

A CHARLIE RAVOVO THOMAS AND OTHERS

v.

NATIVE LAND TRUST BOARD

B [SUPREME COURT, 1962 (Hammett P.J.), 25th September,
4th October]

Civil Jurisdiction

C *Native land—membership of tokatoka and mataqali—identity of persons to whom rent of native land to be paid—not questions to be decided by Native Land Trust Board—Register of Native Lands —Native Lands Commission—Native Land Trust Ordinance (Cap. 104) ss.2,3,4(1), 14(1), 32—Native Lands Ordinance (Cap. 103) ss.4,6,6(4), 6A,7,8—Rules of the Supreme Court 1883 (Imperial) 0.25 r.2—Native Land (Leases and Licences) Regulations (Cap. 103) reg. 3(1).*

D The plaintiffs claimed declarations that they were members of Tokatoka Matalaqere and Mataqali Ketenatukani, that one of their number was the Turaga ni Mataqali of that mataqali, and that they were entitled to the rents payable to Tokatoka Matalaqele. Points of law set down for argument before trial amounted to a claim by the defendant Board that there was no cause of action because the Board was under no duty nor had it any power to decide the membership of any mataqali or tokatoka, which duty and power was vested in the Native Lands Commission.

E *Held:* 1. The Native Land Trust Ordinance, under which the defendant Board was established, vested the control of all native land in the Board, but nowhere laid down how the “native owners” were to be ascertained, or conferred any power to decide that question, or the question of the identity of the persons entitled to the rents.

F 2. The Native Lands Ordinance, on the other hand, provided for a Native Lands Commission charged with the duty of ascertaining what lands were native lands and of compiling a register of such lands and the owners thereof.

G 3. The Native Lands Ordinance laid down a complete procedure for the ascertainment of the identity of the native owners of land and the defendant Board had no discretion or power to make any decision as to the identity of the native owners.

4. There being no allegation in the Statement of Claim that the plaintiffs were recorded as owners in the Register of Native Lands under the Native Lands Ordinance the plaintiffs were in the circumstances of the case not entitled to the declarations sought.

H 5. If the court had a discretion in the matter it would not, on the pleadings, exercise it in favour of the plaintiffs, who had apparently ignored a procedure and had not availed themselves of a method of

seeking redress expressly provided by the legislature for use in such cases. Points of law set down for hearing before trial in an action for declarations relating to native lands and rental therefor.

A. D. Patel for the plaintiff. A

D. M. N. McFarlane for the defendant Board.

The facts sufficiently appear from the judgment.

HAMMETT P.J. : [4th October, 1962]—

In this action the Plaintiffs claim the following declarations :

- (1) A declaration that they are members of Tokatoka Matalaqere and Mataqali Ketenatukani; B
- (2) A declaration that the Plaintiff CHARLIE RAVOVO THOMAS is the Turagani Mataqali of Mataqali Ketenatukani; C
- (3) A declaration that Plaintiffs are entitled to payment of all rents payable to Tokatoka Matalaqere in respect of its own lands and those owned by the extinct tokatoka Nadvanitu. C

The Defendant Board in its defence, after pleading to the facts alleged in the Statement of Claim, raises three points of law. These matters are contained in paragraphs 10, 11 and 12 of the defence which are as follows : D

10. The Defendant pleads in law that it was bound to follow the ruling of the Chairman of the Native Lands Commission and that the duty of the Defendant is to distribute rents in accordance with Section 14(1) of the Native Land Trust Ordinance, Cap. 104, and the regulations thereunder; E
11. The Defendant pleads in law that it is under no duty nor has it the power to decide the membership of any Mataqali or Tokatoka and the Defendant further pleads that the power and duty of deciding whether or not the Plaintiffs or any of them are members of the Tokatoka Matalaqere is vested in the Native Lands Commission by virtue of the Native Lands Ordinance, Cap. 103; F
12. The Defendant pleads in law that the Statement of Claim discloses no cause of action against the Defendant. F

Order 25 Rule 2 of the Rules of the Supreme Court reads :

“2. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.” G

On 7th September, 1962, it was ordered by a Judge in Chambers that these points of law be set down for hearing on 25th September, 1962, before the trial of the action and that until they had been disposed of all further proceedings in the action be stayed. H

I have now heard legal argument on those points and the position appears to be as follows :

A The Defendant in this action is the Native Land Trust Board which was created and established by Section 3 of the Native Land Trust Ordinance, Cap. 104. The general powers and duties of the Board are set out in Section 4(1) of the Ordinance which reads :

“The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Native owners.”

B By Section 2 the term “native owners” is defined as meaning :

“The mataqali or other division or subdivision of the natives having the customary right to occupy and use any native land.”

C This Ordinance nowhere lays down how the “native owners” are to be ascertained and the Board is given no power or authority to decide who are in fact the “native owners” of any land.

The duties and powers of the Board in respect of rents it receives from native land are contained in Section 14(1) of the Ordinance which reads :

D “14(1). Subject to the provisions of subsections (3), (4) and (5) of this section, rents and premiums received in respect of leases or licences in respect of native land shall be subject to a deduction of such amount as the Board may from time to time determine not exceeding twenty-five per centum 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.”

E Under Section 32 the Governor in Council may make regulations prescribing all matters which are necessary to be prescribed for the giving effect to the Ordinance.

The Regulations which have been made by the Governor in Council prescribing how the balance of rents collected shall be distributed are contained in Regulation 3(1) of the Native Land (Leases and Licences) Regulations, of which the material part reads as follows :

F “3(1). Twenty-five per centum shall be deducted as and for the expenses of collection and administration from all sums of money received for rents of and premiums in respect of leases or licences of native land and shall be paid to the funds of the Board :

G

The following shall be the division of every sum of twenty shillings of the balance remaining —

- (a) to the turaga i taukei, if any, one shilling;
- (b) to the chief of the qali, two shillings;
- (c) to the chief of the mataqali, three shillings;
- (d) to the mataqali, the balance of the sum:

H

Again there is no provision in these Regulations as to how the actual identities of the native owners, the mataqali, the turaga ni taukei, the chief of the qali or the mataqali entitled to receive this money are to be ascertained and no specific power or authority is given to the Board to ascertain them, nor is any procedure laid down in these Regulations by which they may be ascertained.

A

In the absence of any provision in this Ordinance or the rest of the body of laws in force in Fiji for ascertaining who are the native owners of land, it is clear that the onus would by implication rest upon the Native Land Trust Board to ascertain their identity before paying out money received as rents. The performance of such an implied duty would undoubtedly be enforced by the Courts and in the exercise of such duties the Board would be subject to the control of the Courts. It would be open to persons aggrieved to apply to the Court for a declaratory judgment setting out their rights in the event of the Board failing to recognise them.

B

The law of Fiji is not, however, silent on these matters. In the Native Lands Ordinance, Cap. 103, is set out a complete code showing how the identity of native owners is to be ascertained. Section 4 of this Ordinance reads :

C

"4. The Governor shall appoint a Native Lands Commission consisting of one or more Commissioners, each of whom shall have the powers of the Commission, who shall be charged with the duty of ascertaining what lands in each province of the Colony are the rightful and hereditary property of native owners, whether of mataqali or in whatever manner or way or by whatever divisions or subdivisions of the people the same may be held."

D

Section 6 places a duty on the Commission to institute inquiries into the title to all lands claimed by mataqali and to describe the boundaries of such land and the names of the members of the communities claiming to be the owners thereof.

E

Section 6(4) reads :

"6(4). If there is no dispute as to the ownership of any lands marked out and defined as aforesaid and the Commission is satisfied that the claim is bona fide and that all conditions as to notice of the inquiry and the claim made have been duly complied with and that full opportunity of objecting to the ownership claimed has been given to all interested the Commission shall record the boundaries of such lands and the names of the owners."

F

G

Section 6A lays down a method by which an appeal may be lodged against any decision of the Native Lands Commission to an Appeals Tribunal and lays down that the determination of that Tribunal shall be final.

Sections 7 and 8 require that a "Register of Native Lands" shall be compiled and maintained in which a description of the boundaries of all native land and the owners thereof shall be recorded.

H

A It is quite clear that the Native Lands Ordinance lays down a complete procedure whereby the identity of the native owners of land are to be ascertained. In view of this, and in view of the absence of any provisions to the contrary in the Native Land Trust Ordinance, it is obvious that the Native Land Trust Board has no discretion or power to make any decision whatever as to the identity of the native owners of land but must accept the findings of the Native Lands Commission as recorded in the Register of Native Lands on such issues.

B It is the contention of the Board that this Court has no power to grant the declarations sought by the Plaintiffs against the Board.

C It is the contention of the Plaintiffs that this Court has a discretion which it could exercise in favour of the Plaintiffs in granting a declaratory judgment such as is sought in this case. In these circumstances Counsel for the Plaintiffs has urged that unless and until the Court has heard all the evidence in the case it cannot decide whether or not this is a proper case in which its discretion should be exercised.

D In the course of the argument before me I pointed out to Counsel for the Plaintiffs that the statement of claim does not state whether or not the Plaintiffs have pursued the remedy which is open to them under the provisions of the Native Lands Ordinance to have the issue of whether they are or are not the native owners of the land in question determined by the Native Lands Commission. Again there is nothing to show whether, if that has been tried without success, they have availed themselves of the right of appeal to the Appeals Tribunal set up under that Ordinance. Again there is nothing in the statement of claim to show whether the Plaintiffs' names were ever recorded in the Register of Native Lands as the native owners of the land in question, and, if so, whether their names are now so registered or not.

E
F If the Plaintiffs are in fact recorded in the Register of Native Lands as the native owners of the land in question and the Native Land Trust Board have refused to pay them their share of the rents received by the Board, it would appear that the Plaintiffs might well be entitled to one at least, if not more, of the declarations sought.

G To that extent, therefore, there is some merit in the submission of Counsel for the Plaintiffs. He has further submitted that he has been considering amending the writ by adding the name of the Native Lands Commission as a co-Defendant and by amending the statement of claim. He contends that since he would be entitled to apply for leave to amend at any time up to and even at the trial, a decision against the Plaintiffs on this preliminary issue should not be made at this stage in case he should decide so to amend. With this latter submission I cannot agree. I must take the pleadings as they are and the parties as they are at present before me and not deal with this case on the basis that some amendments might possibly be sought later.

After considering all that has been urged before me I am quite satisfied that this action is incompetent. This Court could only, in my view, grant any of the declarations sought against the Native Land Trust Board if it was claimed in the statement of claim and proved that the Plaintiffs are recorded in the Register of Native Lands as the native owners of the land in question. Since that fact is not even alleged in the statement of claim I consider that the Plaintiffs are not entitled to the declarations sought in the particular circumstances of this case having regard to the statement of facts which is set out in the statement of claim. A

If the Court did, however, have any discretion in the matter it would certainly not, in my view, on these pleadings, exercise it in favour of the Plaintiffs. I say this because the legislature has provided a specific remedy to a specified tribunal and has laid down the procedure open to persons who claim to be "native owners" of native land together with a right of appeal from the decision of that tribunal. B

The Court will not lend its aid, by the exercise of a discretionary power, to Plaintiffs who have apparently ignored a procedure and have not availed themselves of a method of seeking a redress for their grievance which has been expressly provided by the legislature for use in such cases. To act otherwise would be to encourage and even assist persons to circumscribe and to stultify a tribunal carefully set up and staffed by personnel with a suitable knowledge and experience of Fijian traditions and customs and customary law specifically to deal with the very type of problem that arises in this case. C D

Since, in the words of Order 25, Rule 3, my decision on this point of law does, in my opinion, substantially dispose of the whole action, I do therefore dismiss the action with costs to the Defendants, to be taxed.

Action dismissed.