. The Plaintiff pleaded *inter alia* that the Defendants are Trustees to a document titled Deed of Trust dated 6 May 2009, signed by the Defendants, purporting to create a Trust for the Mataqali Nabukebuke of the Yavusa Nabukebuke in the Province of Namosi, and that the Deed of Trust was registered with the Registrar of Deeds; that upon registration of the Deed of Trust, the Defendants proceeded to exercise powers of administration and control over the members of the Mataqali Nabukebuke relating to their native land and its use by a company, Namosi Joint Venture/ Newcrest Mining; that the Deed of Trust did not satisfy the requirements of the law for the creation of a Trust; that the Defendants have falsely represented in order to defraud and deceive members of the Mataqali Nabukebuke, governmental authorities, the public at large and the Namosi Joint Venture/ Newcrest Mining that the Defendants have been duly elected as Trustees and conferred with power to act on behalf of the members of the Mataqali Nabukebuke; and, that the members of the Mataqali Nabukebuke have not agreed to the objects of the Trust Deed.
3. The Plaintiff sought *inter alia* the following Orders:
 - (I) A Declaration that the document titled Deed of Trust dated 6 May 2009 is null and void and is of no legal effect;
 - (II) A Declaration that the Defendants are not the Trustees of the Mataqali Nabukebuke of the Yavusa Nabukebuke of the Province of Namosi;
 - (III) An Injunction restraining the Defendants from acting as Trustees for the Mataqali Nabukebuke, Yavusa Nabukebuke of the Province of Namosi;
 - (IV) That the Defendants provide a full accounting of all monies that have come into their possession and all activities undertaken and

arrangements entered into whilst they have purported to act as Trustees of the Mataqali Nabukebuke of the Yavusa Nabukebuke pursuant to the document titled Deed of Trust dated 6 May 2009.

4. In summary, the Plaintiff's testimony is that he is the head of the Mataqali Nabukebuke and the head of the Yavusa Nabukebuke in the Province of Namosi, and that he is the Plaintiff in these proceedings, personally, as well as in a representative capacity on behalf of the members of the Mataqali Nabukebuke and the Yavusa Nabukebuke of Namosi; that he was substituted as the Plaintiff on 14 February 2018; after the death of his brother, Daniele Vakatawabai, the original Plaintiff, who was the head of the Mataqali in Namosi; the Mataqali own the land in respect of which an exploratory licence has been issued to a company; Namosi Joint Venture/ Newcrest Mining; the Defendants are the Trustees, and he brought this action against the Trustees because of the concerns he had for his clan; the Defendants have been running the affairs of the Mataqali for a long time, and during this period the Defendants have not had a meeting with the elders of the clan; the requirement for approval is for 60% of the members to sign and grant approval of the Trust Deed, but such approval was not granted by the members of the clan; the Defendants have been acting illegally, and dealing with the mining company, Namosi Joint Venture/ Newcrest Mining, as Trustees, but the Trust Deed is not a valid legal document; as it has not been sanctioned by the majority of the members of the Mataqali.
5. The Plaintiff tendered three documents marked exhibits P1 to P3; the Trust Deed marked P1, and letters dated 5 April 2016 and 5 April 2017 from lawyers, Fa & Company - acting for the Mataqali Nabukebuke of the Namosi Village - to Venasio Tokatokavanua marked P2 and P3 respectively. Though not specifically identified as such in evidence, Venasio Tokatokavanua, mentioned in the letters P2 and P3, appears to be the 1st Defendant. By letters P2 and P3, the law firm, acting for the Mataqali, has called upon the 1st Defendant to refrain from interfering in the affairs of the Mataqali Nabukebuke and in the administration of the Trust. The letters also drew attention to the current action before Court. There is no evidence before Court that these letters were replied.
6. The Plaintiff did not show proof that he was acting in a representative capacity, which actions are governed by Order 15 Rule 14. The relevant part of the Rule, 14 (1), reads as follows:

"Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 15, the proceedings may be begun, and, unless the Court otherwise orders,

continued, by or against any one or more of them as representing all or as representing all except one or more of them”.

7. Counsel for the Plaintiff submitted that proof of representation was not necessary in view of the decision of the Court of Appeal in Narawa v Native Land Trust Board¹. The Court of Appeal held that in terms of the Rule “*the only requirement is that the persons intended to be represented have the same interest in the proceedings*”. The Court, which discussed English authorities under the comparable rule in England, laid down the principle that, “*the person seeking to bring an action in a representative capacity does not have to obtain the consent of those he purports to represent, either all or some of them*”. The representative action is a procedure the purpose of which is to achieve justice². For the aforesaid reasons, the Court accepts the Plaintiff’s representative capacity in this action.
8. The Trust Deed (P1) is dated 6 May 2009. The instrument declares (page 2) that the “*members of the Mataqali Nabukebuke have gathered and agree to create this trust in order to vest in the Trustees certain powers to manage and administer their affairs in accordance with this document and such other purposes as may be granted to the Trustees from time to time*”, and that, “*the members of the Mataqali Nabukebuke have agreed and consented to the purpose and objects of the trust and the appointment of the first trustees and have signified their consent by majority resolutions at their various meetings*”.
9. Counsel for the Plaintiff submitted to Court that he was not seeking an Injunction restraining the Defendants from acting as Trustees for the Mataqali Nabukebuke, Yavusa Nabukebuke of the Province of Namosi (though prayed for in relief III of the Amended Statement of Claim), when the Plaintiff answered in the negative upon being asked whether the Defendants continued to act as Trustees on behalf of the Mataqali. Moreover, the Trust Deed (P1) dated 6 May 2009, limits the initial appointment of the first Trustees to a period of five years. But, there is no evidence that the first Trustees were re-appointed upon the expiry of their initial appointment. Non appointment for a further period could be the reason the Plaintiff did not claim that the Defendants were continuing to act as Trustees. In these circumstances, Court will not grant the Plaintiff injunctive relief. For these reasons, it is also not necessary for Court to declare that the Defendants are not the Trustees of the Mataqali Nabukebuke of the Yavusa Nabukebuke of Namosi.

¹ [2002] FJCA 9; ABU0012.99S (31 May 2002)

² John v Rees [1970] 1 Ch 345, 368

10. The Trust Deed contains a list of members of the Mataqali Nabukebuke agreeing to the contents of the Deed and to the appointment of the first Trustees; sixty (60) members have signed this document of authority. There is, however, no evidence of the total membership of the Mataqali or the percentage of the Mataqali who have signed the authority in the Trust Deed (P1). The Plaintiff said in his evidence that the requirement was for 60% of the members to sign and grant approval, and that this requirement was not met. In the absence of any evidence to the contrary or challenge of the Plaintiff's testimony, the Court will accept the Plaintiff's evidence that the Trust Deed was not approved by the majority of the Mataqali.
11. In these circumstances, the Court accepts the Plaintiff's uncontroverted position that the Trust Deed dated 6 May 2009 (P1) is invalid for want of approval by the majority of the Mataqali.
12. The Plaintiff has sought an order for the *"Defendants to provide a full accounting of all monies that have come into their possession and all activities undertaken and arrangements entered into whilst they have purported to act as Trustees of the Mataqali Nabukebuke of the Yavusa Nabukebuke pursuant to the document titled Deed of Trust dated 6 May 2009"*.
13. The Plaintiff in his evidence stated that the Defendants have taken money from Namosi Joint Venture/ Newcrest Mining. When inquired how the Plaintiff knew of this, he replied that he had learned that the Trustees had opened bank accounts. There was no other evidence that the Defendants had profited as a result of their position as Trustees. The pleadings contain no material of unauthorised profits taken by the Trustees, except for a statement at paragraph 21, "that the Defendants have personally benefitted from purporting to act as Trustees". Such a bare assertion alone may not ordinarily suffice to obtain an order for accounting. However, the office of Trustee imports a fiduciary duty. The powers of the Trustees set out in the Trust Deed (especially clause 3.4) relate to the handling of trust property, including the raising of finances on behalf of the Mataqali as well as to open a bank account for and on behalf of the trust and account to the members of its operations. These provisions also speak of accounting and reporting to the beneficiaries. Even though the Trust Deed is invalid for want of majority approval, the Defendants may have acted as *de-facto* Trustees and exercised the powers conferred on them by the instrument. The failure of the Trust Deed, in these circumstances, will not necessarily have diminished the fiduciary responsibility of the Defendants to the beneficiaries, the members of the Mataqali.

14. For these reasons it becomes necessary for the Court to order an account to be taken from the Trustees. Such an account has to be limited to the initial term of appointment of the Defendants as Trustees, which ended five years after the Trust Deed was settled. In the absence of any evidence of re-appointment as Trustees, there is no basis upon which to order accounting by the Defendants after the initial appointment for five years ended.
15. Interestingly, this action itself was filed on 11 April 2016, almost two years after the initial appointment ended. Even the letters marked P2 and P3 were sent on behalf of the Mataqali long after the initial appointment of the Trustees had lapsed. The Plaintiff gave no explanation for the delay in proceeding against the Trust Deed. However, in view of the foregoing, and, in the absence of any opposition to these proceedings, the Court is inclined to grant the Plaintiff the reliefs set out below.

Orders

16. In the aforesaid, the Court makes the following Orders:

- (I) The Trust Deed dated 6 May 2009 (P1) is declared null and void, and of no legal effect;
- (II) The Defendants are ordered to provide an account of all monies that have come into their possession and all activities undertaken and arrangements entered into on the basis of the Trust Deed dated 6 May 2009 (P1);
- (III) The Defendants shall pay the Plaintiff costs summarily assessed in a sum of \$1400.

Delivered at Suva this 17th day of May 2019.



Justice M. Javed Mansoor
Judge of the High Court