RATU NEUMI LEQATAQA (for and on behalf of himself and on behalf of YAVUSA SALATU) and 4 Ors v NATIVE LAND TRUST BOARD and 3 Ors (HBC341J of 2005S)

HIGH COURT — CIVIL JURISDICTION

JITOKO J

19 July 2007

Native title — lease — expiry of lease — whether land reverted to reserve upon expiry of lease — whether grant of approval notice to lease complied with requirements of Native Land Trust Act (Cap 134) — whether land recommended in 1958 Thompson Report was native reserve — Crown Proceedings Act (Cap 24) — Native Land Trust Act (Cap 134) s 17 — Native Lands Trust Ordinance 1940 (Ordinance No 12 of 1940) ss 16, 17, 19.

The Plaintiffs were owners of the land in question. Their ownership was determined by the first Native Land Commission dated 4 April 1905. In 1909, native lands in the Tailevu North area were being opened up to lease. In July 1910, Arnold Kellar was granted a lease over an area of the Plaintiffs' land for a term of 50 years for agricultural, grazing and dairy purposes. Mr Kellar later transferred part of his lease to the first Defendant (D1) for the same use. D1 became the registered proprietor of the said land and over the balance of the life of the lease. The fourth Defendant (D4) began to build a school within the leased property. In June 1940, barely a few weeks after the transfer of part of the lease from Mr Kellar to D1, the Native Land Trust Board (the second Defendant (D2)) came into existence with the promulgation of the Native Lands Trust Ordinance 1940. The Native Lands Reserve Commissioners was tasked of ascertaining the boundaries of native land which the native owners wanted to be set aside as native reserves. In December 1958, Reserves Commissioner Thompson carried out the inquiry on the Reserve Claim No 262 of Yavusa Salatu over their 560 acres. In his recommendation to D2, he noted that Reserve Claim No 262 was the only reserve claim of Yavusa Salatu. Thus, upon Commissioner's recommendations, except for the 100 acres on which the school was situated, all the land the subject of Native Lease Book No 27 Folio 383 was to be set aside as native reserve. The 100 acres was to remain outside the reserve portion. In July 1960, the original lease granted to D1 expired. The Plaintiffs claimed that the land had, upon the expiry of the original lease, reverted to reserve, and any subsequent use meant the land to be de-reserved with their consent. The Plaintiffs sought certain declarations that the land the subject of this proceedings was native reserve and that its purported exclusion and lease to D4 by D1 was not in accordance with the law, and was therefore unlawful and null and void.

Held — (1) In deciding whether to de-reserve or otherwise, D2 should be satisfied that the period of exclusion, such as the lease period, would not overrun or extend beyond the period when the landowners were most likely to require the said land for their maintenance and support of their members.

(2) The granting of the approval notice to lease by D2 to D4 from 1 January 1975 for a term of 30 years failed to comply with the requirements of s 17 of the Native Land Trust Act (Cap 134) (the Act). The grant was contrary to the provisions of the Act. Any attempt to grant any new lease by D2 over the same land, without the steps already described above as necessary for the action to conform with the requirements of ss 15 and 17 of the Act, would be irregular and therefore ultra vires.

(3) D2, while accepting and implementing the Thompson recommendations, had not given them their full legal effect, by its failure to comply with the requirements of ss 15 and 17 of the Act.

(4) The land recommended in the 1958 Thompson Report to be excluded from the reserve claim of Yavusa Salatu should be declared native reserve for the purpose of the Act, and therefore any dealings on it required the consent of its native owners. D2 should now act to rectify the situation.

Application granted.

Case referred to

Bulou Vilisi Mataitoga and Ors v NLTB and Ors HBC 315J/2003S; [2007] FJHC 147, cited.

S. Matawalu and *S. Naqase* for the Plaintiffs

S. Valenitabua for the first Defendant

M. Rakuita for the second and third Defendants

T. Fa for the fourth Defendant

Jitoko J. This is an application by originating summons, by the representatives of Yavusa Salatu, Nakalawaca Village, Namalata, Tailevu, as the Plaintiffs' seeking certain declarations that the land the subject of this proceedings is native reserve and that its purported exclusion and lease to the fourth Defendant (D4) by the first Defendant (D1) was not in accordance with the law, and was therefore unlawful and null and void.

Background

The first Defendant is a body corporate duly constituted under the Native Land Trust Act, (Cap 134) (the Act) to control and administer native land. The second Defendant (D2) is a statutory body established under s 4 of the Native Lands Act (Cap 133), charged with the duty of ascertaining what lands are native lands and their native owners. The third Defendant (D3) is named as nominal Defendant in the representative capacity on behalf of the state in accordance with the Crown Proceedings Act (Cap 24). The D4 is a corporate entity that holds the lease on the land on which the education institution, Fulton College, operates.

The Plaintiffs are owners of the land comprised in NLC Lot 18 Reference J/18, four situated in the Tikina of Namalata in the province of Tailevu with total area of 560 acres. The determination of the ownership of the land was made by the first Native Land Commission sitting held on 4 April 1905, by Mr David Wilkinson for the Namalata District sitting at Dakuivuna Village.

Archival records show that by 1909, native lands in the Tailevu North area were being opened up to lease. In July 1910, with the consent of the Namalata District Council, the government by an order in council, granted one Arnold Kellar a lease over an area of approximately 400 acres of the Plaintiffs' land. Its term was for 50 years and purpose agricultural grazing and dairy. The records show that on 30 May 1940, Mr Kellar, transferred part of his lease to the D4 ostensibly for the same use. The D4 became the registered proprietor of Memorandum of Native Lease Book No 27 Folio 383. Over the balance of the 20 approximately of the life of the lease, the D4 began to build a school, to be known as the Fulton College, the leased property.

In June 1940, in fact barely a few weeks after the transfer of part of the lease from Mr Kellar to the ACAL, the Native Land Trust Board (the board) came into existence with the promulgation of the Native Lands Trust Ordinance 1940 (Ordinance No 12 of 1940). With it, most importantly, and for the first time, the creation of native reserves under Pt III of the said Ordinance under ss 16 and 19,

the board and the governor respectively can set aside land as native reserves. Also under the new law, the board, as administrator of all native lands, succeeded in this case, as lessor to the ACAL lease.

The Native Lands Reserve Commissioners originally appointed under the Native Land (Native Reserves) Regulations had, since inception been sitting throughout the country, ascertaining the boundaries of native land which the native owners wanted to be set aside as native reserves. The commissioners, after holding such hearings, would then recommend to the board the setting aside of ascertained native lands as native reserves: (reg 10) of the Native Land (Native Reserves) Regulations.

In December 1958, Reserves Commissioner Ian Thompson, (later to become Sir Ian Thomson) carried out the inquiry on the Reserve Claim No 262 of Yavusa Salatu over their 560 acres. In his recommendation to the board, Mr Thompson first noted that Reserve Claim No 262 was the only reserve claim of Yavusa Salatu. He added that:

> This Lot covers an area of 560 acres, of which 3/4 is under lease to the Fulton Mission School. The owners are hard pressed for cultivable land close to their village of Nakalawaca, and are planting, in fact, on Verata land (Yavusa Qalibure and Naloto).

In his recommendations to the board, Mr Thompson said that:

> (a) the leased areas now under bananas and cattle (ie the area in the north-eastern and north-western (west of King's Road) portions of the Lot) should be returned and reserved for the native owners on the expiry of the lease;
>
> (b) an area of 100 acres including the school lease should be placed outside reserve;
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> (c) the remainder of the Lot should be reserved for the use of the native owners the Yavusa Salatu, excluding (1) sufficient land to provide a right of way for the school water supply and (ii) a right of way between the school buildings and the landing place the Naduruka Creek near its junction with the Waidalice River.

The Commissioner's recommendations were approved on 29 December, 1951 by the board. This meant that, except for the 100 acres on which the school, Fulton College, was situated, all the land the subject of Native Lease Book No 27 Folio 383, was to be set aside as native reserve. The 100 acres was to remain outside the reserve portion. The board also decided that pending proper survey and proclamation, the approval should be made public. Gazette Notice No 1577 of 15 December 1967 (FRG vol 94, no 56) informed the public of the board's decision. It stated that the board had approved and set aside the portions of land belonging to Yavusa Salatu as recommended by Commissioner Thompson, as "Fijian Reserve". Adding that:

> It is not practicable at the present time to demarcate the boundaries by survey on the ground. Until such time as the areas are proclaimed however, the areas indicated above will for the purpose of administration be treated by the Board as if they were Native Reserves proclaimed under the Native Land Trust Ordinance Cap 104 and no part of the lands comprised therein will be leased, either as an extension of an existing lease beyond the normal date of expiry, or as a new lease.

The Plaintiffs' land was finally proclaimed in the gazette of 11 February 1983 (Gazette Notice No 244 FRG vol 110, no 7), with the proviso, that, the proclaimed land do not include:

> (a) any portions of native land which the Board has determined shall be excluded from Native Reserve under the provisions of section 17 of the Act.

Provided that where such exclusion was for a specified period then such land shall be included at the end of such period; and,

(b) any land the subject of a lease or a licence or a provisional notice of approval to lease subsisting at the date of this notification which would be in conflict with the provisions of section 16 of the Act until the term thereof has determined whereupon such land shall be included.

It is also relevant to refer to the minutes of the board meeting (265th meeting held on 27 January 1983) which inter alia, approved the above proclamation. Paragraph 4 of the minutes dealt with the reservation noting as follows:

> Having examined the present situation with the assistance of the Legal Adviser, the meeting approved that proclamation in the form recommended proceed forthwith having noted —
>
> 4.1 that the process of setting aside native land as reserve should thereupon be legally concluded;
>
> 4.2 that lands subsequently de-reserved after having been set aside, would remain excluded for the period given;
>
> 4.3 that all leases and licences currently at the time of proclamation will be preserved until maturity;
>
> 4.4 and the status of lands exempted under the ALTA (Exemption) Regulations will be duly reserved.

In the meantime in 1952, 8 years before the lease expired, ACAL, through its solicitors Messrs Wm Scott & Co, tried to get the board to extend the terms of its expiry lease. In its letter of 6 May 1952, the solicitors asked for an extension of 99 years. The board in its reply of 22 November 1952 confirmed that the extension requested "will not be considered until such time as the Native reserves in the area have been determined": (see Annex STN 3 of Naqase's affidavit).

In July 1960 the original lease granted to the D4 expired. There followed a period of intense negotiations between the landowners, the board, and representatives of the D4 for a new lease. The documentary evidence produced before the court show that in view of some uncertainty by the board as to how to classify the expired lease land, the D4, on two occasions in March and November 1971, applied to the board for the subject land to be de-reserved. On both occasions, the board refused. There is some evidence to suggest that some landowners had upon receipt of goodwill payment by the D4, agreed to the application for de-reservation. This did not eventuate.

Notwithstanding the legal uncertainty the board faced, it went ahead and issued an approval notice to lease to the fourth Defendant over the subject land for a period of 30 years from 1 January 1975. This approval notice has already expired. According to the Plaintiffs, the board is in the process of issuing a new registered lease to the fourth Defendant. It is in response to this effort that the Plaintiffs' had applied and obtained an injunction against the board.

Plaintiffs' claim

In a nutshell, the Plaintiffs' claim is that their land on which the Fulton College is situated, fall within native reserve and consequently its use must comply with the requirements of s 17 of the Native Lands Trust Act (Cap 134). In particular, the Plaintiffs claim that the land had, upon the expiry of the original lease, reverted to reserve, and any subsequent use meant the land to be de-reserved with their consent.

Court's consideration

In the course of commencement and progress of the proceedings, it became obvious to the court that given the plethora of seemingly contradictory if not ambiguous evidence by way of reports and statements, both in English and the vernacular, it would be necessary to adduce additional oral evidence. It therefore ordered open court hearing. Further, and in order to assist the parties focus only on the relevance, the court identified the issue of reservation of the Plaintiffs' land and specifically the recommendation of the Native Lands Commission (Reserve Claim No 262) pertaining to its use and the relevant administrative decisions and/or actions taken, as the critical issue. The court as a result ordered that the following issue be tried first, namely:

> Whether the recommendations made by the Lands Commissioner Sir Ian Thompson in 1958 as contained in NLC Report (Reserve Claim No 262) which inter alia, recommended the setting aside of 100 acres for the school (Fulton College), had been followed through by the Board, and in accordance with the provisions of the Act.

The issue is one both of facts and law.

The Thompson recommendations

The recommendations are set out above. It is important to bear in mind that the concept of native reserve was created to provide land for Fijians who have become landless or for those whose mataqali do not have sufficient land to use. The report highlighted that this claim was "the only reserve claim of the Yavusa Salatu …" The report especially noted that of the total acreage of 560, three-quarters of the land was under lease to the school. It also noted that the owners were "hard pressed for cultivable land …". and resulting in their encroachment of the adjoining Verata land. It is with these in mind that the recommendations were made that would see the reservation of all except the 100 acres, that in the words of Ian Thompson "should be placed outside reserve".

Essentially, the recommendations were:

(i) the return of all land previously under cattle and banana (the original lease being agricultural pastoral and dairy) at the expiry of the lease and reserved for the Yavusa Salatu;

(ii) the placing of the 100 acres included and being part of the Fulton College, outside the reserve; and

(iii) all other remaining land to be reserved for Yavusa Salatu except rights of way for the school to its water supply and to the Naduruka Creek landing.

The board and the recommendations

It is acknowledged that the board accepted at its meeting of 29 December 1961, the Thompson Report and its recommendations while directing that the action be made public while waiting for the governor's proclamation. This publicity appeared in the gazette of 15 December 1967 stating that the board has approved the setting aside as Fijian reserves of all those portions of land described in the paras (a)–(d) that followed. The Yavusa Salatu land is part of those described in para (a). The gazette notice added that subject to survey, and until proclamation, all the areas described in paras (a)–(d), are deemed to be native reserves, as if they had already been proclaimed.

The Plaintiffs' land was proclaimed as native reserve and gazetted on 11 February 1983, after having been approved at the board's meeting on 27 January 1983. The particulars of these are quoted above, but it is pertinent to

refer again to the proviso to the schedule of the gazette notice that excluded from the proclamation, any land already de-reserved under s 17.

Did the board implement the Thompson recommendations? First, it is clear that on 29 December 1961, it approved the recommendations in total, stating that they "should be approved as recommended". It is also clear that in all the subsequent actions by the board, including the gazette notices of 15 December 1967 (notice) and 11 February 1983 (proclamation), it has maintained the essence of the Thompson recommendations, including importantly the placing of the 100 acres outside the Yavusa Salatu reserve.

The fundamental issue in all of these considerations and on which the case for the Plaintiffs is based, is the intended future status of the 100 acres which was placed outside reserve by the board upon Commissioner Thompson's recommendation. It is the Defendants' counsel's contention, that the 100 acres lot was at no time included in Yavusa Salatu's reserve land. Counsel reminded the court that the Thompson land enquiry and recommendations preceded the proclamation and the coming into force of the 1940 Native Lands Trust Ordinance, which first recognised the concept of native reserve land. Taken to its logical conclusion, the Defendants' argument is that since the recommendation to place the 100 acres outside native reserve was made prior to the law creating native reserves, such land could never fall into reserve land and subsequently be de-reserved. In other words, this land can never come under the protection of s 17 of the Act. In addition and in support of their arguments, the Defendants point to the fact that the excluded land had never been proclaimed or gazetted as required by law.

With respect to counsel for the Defendants, I do not agree. In the first place, while it is true that the Thompson recommendations predated the 1940 Native Lands Trust Ordinance, their implementations were done later, well after the Ordinance. In my view, the Thompson recommendations must be read as compatible with the provisions of the Ordinance. This means that the Yavusa Salatu reserve land would have been protected under s 16 of the Ordinance, while the exclusion of the 100 acres must be read and interpreted as being excluded under s 18 of the Ordinance (now s 17 of the Act). There is support to this conclusion, which I now will elaborate on. First, the original claim by Yavusa Salatu and recorded by Thompson, included the excluded 100 acres. It formed part of the reserve claim. It was recognised and accepted by the commission, that it formed part of the Yavusa Salatu's claim, except that it was at that time, under a specific use (school lease) for a specified period to the D4. The recommendation that the 100 acres lot be placed outside the reserve by Thompson and acted upon by the board in 1961, can only be legally effective and recognised within the framework of the 1940 Ordinance and specifically s 18, which is s 17 of the present Act.

It is important to emphasise the fact that the Thompson report did not find that the 100 acres did not belong to Yavusa Salatu or that it did not form part of its reserve land claim. On the contrary it recommended that it be excluded from the claim for the reason I have already averred to. The land is alienated from the reserve portion only until the period of exclusion expired. In my view therefore there can be no other conclusion than this, that the board in accepting and implementing the Thompson recommendations, was acting in accordance with ss 16 [15] and 17 [18] of the Ordinance [Act].

There is further grounds in support to this conclusion. It has to do with the rationale behind the creation of the concept of native reserve. This issue had been examined fully in this court's judgment in *Bulou Vilisi Mataitoga and Ors v NLTB and Ors* HBC 315J/2003S; [2007] FJHC 147 (*Mataitoga*). It is adequate in summary to say that the intention or objective of the creation of native reserves was to ensure that sufficient land was available to Fijians who have become landless or for those mataqalis whose land have become insufficient for their use, maintenance and support.

The ultimate objective in the creation of native reserves, be they under s 16 or s 19 of the Act, is the provision of adequate land for future Fijian generations. The scheme is evidenced, as referred to in the *Mataitoga* case, by:

(i) the restriction of leases of native reserves to native Fijians only or to the Land Development Authority (the forerunner to the Native Land Development Corporation) under s 16;

(ii) the return of the de-reserved land back to native reserve, at the expiry of the period of exclusion under s 17; and

(iii) the ultimus haeres principle is intended to reserve the Crown/State acquired land principally for the benefit of the Fijian landowners, under s 19.

These provisions combine to sustain the pool of land that form the native reserves under the scheme which I have just described.

In this case it is evident from as early as the Thompson inquiry that Yavusa Salatu was in need of land for its members. He reported that "the owners are hard pressed for cultivable land close to their village of Nakalawaca, and are planting in fact on Verata land …". While he ultimately recommended the exclusion of the 100 acres from the reserved portion of the claim, the expectation must surely be, given the future needs of Yavusa Salatu, that the land was going to be returned to the landowners sometime in the future. It is illogical to argue that the land was going to be excluded permanently as part of their reserve claim. To do so, would in my view, be in conflict with the objects and reasons of the creation of native reserve, and in fact contrary to the very objective of the holding of Native Lands Commission enquiries in sittings such as the one chaired by Sir Ian Thompson in December 1958 dealing with this claim. These findings lend considerable credence to the above conclusion that the exclusion of the 100 acres of Yavusa Salatu land as recommended by Thompson and accepted by the board, could only be legally effected through the operation and under the purview of s 17 of the Act.

As to the Defendants' arguments that the excluded land had never been proclaimed nor gazetted, the answer is simple. It is incumbent on the board, in a case where land is returned after being de-reserved, to do whatever is necessary to have it reserved. The fact that a land has never been proclaimed as such, does not stop it at any future time of it being declared so.

Having decided that the land in question should be deemed excluded as native reserve through the operations of s 17, the next question is whether the subsequent approval to lease in 1975 to the D4 and the present intention of the board to give a new lease to the same was and is in conformity with the requirements of s 17. For completeness I set out the section in full.

> Exclusion of land from native reserve with consent of native owners.
>
> 17. (1) The Board may upon good cause being shown with the consent of native owners of the land, exclude either permanently or for a specific period any portion of land from any native reserve.
>
> (2) Every such exclusion as aforesaid shall be published in the Gazette and in a newspaper published in the Fijian language and circulating in Fiji.

> (3) When any native land has been excluded from a native reserve for a specified period such land shall upon the expiration of such period resume the same character and incidents as were attached to it before its exclusion from the native reserve.

The requirements under the section are quite specific. First, before any native land can be excluded from reserve, the board must be satisfied of the existence of *a good cause*. The court in the *Mataitoga* case offered its views on what may or may not constitute *a good cause*. Second, there must be consent of the landowners to the decision to exclude or de-reserve. Of particular importance under subs (1) are the qualifications to the exclusion namely, that it can be "either permanently or for a specified period". Under subs (3), all land excluded must be returned to native reserve upon the expiry of the specified period of the exclusion.

There can be no argument that in this instance the lease over the 100 acres, being the balance of that transferred from Arnold Keller to ACAL the D4, was for a specified period namely 50 years. It is further agreed that this lease expired in July 1960. A new agreement to lease in the form of an approval notice, was issued by the board in favour of the D4 from 1 January 1975 for 30 years. This too has expired, and the board and the D4 are contemplating a new agreement. The land, since the issuance of the original lease, would have been outside the reserve and therefore the control of Yavusa Salatu for over 97 years. The D4 has been the sitting tenant for the last 67 years.

Should the land have reverted back to native reserve at the expiry of the lease? I am in no doubt that it should have. The exclusion, the court has already decided, was made in accordance with s 17(1) and therefore the return guaranteed under s 17(3) must follow. The lease inherited by the D4 from Arnold Keller was for 50 years, a specified period. There is no evidence of any intention of excluding the land permanently. The provision only speaks of specified period of the lease. The court's interpretation may have been different if it stated "specific purpose" of the lease. This being so, it was incumbent on the board to ensure compliance with s 17(3), and to see that the land reverted to native reserve under Yavusa Salatu after the expiry of the lease in July 1960.

I am very mindful of the important fact that the 100 acres in question forms part of the land upon which the Fulton College, under the aegis of the D4, is founded. This factor alone cannot detract from the court's finding that the board had failed to comply with the requirements of s 17(3) of the Act. It still would have been possible after the lease expired in 1960, to issue a new lease over the property to the same party so long as the requirements of s 17 were complied with. This in turn raises the question of the landowners' consent.

The consent of the landowners is a vital consideration in the alienation of reserved land. This is clear from s 17(1). It is mandatory. Without it, the board may not de-reserve. The form of consent required is set out under the Native Land (Miscellaneous Forms) Regulations 1965.

In this case, the Defendants argue that consent was not required since the land in question was outside reserve. However, given the court's finding that it was, then obviously, the consent of the landowners was needed. The legal requirements therefore before the 1975 30 year approval notice should have been granted by the board to the D4 were as follows:

(i) the reversion of the 100 acres to the Yavusa Salatu reserve;
(ii) the application by the D4 for a new lease over the same land;
(iii) the consideration by the board of good cause to de-reserve; and
(iv) the consent of the native landowners.

It is worth noting that in deciding whether to de-reserve or otherwise, the board must be satisfied that the period of exclusion such as the lease period, does not overrun or extend beyond the period when the landowners are most likely to require the said land for their maintenance and support of their members.

In all the circumstances it is the finding of this court that the granting of the approval notice to lease by the board to the D4 from 1 January 1975 for a term of 30 years should have complied with the requirements of s 17 of the Act. It did not. The grant was contrary to the provisions of the Act. It follows therefore that any attempt to grant any new lease by the board over the same land without the steps already described above as necessary for the action to conform with the requirements of ss 15 and 17 of the Act, would be irregular and therefore ultra vires the Act.

The answer to the specific issue as identified by the court to be addressed, can only be in the negative. In other words, the board while accepting and implementing the Thompson recommendations, had not given them their full legal effect, by its failure to comply with the requirements of the Act, specifically ss 15 and 17.

It is the conclusive finding of this court therefore that the land recommended in the 1958 Thompson Report to be excluded from the reserve claim of Yavusa Salatu, namely the 100 acres presently occupied by the Fulton College, should be native reserve for the purpose of the Native Lands Trust Act, and therefore any dealings on it requires the consent of its native owners. It follows from this finding that the board must now act to rectify the situation.

Costs of $1200 is awarded against the D1 and D3.

Application granted.