

**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 Yavusa Sabutoyatoya of Wayasewa in Yasawa.

**APPELLANT/PLAINTIFF**

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

**FIRST RESPONDENT/FIRST DEFENDANT**

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

**SECOND RESPONDENT/SECOND DEFENDANT**

**REGISTRAR OF TITLES**, of Suvavou House, Victoria Parade, Suva.

**THIRD RESPONDENT/THIRD DEFENDANT**

**Appearances** : Mr I. Fa for the plaintiff/applicant  
Ms P. Low for the first defendant/ respondent  
Mr W. Mucunabitu for the second defendant/second respondent  
Third defendant/ third respondent – excused

**Date of Hearing** : 03 October 2019

**Date of Judgment**: 30 January 2020

**J U D G M E N T**

## **Introduction**

[01] The plaintiff/appellant ('the *appellant*') appeals, with the leave granted by this Court, a decision of the learned Master ('the *Master*') dismissing an action brought by him as an abuse of the process of the Court on the ground of *res judicata*.

[02] At the hearing of the appeal, both parties made their oral argument and they relied on their written submissions as well. I was immensely assisted by their submissions. I appreciate both counsel and their team for their effort.

## **The parties**

[03] Mr Josua Malinavitilevu Naulivou, the appellant is a member of the Yavusa Sabutoyatoya of Wayasewa in Yasawa. He commenced the proceeding 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 Yavusa Sabutoyatoya of Wayasewa in Yasawa.

[04] Mr Ratu Kitone Eparama Tavaiqia, the first defendant/first respondent ('the *first respondent*') is the Turaga ni Yavusa of the Yavusa Sabutoyatoya of Viseisei Village in Vuda and is the holder of the chiefly title of Tui Vuda.

[05] iTaukei Land Trust Board, the second defendant/respondent ('the *second respondent*') is a body corporate under the Native Lands Trust Act, and is by law vested with the power and authority to administer all native lands in Fiji for and on behalf of its Fijian owners.

[06] The Registrar of Title, the third defendant/respondent ('the *third respondent*') is an office created under S. 6 of the Land Transfer Act ('*LTA*') charged with the administration of the provision of the LTA.

## **The facts**

[07] The facts gleaned from the statement of claim are as follows:

- 1) *That the first defendant and his predecessors since the purchase of Vomo Island by the Mataqali Sabutoyatoya of the Province of Yasawa, claimed ownership to Vomo Island through custom and tradition of the defendant.*
- 2) *That pursuant to its claims of ownership of Vomo Island through its customs and traditions the first defendant and his predecessors have paid claim to the financial benefits of the leasing of Vomo Island.*
- 3) *That the second defendant has at all material times treated Vomo Island as Native Land and has administered to the island pursuant to section 4 of the Native Land Trust Act. That pursuant to this the second defendant has issued leases over Vomo Island and authorized the carrying out of developments on the island.*
- 4) *That the second defendant has allowed land on Vomo Island to be alienated for a substantial period of time.*
- 5) *That the first defendant in its administration of Vomo Island has for all intents and purposes treated the first defendant and his predecessors as the owners of Vomo Island.*
- 6) *The plaintiff alleges that Vomo Island since 1899 been a freehold land with a certificate of title governed and administered under the principles of the Torrens System of title registration.*

Causes of action against the first defendant

- 7) That the first defendant and or its predecessors are not and have not been at any time the registered proprietor of Vomo Island.
- 8) That the Yavusa Sabutoyatoya of Wayasewa of which the plaintiff is a member and the Yavusa Sabutoyatoya at Viseisei Vuda of which the first defendant is a member are two separate and distinct Yavusas.
- 9) That the Yavusa Sabutoyatoya of Wayasewa Yasawa and the Mataqali Sabutoyatoya of the Province of Yasawa are one and the same entity as during the time of the Wilkinson Land Commission landownership in the Province of Yasawa was through the Mataqali.

10) That the Mataqali Sabutoyatoya in Yasawa Province holds an indefeasible title to Certificate of Title Volume 12 Folio 1019 being the Certificate of Title of Vomo Island comprising 109 hectares.

11) That the first defendant does not hold any title or interest in Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island Comprising 109 hectares.

Cause of Action against the 2<sup>nd</sup> Defendant

12) That the 2<sup>nd</sup> defendant has acted unlawfully and continues to act unlawfully by issuing leases and licenses and or alienating land on Vomo Island.

13) That the 2<sup>nd</sup> defendant has acted unlawfully and continues to act unlawfully by receiving monies from the issuing of leases, licenses and or alienating land on Vomo Island and the payment of those monies or any part of it to the first defendant.

Cause of Action against the 3<sup>rd</sup> Defendant

14) That Vomo Island being land comprised in Certificate of Title Volume 12 Folio 1019 comprising of approximately 109 hectares is land subject to the provisions of the Land Transfer Act Cap 131 Laws of Fiji.

15) That Vomo Island has been in the possession of the Plaintiff since 1899 after the land was purchased by then Mataqali Sabutoyatoya of Yasawa Province. That the land has since then been used by the Plaintiff and his ancestors for farming and sustenance.

16) That due to the continuous possession and occupation of Vomo Island by the Mataqali Sabutoyatoya/Yavusa Sabutoyatoya of Wayasewa for the last 100 years the Yavusa Sabutoyatoya is entitled to a vesting order pursuant to section 78 of the Land Transfer Act Cap 131 Laws of Fiji.

[08] The first respondent, upon filing the acknowledgement of service, filed an application to strike the claim under O 18, R 18 (1) of the High Court Rules

1988, as amended ('HCR'). In his supporting affidavit (affidavit of Jeremaia Natoka), the first respondent deposed:

"...

4. *That the action was first instituted by the present plaintiff's father, Timoci Nagaga Naulivou, in or about 1994 through a previous Statement of Claim, filed in the High Court in which the present Plaintiff's father claimed the following:*

- 1) *That the Certificate of Title Volume 12 Folio 1019 of Vomo Island is freehold;*
- 2) *That the Plaintiff is the registered proprietor of Vomo Island; and*
- 3) *That the Plaintiff does not receive, but ought to receive, lease monies gain from leasing Vomo Island.*

5. *That when the matter was tried in the High Court of Fiji, on 12 November 2003 the Court declared that:*

- 1) *CT Volume 12 Folio 1019, the land title to Vomo Island, which includes the islands of Vomolevu and Vomolailai is freehold;*
- 2) *The subject freehold is owned by two Yavusas, Sabutoyatoya [Viseisei] and Sabutoyatoyoya [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 ad Licenses) Regulations Cap. 134; and*
- 6) *Liberty is given to the parties to apply for directions on Trusteeship, distribution or correction of title matters.*

6. *That following the judgment of the High Court, the Plaintiff's uncle, Josua Malina Vitilevu, appealed the High Court's decision where, on 29 July 2005, the Fiji Court of Appeal ruled that:*

- 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 and that profits derived from the lease are to be distributed equally to all registered members of the two co-owning Yavusas: and*
- 4) *There will be no Order as to costs.*

7. *That the Plaintiff's uncle attempted to appeal to the Supreme Court of Fiji bringing new grounds that have not been previously dealt with in the preceding courts to which, on 29 January 2010, the Supreme Court did not accept the Plaintiff's appeal.*

*The present Statement of Claim*

8. *That the Plaintiff's present Statement of Claim, dated 28 June 2016, raised the same matters that were claimed by the Plaintiff's father Statement of Claim in or about 1994.*
9. *That the matters claimed in the Plaintiff's present Statement of Claim have been decided and settled through the Law Courts of Fiji.*
10. *I readily believe that the Plaintiff's present claims constitute an abuse of the process of the Court.*
11. *That the Plaintiff, through the present Statement of Claim, is claiming to be the registered proprietor of Certificate of Title Volume 12 Folio 1019.*
12. *That as a consequence of the Plaintiff's conduct, the First Defendant is incurring unwarranted legal costs and the Plaintiff's conduct has caused the First Defendant and continues to cause the First Defendant stress of having to defend this action when the Plaintiff's present Statement of Claim is an abuse of the process of the Court.  
..."*

[09] The appellant then filed an affidavit of Rusiate Naulivou in response. In that affidavit the appellant states:

"...

3. *I have read the affidavit and as the outset state that the affidavit is misconceived. It ignores and misunderstands the causes of action raised by the Plaintiff against the 1<sup>st</sup> Defendant in its Statement of Claim and mischaracterizes them in its application. The Plaintiff's claim against the 1<sup>st</sup> Defendant is that **the 1<sup>st</sup> Defendant has at no time been the registered proprietor of Certificate of Title Vol 12 FOLIO 1019 being the Certificate of Title to Vomo Island comprising of 109 hectares. The plaintiff alleges that Yavusa Sabutoyatoya of Wayasewa of Namara Village Wayalailai (the Plaintiff) is the registered proprietor of Certificate of Title Vol 12 FOLIO 1019 and has an indefeasible title to Vomo Island, under the Land Transfer Act. (Emphasis provided)***
4. *It is the Plaintiff's case that the Mataqali Sabutoyatoya, Yasawa Province is one and the same entity as the Yavusa Sabutoyatoya of the island of Wayasewa in Yasawa as at the material time, Mr Wilkinson the then Chairman of the Native Lands Commission had used the term Yavusa and Mataqali interchangeably in registering landowning units in Yasawa.*

5. *The Plaintiff also asserts that its continuous possession and occupation of Vomo Island described in CT VOL 12 FOLIO 1019, for more than 100 years entitles it to vesting orders pursuant to section 78 of the Land Transfer Act. That the above issues contained in the Plaintiff's Statement of Claim has not been the subject of any causes of action or determination in any court proceedings before any court, to date.*
6. *I now refer to the affidavit of Jeremaia Natoka and reply to the same.*
7. *I refer to Paragraphs 1 – 2 of the affidavit and make no comment on the same.*
8. *I refer to paragraph 3 of the affidavit and deny the allegations therein. I say that the Plaintiff in filing this action has not acted in abuse of the court process as alleged. **The issues raised by the Plaintiff against the 1<sup>st</sup> Defendant have not been the subject of any determination before any court to date.** They relate to the Plaintiff's rights to property which are protected by the Constitution of Fiji. I further say that the 1<sup>st</sup> Defendant's application is conceived. (Emphasis provided)*
9. *I refer to paragraph 4 of the affidavit and deny the same. I say that in Civil Action No. 69 of 1994 filed in the High Court of Lautoka, there were 3 (three) issues agreed by the parties for determination by the court. The 3 (three) issues were identified by the Fiji Court of Appeal in Josua Malinavitivou v Ratu Joseva Iloilovatu, Native Land Trust Board in Civil Appeal No. ABU 002 of 2004 as follows:*
  - (i) *Is there one Yavusa Sabutoyatoya or two?*
  - (ii) *Were the premiums and the rental proceeds paid out by the Native Land Trust Board on leasing of Vomolevu and Vomolailai in the correct proportions?*
  - (iii) *What is the measure of damages and costs?*
10. *I refer to paragraph 5 of the affidavit and admit the same, however, I further say that the Fiji Court of Appeal was critical of the decision of the High Court as some of the orders made were not in response to the issues before it for determination and were not part of the relief prayed for by the parties.*
11. *I refer to paragraph 6 of the affidavit and say that the orders of the Fiji Court of Appeal speak for themselves. I further say that the orders should be read in conjunction with the judgment of the Fiji Court of Appeal. I further say that none of the orders relate to the issues for determination raised by the Plaintiff against the 1<sup>st</sup> Defendant in the proceedings.*

12. *I refer to paragraph 7 of the affidavit and say that those grounds referred to herein are the subject of the Plaintiff's cause of action in the present case.*
13. *I refer to paragraph 8 of the affidavit and deny the same. The allegation therein is inaccurate and false. I refer the 1<sup>st</sup> Defendant to paragraphs 3,4,5,8 and 9 above-mentioned.*
14. *I refer to paragraph 9 of the affidavit and deny the same. The allegation therein is inaccurate and false. I refer the 1<sup>st</sup> Defendant to paragraphs 3,4,5,8 and 9 above-mentioned.*
15. *I refer to paragraph 10 of the affidavit and deny the same. The allegation of abuse of process is misconceived. I say that the 1<sup>st</sup> Defendant's application is misconceived.*
16. *I refer to paragraph 11 and admit the same. The Mataqali Sabutoyatoya Yasawa Province is one and the same as the Yavusa Sabutoyatoya, Wayasewa of Namara Village Wayalilai. The Yavusa Sabutoyatoya of Viseisei Vuda is a separate entity and has never been registered on the title.*

[10] Thereafter, the first respondent filed an affidavit in reply to the appellant's affidavit in response.

[11] The Master then heard the matter. Both parties made their oral submission and filed written submissions.

[12] By his reserved ruling dated 27 Jul 2018. The Master dismissed the action as an abuse of process of the court with summarily assessed costs of \$2,000.00 ('the order'). The appellant appeals that order to this court.

### **Grounds of appeal**

[13] The appellant appeals against the Master's order on the following grounds:

1. *That the Master erred in law and in fact in finding that the doctrine of res judicata applies to the present case and the plaintiff is estopped from bringing*



*this action seeking the Court to decide the matter that had already been adjudged by the High Court and affirmed by the Court of Appeal and the Supreme Court, on the following grounds:*

- (i) *That the Plaintiffs' causes of action in its Statement of Claim, as set out below, have not been determined by the High Court in Nauliviou v Native Land Trust Board [2003] HBC 0069. 1994L [2003] FJHC 34HBC 0069. 1994 L [2003] FJHC 341 as alleged.*

*"Cause of Action against the 1<sup>st</sup> Defendant*

22. *That the 1<sup>st</sup> Defendant and or its predecessors are not and have not been at any time the registered proprietor of Vomo Island.*
23. *That the Yavusa Sabutoyatoya of Wayasewa of which the Plaintiff is a member and the Yavusa Sabutoyatoya at Viseisei Vuda of which the 1<sup>st</sup> Defendant is a member are two separate and distinct Yavusas.*
24. *That the Yavusa Sabutoyatoya of Wayasewa Yasawa and the Mataqali Sabutoyatoya of the Province of Yasawa are one and the same entity as during the time of the Wilkinson Land Commission landownership in the Province of Yasawa was through the Mataqali.*
25. *That the Mataqali Sabutoyatoya in Yasawa Province holds an indefeasible title Certificate of Title Volume 12 Folio 1019 being the Certificate of Title of Vomo Island comprising 109 hectares.*
26. *That the 1<sup>st</sup> Defendant does not hold any title or interest in Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island Comprising 109 hectares.*

Cause of Action against the 2<sup>nd</sup> defendant

27. *That the 2<sup>nd</sup> Defendant has acted unlawfully and continues to act unlawfully by issuing leases and licenses and or alienating land on Vomo Island.*
28. *That the 2<sup>nd</sup> Defendant has acted unlawfully and continues to act unlawfully by receiving monies from the issuing of leases, licenses and or alienating land on Vomo Island and the payment of those monies or any part of it's the 1<sup>st</sup> Defendant.*

Cause of Action against the 3<sup>rd</sup> Defendant

29. *That Vomo Island being land comprised in Certificate of Title Volume 12 Folio 1019 comprising of approximately 109 hectares is land subject to the provisions of the Land Transfer Act Cap 131 Laws of Fiji.*
30. *That Vomo Island has been in the possession of the Plaintiff since 1899 after the land was purchased by then Mataqali Sabutoyatoya of Yasawa Province. That the land has since then been used by the Plaintiff and his ancestors for farming and sustenance.*
31. *That due to the continuous possession and occupation of Vomo Island by the Mataqali Sabutoyatoya/Yavusa Sabutoyatoya of Wayasewa for the last 100 years the Yavusa Sabutoyatoya is entitled to a vesting order pursuant to section 78 of the Land Transfer Act Cap 131 Laws of Fiji."*

That a review of the original court file will reveal that the Plaintiff's Statement of Claim in the case of Naulivou v Native Land Trust Board [2003] HBC 0069. 1994L [2003] FJHC 341 did not plead the above causes of

action or raise them as issues for determination by the High Court in Lautoka. Therefore, the decision of the High Court of Lautoka in *Naulivou v Native Land Trust Board [2003] HBC 0069, 1994L [2003] FJHC 341* did not determine the issue raised by the Plaintiff as held by the Master.

- (ii) That the agreed issues for determination in the case of *Naulivou v Native Land Trust Board [2003] HBC 0069, 1994L [2003] FJHC 341* (which could be easily identifiable by a review of the Court file are:

*“(i) Is there one Yavusa Sabutoyatoya or two?*

*(ii) Were the premiums and the rental proceeds paid out by the Native Land Trust Board on leasing of Vomo Levu and Vomo Lailai in the correct proportions?*

*(iii) If not, what is the measure of damages and costs?”*

Clearly, the matters for determination in the present case and in the case *Naulivou v Native Land Trust Board [2003] HBC 0069, 1994L [2003] FJHC 341* are different and therefore the doctrine of *res judicata* cannot apply as alleged.

- (iii) That the Master of the Court at paragraph 19 of his decision sets out the relief claimed by the Plaintiff in *Naulivou v Native Land Trust Board [2003] HBC 0069, 1994L [2003] FJHC 341* as follows:

*“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 from the 12<sup>th</sup> day of March 1989 till expiry of lease;*

- b) For an Order that the Native Land Trust Board pay to Tokatoka 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 12<sup>th</sup> day of March 1989 till date of Order;*
- c) General damages*
- d) Any other order the Court deems just*
- e) Costs of this action."*

*In setting out the above, the Maser not only failed to set out the causes of action pleaded by the Plaintiff but also fails to clarify that the reasons the Plaintiff were claiming those remedies was because in 1990 Vomo Island was decided by the Native Land and Fisheries Commission and the Native Land and Fisheries Commission and the Native Land Appeals Tribunal to be Native Land.*

*This was aptly described in the decision of the Court of Appeal in Josua Malinavitilevu Naulivou v Ratu Josefa Iloilovatu Uluivuda and Native Land Trust Board Civil Appeal No. ABU 0002 of 2004L as follows:*

*"[10] In 1990 the Native Land and Fisheries Commission enquired into the ownership of the islands. It directed that they were to be registered in the Registrar of Native Lands under the ownership of Yavusa Sabutoyatoya of Viseisei "with the administration and use of the islands vested solely with the holder of the Tui Vuda." The Plaintiff appealed to the Appeals*

*Tribunal established by the Native Lands Act (Cap. 133). In a letter send by the Commission to the Board in March 1991 it was stated that the Appeal Tribunal sat in October 1990. Accordingly to the Commission the two yavusas agreed that the Plaintiff was “also be included in the ownership of the island after approaching the Tui Vuda to soro or seek forgiveness for questioning his control of the island.” It is not clear whether the “i soro” was ever performed but the Plaintiff claims that despite the recognition by the Native Lands and Fisheries Commission that it was indeed part of the proprietary unit owning the Vomo Islands it continued to receive nothing from the Board.”*

- (iv) *That the Orders made by the High Court in Naulivou v Native Land Trust Board HBC 0069. 1994L quoted by the Master at paragraph 2 of his decision were:*

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

**6. Liberty to the parties to apply for direction on Trusteeship, distribution or correction of little matters."**

*That these Orders were not the subject of any causes of action filed by the then Plaintiff in his Writ of Summons/Statement of Claim for determination by the Courts nor were they the subject of any relief claimed by the then Plaintiff in his Statement of Claim/Writ of Summons.*

*That these Orders were made and created by the High Court on its own volition and the Plaintiff was not given any warning that such Orders would be made, nor were they granted an opportunity to address the same in light of the fact that they would surely prejudice the Plaintiff's rights.*

- (v) *That the Master had wrongly characterized the following passages quoted at paragraph 21:*

*"In our view, the Plaintiff is now attempting to raise an appeal entirely new case inconstant 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."*

*and paragraph 23:*

*"... 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)."*

*of his judgment to support his finding that the issues raised by the Plaintiff were res judicata. In fact, that passages support the Plaintiff's contention that the issue*

*of indefeasibility of title was not res judicata as they were not pleaded in the High Court matter and could not be raised in the appeal.*

- (vi) *That the decision of the High Court of Australia in Brewer v Brewer (1953) 88 CLR 1 is not an authority for the proposition put forward by the Master in the first instance of paragraph 25 of his decision where he said:*

*“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.”*

2. *That the Master erred in law and in fact in holding that the Plaintiff by filing this action had acted in abuse of the Court for the following reasons:*

- (i) *That the issues raised by the Plaintiff in its Statement of Claim/Writ of Summons in this matter has not been adjudged or determined by the Court at any time. They are:*

*“Cause of Action against the 1<sup>st</sup> Defendant*

22. *That the 1<sup>st</sup> Defendant and or its predecessors are not and have not been at any time the registered proprietor of Vomo Island.*
23. *That the Yavusa Sabutoyatoya of Wayasewa of which the Plaintiff is a member and the Yavusa Sabutoyatoya of Viseisei Vuda of which the 1<sup>st</sup> Defendant is a member are two separate and distinct yavusas.*
24. *That the Yavusa Sabutoyatoya of Wayasewa Yasawa and the Mataqali Sabutoyatoya of the Province of Yasawa are one and the same entity as during the time of the Wilkinson Land Commission landownership in the province of Yasawa was through the Mataqali.*

25. *That the Mataqali Sabutoyatoya in Yasawa Province holds an indefeasible title Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island comprising 109 hectares.*
26. *That the 1<sup>st</sup> Defendant does not hold any title or interest in Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island comprising 109 hectares.*

*Cause of Action against the 2<sup>nd</sup> Defendant*

27. *That the 2<sup>nd</sup> Defendant has acted unlawfully and continues to act unlawfully by issuing leases and licenses and or alienating land on Vomo Island.*
28. *That the 2<sup>nd</sup> Defendant has acted unlawfully and continues to act unlawfully by receiving monies from the issuing of leases, licenses and or alienating land on Vomo Island and the payment of those monies or any part of it's the 1<sup>st</sup> Defendant.*

*Cause of Action against the 3<sup>rd</sup> Defendant*

29. *That Vomo Island being land comprised in Certificate of Title Volume 12 Folio 1019 comprising of approximately 190 hectares is land subject to the provisions of the Land Transfer Act Cap 131 Laws of Fiji.*
30. *That Vomo Island has been in the possession of the Plaintiff since 1899 after the land was purchased by then Mataqali Sabutoyatoya of Yasawa Province. That the land has since then been used by the Plaintiff and his ancestors for farming and sustenance.*



31. *That due to the continuous possession and occupation of Vomo Island by the Mataqali Sabutoyatoya /Yavsa Sabutoyatoya of Wayasewa for the last 100 years the Yavusa Sabutoyatoya is entitled to a vesting order pursuant to section 78 of the Land Transfer Act Cap 131 Laws of Fiji."*

- (ii) *The above causes of action are not being re-litigated as they have never been brought before a Court until this case was filed by the Plaintiff.*
  - (iii) *That the matters taken up to the Court of Appeal and Supreme Court was a response to the High Court creating new issues for determination which were never before it and the Court of Appeal and the Supreme Court clarifying that it could not hear these issues as they were not part of the pleadings in the High Court, hence the need for the Plaintiff to file a new action.*
  - (iv) *That the allegation that the Plaintiff did not mention that his relatives were involved in the case of Naulivou v Native Trust Board [2003] HBC 0069. 1994L [2003] FJHC 341 as constituting an abuse of process is misconceived and is a red herring, as the Plaintiff has commenced this proceeding in a representative and personal capacity from the Yavusa Sabutoyatoya Wayasewa in Yasawa and more importantly, the issues raised are new issues and have not been determined by the Court at any time in the past.*
  - (v) *That the fact that the Plaintiff has filed a new case setting out new causes of action against the Defendant does not constitute harassment.*
3. *That the decisions cited by the Master at paragraphs 6 – 25 of his judgment, on the principle of res judicata, and paragraphs 27 – 31 of his judgment, on abuse of process, in fact supports the Plaintiff's case as there can be no res judicata if a cause of action has not been adjudicated or determined by the Court and it would logically follow, that it cannot be an abuse of process.*
4. *The appellant reserves the right to file and amend their grounds of appeal.*

## Reasoning in the court below

- [14] The Master's reasoning for his decision appears at para 32 of this ruling which is as follows:

*"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 judgment and dishonestly of concealing the previous judgment. Both elements present in this case, made 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."*

- [15] Based on that reasoning, he concludes:

*"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."*

## The submissions

- [16] On behalf of the appellant, Mr Fa submits that the question we ask is where does the issue of *res judicata* arise as the causes of action in both cases are not the same. The Plaintiff in the Naulivou case (the first case) became aware that Vomo Island was freehold when the court delivered its ruling. There can be no *res judicata* as both the Court of Appeal and the Supreme Court have stated that the issue of indefeasibility was never determined in the High Court and therefore cannot be raised on appeal. He further submits: under O 18, R 18, the Courts have held in

countless judgments that so long as a statement of claim discloses some cause of action or raises some question fit to be decided by a judge or jury. O 18, R 18, confers upon the court the discretion to prevent an abuse of the process of the Court. This ensures that the court process is “*bona fide*” and must not be abused. The causes of action in the present case confer legal rights to the Plaintiff over Vomo Island and therefore should be determined by the Court. Therefore, he submits, the Master’s decision of 27 July 2018 should be set aside and the plaintiff’s case should be allowed to proceed and be determined by the Court.

- [17] The respondent’s counsel Ms Low conversely contends: the Master is correct in arriving at his decision that the doctrine of *res judicata* applies in the appellant’s claim (Civil Action 127/2016). The Master is also correct in declaring that the actions of the current appellant in Civil Action 127 of 2016 abused the process of the court. The appeal should be dismissed with indemnity costs of this appeal to the first respondent.

### **The issue on appeal**

- [18] The principal issue on appeal was whether the Master erred in law and/or in fact when dismissing the appellant’s claim on the ground of *res judicata* amounting to an abuse of process of the court.

### **The Legal Framework**

- [19] The HCR under O18, R18 states:

***“Striking out pleadings and indorsements (O 18, R 18)***

*18 (1) The Court may at any stage of the proceedings order to be struck out or amended 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;*
- (b) it is scandalous, frivolous or vexatious;*
- (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). (Emphasis provided)*

(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.*"

### **The principles governing *res judicata***

[20] The governing principles on *res judicata* have been discussed in several cases.

[21] The rule in *Henderson v Henderson* (1843) 3 Hare 100, is that:

*"It is an abuse of process to raise in a second claim an issue which should have been raised against someone who was a party to earlier proceedings."*

[22] In *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482, it was said there are two main elements:

*"(a) that the second claim is one that could have been brought in the first claim, or is in conflict with an earlier claim or evidence, and*

*(b) an additional element, such as a collateral attack on the earlier decision or dishonesty, election, or unjust harassment."*

[23] In *Hunter v Chief Constable of the West Midlands Police* [1982] AC a claim against the police was struck out as it was held to be no more than a collateral attack upon the decision of another court of competent jurisdiction.

[24] The House of Lords in *Johnson v Gore Wood and Co.* [2002] 2 AC1 held that:

*"When considering whether a second claim is an abuse of process a broad, merits- based judgment has to be made, taking into account all the public and private interests involved, and all the facts. A second claim should be struck out only if, in all circumstances, it should, rather than merely could, have been brought in the first claim."*

### **Discussion and decision**

[25] The grounds of appeal collectively attack the decision of the Master that he had erred in law and/or in fact when he struck out the appellant's claim on the basis of *res judicata* leading to abuse of the process of the court. I do not intend to deal with the grounds of appeal individually, but rather compendiously.

[26] In order to determine the issue of *res judicata*, one need to compare the issues determined in the previous action and the issues to be determined in the current action or the second action.

[27] It will be noted that the plea of *res judicata* was taken only by the first respondent (**Ratu Kitione Eparama Tavaiqia**). The rest of the respondents did file applications to strike the appellant's claim on the ground of *res judicata*. The second respondent, however, supported the first respondent's application. The third respondent was excused from these appeal proceedings as they were not part of the striking-out application.

*The first case*

[28] I will now examine as to what happened in the earlier case of *Naulivou v Native Land Trust Board* (above) (hereafter I will refer to as "*the first case*").

[29] The first action was brought in 1994 by the current plaintiff's father (Naulivou) only against the Native Land Trust Board (now iTaukei Land Trust Board (TLTB), the second respondent in the current proceedings.

[30] Interestingly, it is notable that the second respondent did not file any application to strike the current action on ground of *res judicata* although the first case was brought against them or they were party to the first action.

*Issues in the first case*

[31] The issues raised for determination by the court in the first case were that:

*“(i) Is there one Yavusa Sabutoyatoya or two?*

*(ii) Were the premiums and the rental proceeds paid out by the Native Land Trust Board on leasing of Vomo Levu and Vomo Lailai in the correct proportions?*

*(iii) If not, what is the measure of damages and costs?”*

[32] It is important to note that no issues were raised in the first case respecting the title to Vomo Island or the indefeasibility of title.

*Decision in the first case*

[33] The High Court in the first case held:

- “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 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 yavusas.*
- 5. With the two yavusas, distribution should follow the distribution as laid down in Regulation 11 of the Native Land Trust (Lease and Licences) Regulations Cap. 134.*
- 6. Liberty to the parties to apply for directions on Trusteeship, distribution or correction of little matters.”*

*The Court of Appeal decision in the first case*

[34] The plaintiff’s uncle, Josua Malinavitilevu appealed the decision in the first case to the Fiji Court of Appeal (*Malinavitilevu v Uluivuda* [2005] FJCA 53; ABU0002J.2004S (29 July 2005). The final result of the Court of Appeal decision was:

*“[1]. Orders 1, 3 and 6 of the High Court, not being the subject of the 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."*

[35] The Court of Appeal set aside orders 4 and 5. While dismissing the appeal against order 2 of the High Court in the first case that: *'The subject freehold is owned by two yavusas, Sabutoyatoya [Viseisei] and Sabutoyatoya [Wayasewa] as owners in common'*, the Court of Appeal observed [at para 26]:

*"... 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."*

[36] It is apparent from the Court of Appeal judgment that the issue whether the subject land (Vomo Island) was *'freehold or not'* was not raised in the first case.

*The Supreme Court decision in the first case*

[37] It was attempted to appeal the Court of Appeal decision to the Supreme Court out of time (*Malinavitilevu v Uluivuda* [2010] FJSC 1; CBV0005.2005 (29 January 2010)). However, the Supreme Court refused special leave to appeal out of time. During the course of its ruling, the Supreme Court said [at para 15]:

*"[15] ... 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)"". (Emphasis provided)*

*The second case or the present case*

[38] Let me now look at the present case or the second case. The second case has been brought by the appellant against the three respondents.

[39] The causes of action in the second action arise out of the indefeasibility of title. The appellant came to know that Vomo Island is a freehold only after the High Court decision in the first case.

[40] The first respondent applied to the Master to have the second case struck out on the basis of *res judicata* and as a result it is abuse of the process of the court. It is, therefore, important to examine the cause of action accrued to the appellant against the respondent. The cause of action or the relief sought against the first respondent in the second case includes:

- 1) *That the 1<sup>st</sup> defendant and or its predecessors are not and have not been at any time the registered proprietor of Vomo Island.*
- 2) *That the Yavusa Sabutoyatoya of Wayasewa of which the plaintiffs is a member and the Yavusa Sabutoyatoya of Viseisei Vuda of which the 1<sup>st</sup> defendant is a member are two separate and distinct Yavusas.*
- 3) *That the Yavusa Sabutoyatoya of Wayasewa Yasawa and the Mataqali Sabutoyatoya of the Province of Yasawa are one and the same entity as during the time of the Wilkinson Land Commission landownership in the Province of Yasawa was through the Mataqali.*
- 4) *That the Mataqali Sabutoyatoya in Yasawa Province holds an indefeasible title Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island comprising 109 hectares.*
- 5) *That the 1<sup>st</sup> Defendant does not hold any title or interest in Certificate of Title Volume 12 Folio 1019 being the Certificate of Title to Vomo Island comprising 109 hectares.*

[41] The appellant compares and distinguishes factors between the first case and the second case in this ways [see pg 6 & 7 of his submissions]:



- (i) *In the Naulivou case (the first case), there was only one (1) defendant, the Native Land Trust Board (the second respondent in the present case). In the present case, there are three (3) defendants.*
- (ii) *The causes of action in the present case are different to that in the Naulivou case. The plaintiff's cause of action against the first defendant relates to the indefeasibility of title to CT Register 12 Folio 1019 by Mataqali Sabutoyatoya, Yasawa.*
- (iii) *The Plaintiff's claim that the Yavusa Sabutoyatoya of Wayasewa is one and the same as Mataqali Sabutoyatoya, Yasawa, the registered proprietor of CT Register 12 Folio 1019.*
- (iv) *The Plaintiff's cause of action against the 2<sup>nd</sup> Defendant is for the unlawful leasing of Vomo Island and the receipting of monies from the same.*
- (v) *The Plaintiff's cause of action against the 3<sup>rd</sup> Respondent is for a vesting order under 5.78 of the Land Transfer Act.*

[42] I accept the appellant's comparison between the first case and the second case.

[43] The Master heavily relied on the Henderson rule. The Henderson rule is that: *"it is an abuse of process to raise in a second claim an issue which should have been raised against someone who was a party to earlier proceedings."*

[44] The appellant only came to know that Vomo Island is a freehold only after the High Court judgment in the first case. Therefore, the appellant's father could not have raised that issue against someone who was a party to in the earlier proceeding because the appellant's father who brought the first action did not know that Vomo Island was a freehold at the time when he brought the first action.

[45] The first case was brought against the Native Land Trust Board, the second respondent in the second action on the basis that Vomo Island was Native Land. It concentrated on the distribution of the premiums and the rental proceeds on leasing Vomo Island by the Native Land Trust Board.

[46] The second claim stems from the indefeasibility of title to Vomo Island. The issue of indefeasibility of title to Vomo Island was never raised in the first

action. The Court of Appeal and the Supreme Court judgments in the first case confirm the fact that the issue of indefeasibility was not raised in the High Court.

[47] In my opinion, the second claim is not one that could have been brought in the first claim, or is not in conflict with an earlier claim or evidence. It follows that the plea of *res judicata* does not apply to the appellant's second case.

[48] I would reject the contention that the second action is brought as a collateral attack on the earlier decision. I do not find any element to support such contention.

#### *Abuse of process*

[49] The court has power to strike out an action on the ground that it is an abuse of the process of the court (see HCR, O18, R18 (1) (d)).

[50] 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 (see: *Janov v Morris* [1981] 3 All ER 780).

[51] I am of the view that the appellant's second claim does not re-litigate a question that was decided in the first action. The facts do not demonstrate that it constitutes an abuse of the process of the court. Therefore, his second action should not have been struck out on the ground of abuse of process.

#### **Conclusion**

[52] For all the reasons I have set out above, I conclude that the Master had erred in law and/or in fact when he dismissed the appellant's claim on the ground of *res judicata* and in consequence it was an abuse of process. His order should not be allowed to stand. I would, therefore, allow the appeal and set aside his order dated 27 July 2018 and reinstate the appellant's claim to take its normal course. I

would order that the first respondent shall pay cost of this appeal to the appellant in the sum of \$2,000.00, which is summarily assessed, within 21 days of the date of this judgment.

**The result**

1. Appeal allowed.
2. Master's order dated 27 July 2018 set aside.
3. Matter reinstated to take its normal course.
4. The first respondent shall pay cost of the appeal in the sum of \$2,000.00, which is summarily assessed within 21 days of the date of this judgment.

*M.H. Mohamed Ajmeer*  
30/1/20

.....  
**M.H. Mohamed Ajmeer**  
**JUDGE**



**At Lautoka**  
**30 January 2020**

Solicitors

Fa & Company, Barristers & Solicitors for the appellant  
Howards Lawyers for the first respondent