

RATU MALAKAI WAQATABU

v

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NATIVE LAND TRUST BOARD & ANOTHER

[HIGH COURT, 1995 (Byrne J.) 28 February]

Civil Jurisdiction

B *Native Land-permission of native owners to lease-claim that proper procedures not followed-whether native owner may sue for infringement of personal rights - Native Land Trust Act (Cap 134) Section 23.*

The Plaintiff alleged that the NLTB had failed to obtain the mataqali's permission before leasing its land. The NLTB argued that the Plaintiff had
 C no locus to bring the action. HELD: A member of a proprietary unit may sue in his own right in respect of a personal right and may succeed on a claim for damages and an injunction.

Cases cited:

Anns & Ors v. London Borough of Merton [1977] 2 All ER 492
 D *Meli Kailavu & Ors v. NLTB* (1956) FLR 17
Waisake Ratu v. NLTB (CA 580/1984)

Ruling on preliminary issues.

A. *Seru* for the Plaintiff

E N. *Nawaikula* for the First Defendant

Byrne J:

By Originating Summons dated 11th of June 1993 the Plaintiff seeks two Declarations and one Order against the First Defendant. He also claims damages.

F Affidavits have been filed on behalf of the parties with the exception of the Second Defendant who has taken no part in the proceedings so far.

At this juncture it is unnecessary to mention in any detail the allegations made against each other by the Plaintiff and the First Defendant because when the matter came before me in chambers on 31st August 1994 the Defendant

G raised two preliminary issues, namely:

(1) whether the action is statute barred by the Limitation Act Cap.35; and

(2) presuming the answer to (1) is 'NO' whether in any event the Plaintiff has any *locus standi*.

Briefly the Plaintiff who is a retired school teacher has deposed that at the time of swearing his first affidavit on 22nd May 1993 he was aged 80 years and a member of Mataqali Vatuvula (Kasia) in the village of Rewasa, Rakiraki, Ra.

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He says that his family is the recognised head of Yavusa Naroko and was the recipient of the share of lease money paid out by the Native Land Trust Board to his Yavusa. He says that that share of lease money was paid to his father Ratu Apenisa Koro Waqatabu, after his death to his brother Ratu Apimeleki Yasawa and after him to the Plaintiff's elder brother Ratu Maikeli Kasami Waqatabu who died on 12th November 1986.

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About three days prior to the death of his elder brother Ratu Maikeli Kasami Waqatabu he called the Plaintiff to his death bed and told him to his great surprise that the Yavusa Naroko's share of the lease money he used to receive had not been paid to him since June 1986, the payment having been stopped by the Native Land Trust Board.

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The Plaintiff states that he grew up in Rewasa Village with one Saimone Davui who died some time in September 1988 and who came from the village of Rakiraki, Saivou, Ra.

The Plaintiff's parents later settled outside the village of Rewasa on a piece of land known as "Draunayavutia" while the Plaintiff attended school and teacher training.

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The Plaintiff's elder brother used the south eastern side of "Draunayavutia" while the Plaintiff used the north western side towards the river.

The Plaintiff claims that due to the friendship he had with the late Saimone Davui, Davui asked him if he would allow him to use a portion of the Plaintiff's land to plant cane as he had no land of his own and the Plaintiff would be absent from the land pursuing his teaching profession.

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With the Plaintiff's consent on 21st January 1950 an application for an Agricultural Licence was made by Saimone Davui over about six acres of the Plaintiff's land for a period of ten years.

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When that licence expired on or about 21st January 1960 the Plaintiff did not agree to a renewal but permitted Saimone Davui to continue to farm the land in his absence while the Plaintiff continued in his teaching profession around the country.

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The Plaintiff deposes that he informed Saimone Davui that when he retired from teaching he would need to have the land back for the use of his own family and himself.

The Plaintiff permitted Saimone Davui to build a home on the portion of the

A Plaintiff's land he was using and Mr. Davui married there and the Plaintiff's family and Mr. Davui's family lived as the Plaintiff says as "a big extended family".

The Plaintiff retired from teaching in 1974 and when he told Saimone Davui that he required the land back as previously agreed Mr. Davui informed him the land belonged to Davui's family and that he had obtained a lease from the Native Land Trust Board for a period of thirty years over that land.

B The Plaintiff claims that as "Draunayavutia" is reserved land the permission of the native owners is required before leasing and the Plaintiff says that neither he nor his deceased elder brother nor he reasonably believes the Mataqali Vatuvula (Kasia) gave its permission or approval to the Board to the leasing of the land by Saimone Davui.

C The Plaintiff alleges that the Native Land Trust Board did not follow proper legal procedures in granting a lease to Saimone Davui and that consequently such lease is null and void.

The Plaintiff therefore seeks:

D (1) A Declaration that the First Defendant failed to comply with proper legal procedures and thereby unlawfully issued a thirty year lease with effect from 1st January 1970 to the late Saimone Davui.

E (2) A Declaration that due to the unlawful procedures followed by the First Defendant in the issue of the lease the subsequent transfer of the same to the Second Defendant was also invalid and of no legal effect.

(3) An Order that the said lease and transfer to the Second Defendant be cancelled under the provisions of Section 168 of the Land Transfer Act Cap.131.

F The Plaintiff also claims damages.

In its submissions the Defendant alleges that the Plaintiff's claim is based on tort, more specifically breach of duty. The First Defendant issued a lease in favour of Saimone Davui in May 1971 effective from 1970. It is submitted therefore that the cause of action runs from May 1971 and that the time for the Plaintiff to commence these proceedings expired in 1977.

It is also alleged that the pleadings do not raise any fact upon which the limitation period may be extended or excluded.

As to *locus standi* the Defendant relies on the statement by Hammett J. in Meli Kaliavu & Others v. Native Land Trust Board 5 FLR 17 at page 20 that:

“It is not, however, open to this member or that member to sue and recover such damages in their own personal capacity. It would be quite out of the question for this Court to award damages personally to these five plaintiffs in respect of a cause of action (if there is one) open to the Mataqali of which they are members. Their claim to damages, therefore, cannot possibly succeed.”

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The Defendant also relies on the comment by Cullinan J. in Waisake Ratu & Others v. Native Land Trust Board Civil Action No. 580 of 1984 that if a Mataqali member takes a personal action then it must be in respect of a matter or interest that is personal to him only. The Defendant submits that the cause of action and the remedy the Plaintiff seeks here is open to the Mataqali as a whole and not to him only.

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In reply to these submissions, first as to the action being statute barred, the Plaintiff submits that he is not alleging a breach of duty of care by the First Defendant so that damages become an issue. Thus this case can be distinguished from Anns & Others v. London Borough of Merton [1977] 2 All ER 492 relied on by the First Defendant in his submission.

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In my judgment this submission is correct although I realise that the Plaintiff also claims damages. Primarily however according to the Originating Summons he is seeking declarations that the lease granted to Saimone Davui is a nullity and that therefore the transfer to the Second Defendant should be cancelled.

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As to *locus standi* the Plaintiff relies on the decision of Cullinan J. in Waisake Ratu and submits that this is a proper case where a member of the proprietary unit may commence proceedings rather than the Mataqali itself.

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In his long and very interesting judgment in Waisake Ratu Cullinan J. referred at page 58 to Section 23 of the Native Land Trust Act Cap. 134 which is as follows:

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“23(1) All actions, suits and proceedings respecting native land or respecting any lease, licence or permit relating thereto, or respecting the breach of any covenant contained in any such lease, licence or permit or respecting any trespass on such land, or any damages accruing by reason of such trespass or for the recovery of any rents or fees, or relating to any damage or wrong whatsoever in respect of such land, may be commenced, prosecuted and carried on in the name and title of the Board.

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(2) In any such action, suit or proceeding the Board may be

represented by any barrister and solicitor or by any officer or servant of the Board duly authorised in that behalf.”

A His Lordship said:

“Section 23 in my view merely confers a discretion upon the Board, if so requested by the native owners, to commence, prosecute and carry on litigation respecting native land, but does not exclude the native owners, nor in a proper case a member of the proprietary unit, from initiating and conducting any such action. That being the case, I find that the first plaintiff’s claim is properly before me.”

Earlier at pages 48 and His Lordship commented on the statement of Hammett J. on which the Defendant relies and said this:

C “The learned Judge (Hammett J.) in my view, did not however state that a member of a Mataqali could not sue in person, but that he could not sue in person in respect of what was really a collective right. Again he did not say that a single member of a proprietary unit could not sue for an injunction. As I see it, he simply said that, in the circumstances of that case, as the plaintiff had no personal rights in the matter and were not therefore entitled to damages, no personal rights had been infringed and therefore an injunction could not be granted. That is a far cry however from saying that, in a proper case, a member of a proprietary unit cannot sue in his own right in respect of a personal right and succeed in his claim for damages and an injunction.”

E At page 60 of his judgment Cullinan J. also said this:

F “I would be slow to interpret the section as meaning thereby that the Legislature intended that the native owners, comprising 50% of the population, holding 85% of the lands of Fiji, should be excluded in person from the Courts of Fiji.”

He then continued:

G “In my judgment the provisions of section 23 are but enabling in character, that is, they enable the Board, though not vested with native lands, to nonetheless conduct suits in respect thereof: the provisions provide for a convenient statutory form of representative action, the aspect of convenience being emphasised by the latter

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provisions of subsection (2) of the section.
Section 23 in my view merely confers.”

In my view these comments may be said to equally apply to the facts as so far known in the present case. I therefore hold that the Plaintiff has *locus standi* to commence these proceedings and I direct that the action now proceed in the normal way.

Costs will be in the cause.

(Application dismissed.)

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