

**IN THE HIGH COURT OF FIJI**  
**CIVIL JURISDICTION**  
**AT SUVA**

**Civil Appeal No. HBA 9 of 2015**

**BETWEEN:**

**ITAUKEI LAND TRUST BOARD**, a statutory body duly established under the provisions of the iTaukei Land Trust Act, Cap. 134 of the Laws of Fiji and having its head office at 431 Victoria Parade, Suva, Fiji.

**APPELLANT**

**AND:**

**LAMI TOWN COUNCIL**, a statutory body duly incorporated under the provisions of the Local Government Act and having its head office at 59 Marine Drive, Lami, Fiji.

**RESPONDENT**

**Before:**

Hon. Acting Chief Justice Kamal Kumar

**Counsels:**

Ms L. Komaitai for the Appellant

Ms S. Naicalevu for the Respondent

**Date of Judgment:**

26 May 2020

**JUDGMENT**

1. On 21 May 2014, Appellant filed Notice of Intention to Appeal (“**NIA**”) learned Chief Magistrate’s Judgment delivered on 6 May 2014, in Suva Magistrates Court Civil Action No. 95 of 2009.
2. On 30 October 2014, the Learned Magistrate granted Order for stay of execution of his Judgment.
3. Lami Town Council, Respondent in this Appeal appealed against the Order granted on 30 October 2014.
4. This Court on 31 March 2014, set-aside the order granted on 30 October 2016, and adjourned iTaukei Land Trust Board Appeal to 15 April 2016, to fix hearing date.
5. On 15 April 2016, Appeal was adjourned to 10 May 2016, to enable parties to verify Copy Records.
6. On 10 May 2016, Counsel for the parties informed Court that Copy Record is incomplete and needs to be rectified when Court adjourned the Appeal to 15 July 2016, to fix hearing date.
7. On 15 July 2016, Court directed parties to file Submissions and adjourned Appeal to 5 October 2016, for hearing.
8. On 5 October 2016, Counsel for parties informed Court that they failed to comply with directions and need time to file Submissions when the Appeal was adjourned to 7 February 2017, for hearing.
9. Appeal was next called on 17 March 2017, and adjourned to 30 May 2017, for hearing which date was vacated due to continuation of a trial and re-listed to 2 June 2017, to fix hearing date.
10. On 2 June 2017, Appeal was set down for hearing on 27 July 2017.

11. Appeal was heard on 27 July 2017, and adjourned for Judgment on Notice.

### **Background Facts**

12. On 7 May 2009, Appellant filed Writ of Summons and Statement of Claim in Suva Magistrates Court Civil Action No. 95 of 2009.
13. On 14 May 2009, Defendant filed Notice of Intention to Defend.
14. Pursuant to Leave of Magistrates Court, Plaintiff on 25 September 2009, filed Amended Statement of Claim.
15. On 30 November 2009, Defendant filed its Statement of Defence.
16. After several adjournments Magistrates Court Action was finally heard on 21 June 2013.
17. Judgment by the Learned Chief Magistrate was delivered on 6 May 2014.

### **Appeal**

18. Grounds of Appeal filed by the Appellant lists eight (8) Grounds of Appeal.
19. A careful analysis of the Grounds of Appeal clearly shows that some grounds of appeal are repeated and/or inter related.
20. This Court is of the view that the Grounds of Appeal that need to be determined by Court can be formulated as follows:-

- (i) Learned Magistrate erred in law and in fact by finding that Appellant was registered proprietor of land that was subject to Native Lease no. 4135 (**“Lease”**).
- (ii) Learned Magistrate erred in law and in fact by holding that Surrender of Lease was not registered pursuant to Land Transfer Act 1971.
- (iii) Learned Magistrate failed to consider the amendment to s60 Local Government Act 1972, which exempts payment of city/town rates on iTaukei land not leased or licensed to any person.
- (iv) Learned Magistrate erred in law and in fact in ordering Appellant to pay town rates for the period 1985 to 2006.

**Learned Magistrate erred in law and in fact by finding that Appellant was registered proprietor of land and was subject to Native Lease no. 4135 (“Lease”)**

21. Section 4(1) iTaukei Land Trust Act 1940 provided as follows:-

“s4(1) The control of all iTaukei land shall be vested in the Board and all such land **shall be administered by the Board for the benefit of the iTaukei owners** or for the benefit of the iTaukei.” *(emphasis added)*

- 22. Section 4(1) bestows control of iTaukei land on iTaukei Land Trust Board and their function is to administer iTaukei land for the benefit of the iTaukei.
- 23. This section does not make iTaukei Land Trust Board the owner of the iTaukei Land or gives the Board any proprietary interest in iTaukei Land.
- 24. Ownership/Proprietorship of the iTaukei Land always rests with the landowning unit for the particular land.
- 25. iTaukei Land Trust Board without being empowered to lease any iTaukei land by the Legislator cannot deal with the iTaukei as a proprietor/registered owner of any landowner could do.

26. Since iTaukei Land Trust Board is not the proprietor/owner of iTaukei land section 8 of iTaukei Land Trust Act gives it the power to “grant lease or licence of portion of iTaukei land not subject to iTaukei reserve”.
27. With all due respect this Court cannot accept the decision of Justice William in **Native Land Trust Board v. Nadi Town Council** [979]; Civil Appeal No. 7 of 1979, when his Lordship held that because of the powers vested in Native Land Trust Board (now iTaukei Land Trust Board) by Legislature, iTaukei Land Trust Board becomes owner of unalienated iTaukei land.
28. This Court notes that in his Judgment, Learned Magistrate held that both the Appellants and LOU are owners of the subject land.
29. On pages 10 and 11 of the Judgment (pages 113, 114 of Copy Record) Learned Magistrate states as follows:-
- “1. Whether the Defendant was the registered proprietor of the property situated at Wainidinu, Delainavesi, off Queen’s Road, Fiji comprised in native Lease No. 4135 being on land described as “Wainidinu. The answer to this by traversing the relevant sections in the Native Lands Trust Act and the Land Transfer Act is - yes the Defendant is the registered proprietor over NL 4135.
2. Whether the landowning unit (LOU) is at all times the registered proprietors of all native land. The answer to this question is yes - the three Yavusa Nauluvatu, Nayavumata and Vatuwaqa are the registered landowning units whose lands are comprised in NL 4135.”
30. This Court in view of what is stated at paragraphs 22 to 27 of this Judgment holds that Appellant was never proprietor/owner of iTaukei land known as “Wainidinu” in the District of Suva and Province of Rewa and owned by the Mataqali Yavusa Nauluvatu, Nayavumata and Vatuwaqa containing 1 acre 1 rood 16 perches comprised and described in iTaukei Lease No. 4135.

31. It is noted that the Lease itself says that subject land is “owned by the Mataqali Yavusa Nauluvatu, Nayavumata and Vatuwaqa”.

**Learned Magistrate erred in law and in fact by holding that surrender of Lease was not registered pursuant to Land Transfer Act 1971**

32. The evidence before the Learned Magistrate established that:-

- (i) iTaukei Lease No. 4135 over the subject land was leased by Plaintiff to Tulsi Dass;
- (ii) Tulsi Dass passed away on 13 May 1950, and Public Trustees was appointed Administrator of his Estate;
- (iii) On 28 November 1957, Public Trustee registered Transmission by Death in relation to the Lease;
- (iv) iTaukei Lease expired on 20 February 1955;
- (v) On 3 May 1968, Appellant issued a Tenancy at Will in favour of Ram Kissun son of Tulsi Dass;
- (vi) Ram Kissun passed away and all his children renounced all their shares in Estate of Ram Kissun to Parbati;
- (vii) On or about 27 September 1995, Appellant served Notice of Termination on Shakuntala Devi by leaving it with one Sumitra Devi.

33. It was Respondent’s case before Magistrate Court that Lease had expired in 1955, and was never renewed as is stated at page 3 of the Learned Magistrates Judgment (page 127 of Copy Records).

34. Section 62 of Land Transfer Act [1971] provides as follows:-

“s62. Whenever any lease registered under the provisions of this Act is intended to be surrendered in whole or in part, and the surrender thereof is effected otherwise than by operation of law or under the provisions of any relating to bankruptcy, the parties may execute a form of surrender, or partial surrender, as the case may be, and upon such form being presented to the Registrar he or she shall enter a memorial of the surrender in the register, and thereupon the estate or interest of the

lessee in such land shall vest in the lessor or in the person in whom, having regard to intervening circumstances, if any, the land would have vested if no such lease had been executed, provided that-

- (a) in the case of a surrender of the whole of the lease, the form of surrender may be endorsed on the duplicate instrument of such lease;
- (b) no lease subject to any mortgage or sublease or other encumbrance shall be surrendered in whole or in part without the consent of the mortgagee, sublessee or encumbrance, as the case may be, of the lease or part thereof intended to be so surrendered, and the Registrar shall endorse on the original and duplicate instruments of such mortgage, sublease or encumbrance the fact of such surrender, and such consent shall operate as a discharge or cancellation of such mortgage, sublease or encumbrance as to the lease or part thereof surrendered, and the Registrar shall enter a memorial of such discharge or cancellation on the instruments of title affected.”

- 35. Surrender of Lease can only take place if lease is in existence and the lessee agrees to give up his/her right to the estate and interest in the lease.
- 36. In this instance, the Lease had expired which means there was no lease over the subject land pursuant to which anyone had any interest or right over the subject land. Tenancy at Will was also terminated by the Appellant.
- 37. This Court holds that in this instance, there was nothing left to be surrendered under section 62 of LTA and as such learned Magistrate erred in holding that Appellant had to surrender the Lease pursuant to section 62 of the LTA.

**Learned Magistrate failed to consider the amendment to s60 of Local Government Act 1972 which Lessee of Native Land to pay rates**

- 38. This Court accepts that Appellant should have pleaded if s60(1)(aa) of Local Government Act 1972 defence to Respondent’s claim.
- 39. This Court notes that Learned Magistrate at page 7 stated as follows:-

“In this instance, the issue of the amendments to the Local Government Act is not specifically pleaded by the Defendant in the Statement of Defence nor is it an issue raised during the hearing. It now falls to the Court in its discretion to decide whether the same should now be accepted as part of the submissions after evidence had been heard.

**After considering the above rule and its intention to protect parties from embarrassment and surprise at the trial - it is clear that these amendments to section 60 of the Local Government Act would have been referred to by both parties in the course of their research for this case. Although it has not been specifically pleaded, the Court will consider this preliminary point for the purposes of properly determining the issues between the parties.”** *(emphasis added)*

40. Respondent in its “Submission” objected to this issue being raised only at the time submission was being made in Magistrates Court.
41. The fact the Learned Magistrate dealt with this issue after noting that Appellant did not raise the amendment to s60 of LGA as a Defence dealt with the amendment this Court will have to address the appeal on this issue.
42. It is also noted that Respondent has not appealed Learned Magistrate’s decision to consider section 60 of LGA in his Judgment when it was not part of pleadings.
43. Section 60(1) of LGA provides as follows:-

“s60(1) All land, including State land, within a municipality shall be rateable land for the purposes of this Act, provided that the following lands shall not be assessed for general rates-

- (a) State lands not leased or licenced to any person;
- (aa) iTaukei land not leased or licensed to any person;
- (b) lands used exclusively for the purpose of recognised or registered schools or of other educational institutions, not run for profit, certified to be such by the Minister responsible for education;



- (c) lands used for the purpose of hospitals, maintained out of public funds or other medical institutions, not run for profit, approved by the Minister responsible for medical services for this purpose;
- (d) lands used for the purpose of mental homes or mental hospitals and orphanages not run for profit;
- (e) lands used exclusively for purposes of public worship;
- (f) cemeteries and crematoria not run for profit;
- (g) prisons;
- (h) lands used exclusively by registered charitable institutions for public charitable purposes.”

44. In this instance, there was no evidence produced in Court to establish that subject land was leased or licensed to any person by iTaukei Land Trust Board.

45. As such, subject land as from 1995 was not to be assessed for general rates.

### **Conclusion**

46. Appellant is not and never was registered proprietor or owner of land known as “Wainidinu” in the District of Suva and Province of Rewa and owned by the Mataqali Yavusa Nauluvatu, Nayavumata and Vatuwaqa containing 1 acre 1 rood 16 perches comprised and described in iTaukei Lease No. 4135.

47. iTaukei Lease No. 4135 had expired and as such there was no need for it to be surrendered pursuant to s62 of LTA.

48. Pursuant to s60(1)(aa) of LGA no rates was to be assessed from 27 September 1995, by the Respondent in respect to the subject land.

49. Appellant not being proprietor or owner of the subject land was and is not liable to pay any town rates to the Respondent.

**Costs**

50. Court takes into consideration that both parties filed submissions and made oral submissions.

**Orders**

51. I make following orders:-

- (i) iTaukei Land Trust Board's Appeal is allowed;
- (ii) Judgment delivered on 16 May 2014, in Magistrates Court Civil Action No. 95 of 2009 is set-aside;
- (iii) Respondent do pay Appellant's costs assessed in the sum of \$1,000.00.



  
**K. Kumar**  
**Acting Chief Justice**

At Suva

26 May 2020

**Legal Department iTaukei Land Trust Board for Applicant**  
**Shekinah Law for Respondent**