

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 86 of 2015

BETWEEN : **TEVITA NACAGILEVU DUACIA**
PLAINTIFF

AND : **ITAUKEI LAND TRUST BOARD**
1ST DEFENDANT

AND : **AMENIASI MOMO, MERE KASILA, SILOVATE BULI,**
VARANISESE QORO & SEMESA RAMOMO
2ND DEFENDANT

AND : **IQRA GROUP LIMITED**
3RD DEFENDANT

AND : **ATTORNEY GENERAL**
4TH DEFENDANT

AND : **REGISTRAR OF TITLES**
5TH DEFENDANT

Counsel : Ms. Patricia Mataika for the Plaintiff
Mr. T. Duanasali for the 1st Defendant
Mr. I. Lutumailagi for the 2nd Defendant
3rd Defendant absent and unrepresented
Mr. J. Mainavolau for the 4th & 5th Defendant

Written Submissions by: Plaintiff on 8th November 2017
: 2nd Defendant on 13th December, 2017
: 1st Defendant on 23rd January, 2018

Date of Hearing : 8th November, 2017

Date of Ruling : 9th March, 2018

Ruling by : Hon. Mr. Justice Mohamed Mackie

RULING OF THE COURT

A. Introduction:-

1. The Plaintiff in this action, by his Originating Summons dated 5th June, 2015 has applied for the following Orders:
 - (1) *A declaration that the 1st Defendant is not permitted by law to issue a lease over native land known as Nukuvou Lot 1 on ND2720 without consent of sixty percent of adult members of Tokatoka Qaranivualiku of Moala village in the district of Sikituru in the Province of Ba.*
 - (2) *A declaration that the 2nd Defendant did not hold a valid lease being Native Lease Number 29449 over iTaukei land known as Nukuvou Lot 1 on ND2720.*
 - (3) *A declaration that the 1st Defendant is not permitted by law to consent to dealing between 2nd and 3rd Defendant in the manner that it did on the 22nd day of March 2014.*
 - (4) *A declaration that the purported assignment of purported Native Lease 29449 between the 2nd Defendant and 3rd Defendant registered with the Registrar of Titles on the 31st day of January 2014 under dealing number 792516 does not transfer any rights in the land known as Nukuvou Lot 1 on ND 2720 and is of no effect.*
 - (5) *A declaration that the vanua view map or Terraview Maps from Fiji LIS (or GIS) Native Land Maps & Databases or maps kept and used under license from the 4th Defendant by 1st Defendant describing Lot 42 as NLC 339 belonging to Mataqali Qaranivualiku is in error and that the true position is that Lot 43 is NLC 339 belonging to Tokatoka Vunatawa while **Lot 42 belonging to Tokatoka Qaranivualiku has no NLC boundary number.** (emphasis mine)*
 - (6) *A declaration that the 4th Defendant is in error in not correcting its vanua view map or Terraview Maps from Fiji LIS (GIS) Native Land Maps & Databases or maps kept and used under license from it **to describe Lot 42 as belonging to Tokatoka Qaranivualiku** and deleting the NLC number 339. (emphasis mine)*

- (7) *An Order and injunction that the 3rd Defendant by itself, its employees, servants and or agents do not enter or remove any material or thing from iTaukei land known as Nukuvou Lot 1 on ND 2720.*
- (8) *An Order and injunction that the 3rd Defendant by itself, its employees, servants and or agents do not enter or remove any material or thing from iTaukei land known as Nukuvou Lot 1 on ND 2720.*
- (9) *An Order and injunction directing the 5th Defendant to cancel the original of native Lease Number 29449 and enter a memorial of such cancellation in the register of leases kept by it.*
- (10) *General damages be paid by 1st, 2nd and 3rd Defendants to be assessed.*
- (11) *Exemplary damages be paid by 1st Defendant.*
- (12) *Such further or other Orders as the honorable Court may determine.*
- (13) *Indemnity Cost be paid by 1st and 2nd Defendants.*

B. Facts

2. Summons being duly served and acknowledged, the 1st defendant on 31st July 2015, the 1st named 2nd defendant on 14th March 2017, 4th and 5th defendants jointly on 3rd September 2015 filed their respective affidavits in opposition, while 3rd defendant neither filed any affidavit nor took part at the hearing despite the service being acknowledged.
3. Plaintiff filed his reply affidavit on 13th July 2016, only to the 1st defendant's affidavit in response and not to other defendant's affidavits in response.
4. The Director of the Geospatial Information Mt Division in the State Land Department, namely, one AKATA TAKALA has filed on 21st February, 2017 a supplementary affidavit dated 16th February, 2017 in support of the 4th and 5th defendants' position.
5. The Plaintiff, TEVIATA NACAGILEVU DUACIA, in his affidavit in support sworn on 3rd June, 2015 and filed on 5th June, 2015, among other things, avers as follows.
- (1) *That he is a member of Tokatoka Qaranivualiku also known as Naqaranivu (Tokatoka) and that he has been appointed by majority adult*

members of Tokatoka to represent the Tokatoka in in these proceedings as per "TND-1" annexed to the affidavit.

- (2) *.....*
- (3) *That the Tokatoka owns land known as Nukuvou ("the land") comprising twenty (20) acres as recorded in the Register of Native Lands Volume 5 folio 666 and ma30 in the plan H/17 4 deposited with the Registrar of Title. (annexture-TND-2)*
- (4) *That land was claimed as a Reserve by the Tokatoka as represented by Etuwate Vuluma before the Reserve Commissioner of the then Native Land Trust Board and recommended by the Commissioner to the Native Land Trust Board as Reserve land of the Tokatoka. Attached marked "TND3: is a true copy of the Report and Recommendation Reserve Claim No. 218, Nukuvou Tokatoka Naqaranivualiku (No. 32) (Acreage of Lot, 14 acres).*
- (5) *That there is another Tokatoka of Mataqali Naqaranivualiku known as Vunatawa which owns about 5 acres of iTaukei Land marked 43 in the Plan H/17 4 deposited with the Registrar of Titles and registered in the Register of Native Lands Volume 5 Folio 667. Attached marked "TND4" is a true copy of said Folio.*
- (6) *That the Tokatoka's land Nukuvou and Tokatoka Vunatawa's land is in the same area but on different Map References. Attached marked "TND5" is a true copy of Plan given to us by the iTaukei Land and Fisheries Commission showing the Tokatoka's Lot 42 known as Nukuvou and Tokatoka Vunatawa's Lot 43.*
- (7) *That the First Defendant had leased out the land to one Damodaran from 25th June, 1989 to 24th June, 2009. The Tokatoka does not know whether the land was reserved before such leasing or not. Attached marked "TND6" is a true copy of extract given to a Tokatoka representative in 2014 by the 1st Defendant showing name of Damodaran and period of his lease.*
- (8) *That sometimes before June, 2010 the land was surveyed and the 1st Defendant certified the survey map on the 1st day of July, 2010.*
- (9) *That I have been advised by the Tokatoka's lawyer Mr. Vuataki that reserve land can only be leased to an iTaukei with the consent of the owners of the reserve land.*
- (10) *That such land can only be leased to a non-iTaukei if the land is excluded from Reserve for the period of the intended lease with the consent of 60% adult members of the Tokatoka.*

- (11) *That further that for exclusions from reserves for period of the lease, the land would revert to its reserve status at the expiry of the lease.*
- (12) *That the land would have been reserved again after expiry of Damodaran's lease on 24th June, 2009 if it had been de-reserved for him to lease the land.*
- (13) *That without getting the Tokatoka's 60% adult consent the 1st Defendant on the 8th day of November, 2010 leased out the land for agricultural purposes to the 2nd Defendants in breach of the iTaukei Land Trust Act. Attached marked "TND7" is a true copy of said purported Lease.*
- (14) *That no Lease premium or rental was paid by the 1st Defendant to the Tokatoka. I believe from information received verbally from 1st Defendant's staff the lease premium and rental was paid to Tokatoka Vunatawa.*
- (15) *That on the 23rd day of December, 2013 the 1st Defendant gave its consent for the 2nd Defendants to transfer their said purported lease to the 3rd Defendant for the 3rd Defendant to pay \$200,000.00 to the 2nd Defendant. Attached marked "TND8" is a true copy of said consent.*
- (16) *That the 3rd Defendant is not an iTaukei and the 1st Defendant breached the iTaukei Land Trust Act in consenting to a lease of our tokatoka's reserve land to a non-iTaukei.*
- (17) *That the 1st, 2nd and 3rd Defendants therefore **defrauded** the Tokatoka by such payment of money by 3rd Defendant to 2nd Defendant. (emphasis mine)*
- (18) *That on the 31st day of January, 2014 the said purported illegal lease was registered with the 4th Defendant in the name of the 3rd Defendant.*
- (19) *That it was in or about February, 2014 that villages in our village told me and members of the Tokatoka that the land had been sold to the 3rd Defendant by one Ameniasi Momo.*
- (20) *That my brother Lemeki Voriri was then designated to write a letter of enquiry to the 1st Defendant which he did by letter dated 14th February, 2014 enquiring why Ameniasi Momo had sold our 13 acres when in fact his Tokatoka only owned 5 acres. Attached marked "TND9.1" is a true copy of said letter and "TND9.2" is a true copy of English translation.*
- (21) *That no response was received from the 1st Defendant and another letter was written by Lemeki Voriri stating that consent for leasing of the land should have been given by the Tokatoka and not Vunatawa and asking that 1st Defendant stop all works on the land. Attached marked "TND10.1" is*

a true copy of said letter and "TND10.2" is a true copy of English translation.

- (22) *That in response to a letter dated 27th March, 2014 to the iTaukei Lands and Fisheries Commission on the 8th April, 2014 confirmed that land known as Nukuvou (plan H/17.4, Lot 42, 14 acres) belongs to Tokatoka Qaranivualiku of Mataqali Qaranivualiku, Yavusa Natutale in the village of Moala, Sikituru, Ba in the oath given to the Commission at Navoci on the 30th September, 1913. Attached marked "TND11.1" is a true copy of said letter and marked "TND11.2" is a true copy of an English translation.*
- (23) *That the 1st Defendant in a letter dated 7th May, 2014 confirmed that on looking through their records in the Reserve Section noted that the land known as Nukuvou belongs to Tokatoka Qaranivualiku of Mataqali Qaranivualiku, Yavusa Natutale in the village of Moala in Sikituru, Ba. Attached marked "TND12.1" is a true copy of said letter and marked "TND12.2" is a true copy of an English translation.*
- (24) *That with such confirmation from iTaukei Lands Commission and the Reserve Section of the 1st Defendant that the land belonged to the Tokatoka and was Reserve we asked the Manager of the 1st Defendant at its Nadi office to rectify the matter but this was not done.*
- (25) *That the 1st Defendant through its Manager at its Nadi office then blamed the error on the Lands Department (4th Defendant) in preparing a map that noted the land Nukuvou as number 339 and the land of Tokatoka Vunatawa as number 339 and both noted as belonging to Mataqali Qaranivualiku. Attached marked "TND13.1" is a true copy of map.*
- (26) *That on enquiry from the iTaukei Land Commission our Solicitor Mr. Vuataki was verbally told over the telephone by one of their officers, and I believe, that Number 339 is the boundary of Lot 43 which belongs to Tokatoka Vunatawa but that Lot 42 belongs to Tokatoka Qaranivualiku but is not surveyed and does not have a boundary line number like Lot 43 and that the error needs to be corrected by Lands Department (4th Defendant) in their preparation of vanua view maps or software as used by 1st Defendant*
- (27) *That an extract was also obtained from Lands Department showing that the land being Lot 42 was described by their system as Lot 1 ND 2720 as appears on the purported lease given by the 1st Defendant to the 2nd and 3rd Defendants. Such extract also showed that Lot 43 belonging to Tokatoka Vunatawa is described as Lot 2 ND 1869. Attached marked "TND13.2"*

- (28) *That the 1st Defendant through its Manager at its Nadi office advised the Tokatoka to write a letter to the General Manager of the 1st Defendant requesting that the lease rental of the land be not paid out by it. The Tokatoka wrote letter dated 14th October, 2015 and attached marked "TND14.1" is a true copy of said letter and marked "TND14.2" is a true copy of an English translation.*
- (29) *That the Tokatoka then wrote to the Chairman of the iTaukei Lands Commission by letter delivered to them on the 31st day of October, 2014 and asking the iTaukei Lands Commission to stop the payment of rental by the 1st Defendant until the problem was sorted out. Attached marked "TND15.1" is a true copy of said letter and marked "TND15.2" is a true copy of an English translation.*
- (30) *That I and Tokatoka members also found out that the 3rd Defendant has no intention of farming the land but to use it for a Fun Park for its Health Resort development on a foreshore development which it has applied for from Lands Department. The foreshore area is adjoining the land. Attached marked "TND16" is a true copy of a google map with the area applied for by 3rd Defendant bounded red and the land marked black and attached "TND17" is copy of 3rd Defendant's scheme plan with the land bounded red showing a golf hole and flag and a sand bunker.*
- (31) *That there is a spring on the land and the 3rd Defendant has entered the land and dug around the spring to widen it resulting in a big pond on the land used by him to provide water to water the plants planted by it on its development.*
- (32) *That the 1st, 2nd and 3rd Defendant have unjustly enriched themselves from the land and unless restrained by injunction will continue to deprecate the said land.*
- (33) *That unless the 4th Defendant corrects in its error in description of Lot 42 Nukuvou in its vanua view software our Tokatoka will continue to suffer loss of use and income from the land.*
- (34) *That we then waited from November 2014 for 1st Defendant to rectify the problem as we did not wish to unnecessarily incur legal costs but after six months passed by we could not wait any longer but incur legal costs in seeking the honorable Court's assistance in rectifying the errors made.*
- (35) *I therefore on of the TOKATOKA QARANIVUALIKU and the members seek orders in terms of the Summons filed herewith.*

C. **Discussion:**

6. All the Learned counsel, who appeared for the contesting parties at the hearing before me have made oral submissions and in addition to same Counsel for the plaintiff, 1st and 2nd defendants have filed helpful written submissions for which I am thankful.
7. I shall peruse and discuss below the contents of the averments in Plaintiff's affidavit together with the relevant averments in the affidavits in response, the supplementary affidavits filed on behalf of the 4th and 5th defendants and the reply affidavit filed by the plaintiff, in the light of the provisions in the High Court Rules 1988 that govern the Originating Summons and the decided authorities that pertains the subject.
8. The tussle herein is mainly between the Plaintiff, who claims to be acting on behalf of the Tokatoka Qaranivualiku / Naqaranivualiku (**Tokatoka**) and the 2nd defendant, being another Tokatoka Mataqali Naqaranivualiku known as Vunatawa (**Vunatawa**), represented by AMENIASI MOMO. The 1st 4th and 5th defendants are alleged to have failed in their respective duties and/or illegally acted when the land in question was given on an agricultural lease to the 2nd defendant in the year 2010 and in the process of subsequent sale of the same land unto the 3rd defendant by the 2nd defendant.
9. The pivotal issue that begs adjudication by this Court, through this Originating Summons, is the disputed ownership of the land called NUKUVOU, which is now shown as **lot 1 on ND 2720** situated in Tikina SIKITURU in BA Province containing the extent of 13a.0r.0p as described in the lease No: - 29449 dated 9th December, 2010 and shown in the Native Lease Diagram, both marked as TND-7 and annexed to the supporting affidavit of the Plaintiff.
10. This land was earlier shown as lot 42 as per the old plan marked as TND-5 and presently as lot 1 in plan ND 2720 marked TND 13(1) and 13(2). The identity of the land in question is not in dispute.
11. This land in question , admittedly, being sold to the 3rd defendant Company by the 2nd defendant with the, purported, Consent and on the Certificate of assignment marked TND-8 , now stands registered in favour of the 3rd defendant Company as per the relevant page of the Register marked and annexed as TND-7.
12. On careful perusal of the averments in Plaintiff's affidavit in support and replies of the defendants in their respective affidavits, it is clear that there is no dispute between the parties with regards to the ownership of the lands described in

paragraphs 3 of plaintiff's supporting affidavit. Thus, Plaintiff's ownership to 20 acres of land as per TND-2 (in volume 5 folio 665) does not require adjudication through this action. This land is, undisputedly, owned by plaintiff's Tokatoka.

13. Likewise, parties are also not in dispute with regard to the ownership of the land described in **paragraph 5 of the plaintiff's supporting affidavit** and shown in TND- 4. This 5 acre land is, undisputedly, owned by the 2nd defendant's Mataqali Naqaranivualiku known as "Vunatava". Therefore, there is no necessity for adjudication on the question of the ownership of the land mentioned in paragraph 5 of the plaintiff's affidavit too, which is more fully described in TND-4. This land is, undisputedly, owned by the 2nd defendant according to the affidavits.
14. Further, the plaintiff's averments in paragraph 1 and 3 of his affidavit, with regard to the reservation of the land as per TND-3, are not disputed by the defendants.
15. The one and only dispute that begs adjudication by this Court is on the ownership of lot no: 42 in TND-5 , which now stands marked as lot 1 on ND 2720 as per Native Lease Diagram annexed to TND-7 and also shown in TND-13 and TND-13.2.
16. It is to be observed that nowhere in the Plaintiff's supporting affidavit, he makes an affirmative or cogent statement that the ownership of the land in question (lot 1 in ND 2720) was or is held by his Tokatoka at any point of time and/or they held possession of same or received the lease premium or rentals or any other benefits on same. In paragraph 14 he admits that no such payments were made to his Tokatoka at any time in the past.
17. The plaintiff does not submit any document similar to TND-2 or TND- 4 or TND-7 to prove his Tokatoka's ,purported, ownership to the disputed land lot 42 (Lot 1 in ND 2720) or any other acceptable document in proof of ownership.
18. All what the plaintiff relies on for his , purported, claim of ownership are some communications, marked as TND-9-1 to TND-12-2, which are mere letters written to the 1st defendant ITAUKEI Land Trust Board and responses received thereto from the 1st defendant and the **ITaukei Land and Fisheries Commission (TLFC)** . These letters and contents of them are not conclusive proof of ownership for the Court to act upon, unless they are duly proved by calling witnesses.
19. Further, the letter dated 27th March, 2014 referred to in the reply letters of TLFC and 1st defendant, both received by the plaintiff's brother **Lemeki Voriri Duacia,**

on 8th April , 2014 & 7th May,2014 and marked as TND-11.2 and TND-12.2 respectively , is not before the Court, which could be a vital document in deciding the issue.

20. The reply letter sent by the TLFC dated 8th April 2014 and marked as TND- 11 -1 & 2 and the reply letter sent by the 1st defendant dated 7th May 2014 marked as TND-12 -1&2, cannot be accepted as the *prima facie* proof of ownership of the plaintiff and the contents of those letters need to be proved in the manner prescribed for same. Until those documents and the disputed contents of same are duly proved, this Court cannot rely or act upon those documents.
21. However, I shall refrain from making any final rulings on the admissibility or validity of those documents marked from TND 9.1 to TND 12.2 since they can be of some assistance to the plaintiff, if this action is converted as a writ action, where all the disputed facts therein can be subjected to due process of proving by calling relevant witnesses.
22. Further, the documents marked as TND-13.1 to TND- 15.2 and the contents of them also cannot be accepted in the way they are presented to the Court as they need to be verified and proved by calling the relevant persons as witnesses. Those documents cannot be admitted as conclusive evidence as to the ownership of the disputed land lot No: 1 in ND -2720 until they are proved. The plaintiff may rely on these documents, subject to proof and any valid objection, if they are presented through a writ action and not through an action by way of originating summons. When the facts are in serious dispute, it is always prudent to resort to a writ action to vindicate the purported right in the subject matter.
23. As I indicated in a foregoing paragraph, the plaintiff's averments with regard to the purported ownership of the land in question are not persuasive and convincing. The documents relied upon by the plaintiff in furtherance of his claim for the land in question do not provide conclusive evidence and they need to be proved along with the other related facts for the court to arrive at a most justifiable and final decision. This exercise can be made possible only through a proper writ action and not through an action by way of originating summons. The task before the Court, if the action is converted into a writ action, can be supported by the discovery process of documents to ascertain the truth.
24. The reply affidavit filed on behalf of the 1st defendant categorically states that all the relevant procedures have been duly followed in leasing the land to the 2nd respondent and thereafter in selling it to the 3rd defendant. However, 2nd defendant while admitting that there is an issue to be sorted out, states further that any such issue can be referred to the iTaukei Land and Fisheries Commission.

Other defendants too do not deny the existence of an issue pertaining to the ownership of the land in question. But none of them dispute the jurisdiction of the High court in the adjudication of it. Therefore, rather than referring the matter to the administrative mechanism, leaving room for possible re-litigation in another form of suit, it is desirable for this Court to engage in the due process of adjudication through a writ action by conversion of this originating summons.

25. Most of the Plaintiff's averments are denied and disputed by the defendants in their respective reply affidavits and the response filed by the plaintiff are not convincing and every averments in plaintiffs 'supporting affidavit regarding the pivotal issues need to be proved formally. Therefore, I shall not make further comments or make any decision on the evidence in those affidavits and leave them to be fully analyzed in the proper action.
26. The allegation in paragraph 17 of the plaintiff's supporting affidavit to the effect that there was fraud involving 1st 2nd and 3rd defendants, necessarily leads me to the conclusion that this matter cannot be addressed by way of an originating summons and it has to be by way of a writ action. Further, in paragraph 4 of the letter marked TND.-9.2 and in paragraph 2 of the letter marked TND-14.2, the writer makes allegation of fraud. Thus my decision to convert this action as a writ action stands substantiated.
27. Order 5 rule 2 of the High Court Rules reads:
 2. *Subject to any provisions of an Act, or of these Rules, by virtue of which any proceedings are expressly required to be begun otherwise than by writ, the following proceedings must, notwithstanding anything in rule 4, be begun by writ; that is to say, proceedings-*
 - a. *In which a claim is made by the plaintiff for any relief or remedy for any tort, other than trespass to land;*
 - b. *In which a claim made by the plaintiff is based on an allegation of fraud; (emphasis is mine)*
 - c.....
 - d....
28. The lease of the land in question to one Dhamodharan for 20 years from 1989 to 2009 is not disputed by any of the parties. The Plaintiff, who was not seemingly concerned about the de-reservation (exclusion from reserve) for the said lease of

20 years, suddenly wakes up in the year 2014 to question the de- reservation supposed to have been done in 2010, to lease the land to the 2nd defendant and for the subsequent sale effected by the 2nd defendant to 3rd defendant in December, 2013.

29. According to the paragraph 11 and 12 of his supporting affidavit, the plaintiff does not know for sure whether the land in question was actually de-reserved or not. He does not produce any document to that effect. The 1st defendant takes the stern position that the land was duly de-reserved for that purpose. Thus, it is the duty of the plaintiff to satisfy the Court that the land in question was not de-reserved and stood reserved by adducing sufficient evidence.
30. In relation to the required consent of 60% adults of respective land owners, the plaintiff's position needs to be proved on preponderance of evidence. In the letter marked TND-10.2, the writer has admitted that the consent was given by the 2nd respondents for the lease in the year 2010. (Para-4 of the letter). However, before deciding the question of consent, the ownership of the land in question has to be duly proved.
31. In the averments of the supporting affidavit and by way of reliefs prayed for in the originating summons, what the plaintiff pleads and moves for is the removal of the boundary number 339 given to lot No:-42 and to assign it to lot No:-43. Plaintiff maintains that the lot 42 not being surveyed does not have a boundary number like lot No: - 43. The plaintiff seems to be considering that he can become the owner of the disputed lot No:-42 by the process of merely shifting the boundary number given to lot No:-42 to lot No: - 43 in the plan. If it is an error on the part of the 4th defendant, as alleged by the plaintiff, it has to be proved by the plaintiff by evidence both documentary and oral. The Court cannot rely on the unsubstantiated statement that certain officers said to have made to the plaintiff verbally and over the phone as averred in his supporting affidavit.
32. Most of the averments in plaintiff's supporting affidavit are based on the hearsay (vide-Paragraphs -14, 19, 25, 26 and 28) and unless the relevant persons are before the Court as witnesses to corroborate the plaintiff's contention therein, the Court cannot accept and act upon those averments in the affidavit.
33. Another important point the Court has to be satisfied by cogent evidence from the plaintiff is, how the plaintiff claims ownership to the disputed lot No:- 42, which is now in the extent of 13 acres (earlier 14 acres as per old plan), while the plaintiff in his TND - 9.2 letter claims that his Tokatoka Naqaranivualiku owns 58 acres only and this 58 acres is simply arrived at by adding the extents of both lots 31 and 39 shown in the plaintiff's document marked TND - 3. It means that Lot 31 in

plan No: - H/17, 4 containing 20 acres and Lot 39 in same plan containing 38 acres make the total of 58 acres. Then how the plaintiff can claim for another 13 acres? This has to be explained by the plaintiff by convincing evidence.

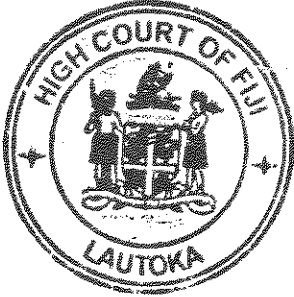
D. Conclusions

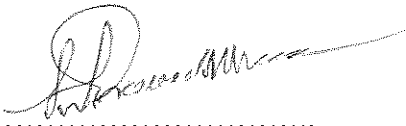
34. The relief sought by the plaintiff in his originating summons, it appears when perused, is based on the allegation of fraud by the defendants. In light of the above provisions in Order 5 rule 2 of HCR, it is clear that the plaintiff cannot commence this action against the defendants by way of originating Summons, because when an action is based on an allegation of fraud it has to be commenced by way of Writ of Summons.
35. Further, the plaintiff has failed to explain as to how the fraud was committed by the defendants. Merely because it is alleged that the defendants had committed fraud; it is not sufficient to inform the nature of the cause of action against the defendants.
36. Disputed matter of above nature cannot be dealt by way of originating summons. For the proper adjudication of all the issues involved, this action by way of originating summons should be converted as a writ action and the Plaintiff should be directed to file the Statement of claim for the defendants to file their statement of defence thereafter. Considering the circumstances, I am of the view that the defendants should be awarded reasonable cost.
37. More importantly, I shall not make my finding or ruling on any of the documents pleaded and filed herein or on the affidavit evidence placed by the parties hereof, except for raising my concern over the inadequacy of same for an action by way of originating summons and leave the entire matters to be finally decided in the writ action to be continued, if the plaintiff wishes so.

E. Final Orders:-

1. The action commenced by the plaintiff by way of originating summons is hereby converted as a writ action.
2. The plaintiff shall file his statement of claim and serve on all the defendants, including the 3rd defendant, within next 28 days.
3. The defendants shall file their respective statements of defence within 21 days thereafter.

4. The plaintiff shall pay a summarily assessed cost of \$ 500 each, to all the defendants, except for 3rd defendant and same shall be paid and settled within 28 days.
5. The record is referred to the Deputy Registrar, for the writ action to take its normal course.




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A.M.Mohammed Mackie
Judge

**At Lautoka
9th March, 2018**