

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 28 of 2010

BETWEEN

FERETI SERU DEWA retired academic of 241 Princes Road, Suva. Suing in his personal capacity as a member of the Tokatoka Matasau, Mataqali Matasau of the Yavusa Naivisere in the District of Naitasiri and the province of Naitasiri and in a representative capacity for and on behalf of Tokatoka Matasau and Mataqali Matasau of the Naivisere in the District of Naitasiri.

PLAINTIFF

AND

NATIVE LAND TRUST BOARD a body corporate constituted under the iTaukei Land Trust Act 1940.

FIRST DEFENDANT

AND

MRS VASEVA KABU SEDUADUA lessee of Bureni Subdivision lot 16 (Part of reference No. 03/01874), Bureni, Naitasiri in the province of Naitasiri.

SECOND DEFENDANT

Counsel : Mr Fa. I. for the substituted Plaintiff
Ms Vokanavanua. Q. for the 1st Defendant
The Substituted 2nd defendant appears in person.

Date of Hearing : 5th December, 2017

Date of Judgment : 07th February, 2018

JUDGMENT

[1] The plaintiff instituted these proceedings seeking the following reliefs:

- (i) A declaration that the lease issued to the second defendant being a lease over land in Bureni Subdivision Lot 16 (part of) reference number 03/0187 in the District and Province of Naitasiri is null and void.
- (ii) An order that the 2nd defendant provide immediate vacant possession of the Native Reserve Land Lot 143B Bureni in the District of Naitasiri, Province of Naitasiri.
- (iii) An order that the 1st defendant refrain from issuing any lease or license over Native Reserve Land known as Lot 143B Bureni in the District and Province of Naitasiri.
- (iv) That the 1st and 2nd defendants, their agents and servants, whomsoever and whatsoever, be reinstated by way of injunction from any way interfering with the rights of the plaintiff, his servants or agents, whomsoever and whatsoever from enjoying their Native Reserve Land in accordance to law.
- (v) Costs.

[2] The basis of the plaintiff's action is that the land which is the subject matter of this action is a Native Reserve and the granting the lease to the 2nd defendant by the 1st defendant was contrary to section 16 of the iTaukei Land Trust Act 1940 (the Act).

[3] In the statement of defence of the 1st defendant it is averred that Lot 16 had merely been set aside as native reserve but was never proclaimed as such. It is averred further that this phenomenon arose out of the fact that until the publication of the Fiji Royal Gazette No. 244 of 1983, except of the land in the Tikina of Momi, in the province of

Nadroga and in the Tikina of Labasa in the province of Macauta none of the lands referred to as "native reserve" had been properly constituted as such and that all subsequent notices creating native reserves whether published before or after the amendment of the Native Land Trust Act in 1968, used wording which quite clearly indicate notices of intent rather than notices actually creating reserves.

- [4] The 2nd defendant in her statement of defence, while denying the averments in the statement of claim averred that no cause of action pleaded against her.
- [5] At the pre-trial conference the parties admitted the following facts:
1. The plaintiff is a member of the Tokatoka Matasau, Mataqali Matasau of the Yavusa Naivisere in the District of Naitasiri and Province of Naitasiri.
 2. The Yavusa Matasau together with the Yavusa Rokotuitai and the Yavusa Naisaki, collectively, are the registered proprietors of 4131 acres of Native Land in the District of Naitasiri, in the Province of Naitasiri, which land is described in Volume 3, Folio 299 of the Registrar of Native Lands.
 3. The land, collectively, owned by the Yavusa by the three (3) Yavusa is a portion of land known as Lot 143B Bureni in the District of Naitasiri and the Province of Naitasiri, which land belong to the 3 (three) Yavusa.
- [6] The main issue for determination is whether the 1st defendant is in breach of section 16 of the Act by issuing the 2nd defendant a lease comprising approximately 30 acres being land known as Bureni Subdivision, Lot 16 (part of) Reference No. 03/01874.
- [7] At the conclusion of the hearing both parties sought time to file written submissions and the court granted time till 22nd December, 2017 but none of the parties filed written submissions.
- [8] Before considering the said issue the court must decide whether the land in question is a Native Reserve within the meaning of section 15 of the Act.
- [9] The substituted plaintiff explained in evidence how this dispute arose. He said the deceased plaintiff was involved in establishing an educational institute called Vutikalulu Centre for Sustainable Technology & Rural Development and it was to be established on the land in dispute. Some volunteers from abroad were to work in the project and when they went to the land passing the 2nd defendants house she stopped them and brought the Police. Her obstruction was on the basis that she was the lessee

of the land. The substituted plaintiff also said that the lease given to the 2nd defendant is illegal for the reason that the land was a native reserve.

[10] The burden of establishing that the land which is the subject matter of this action is a native reserve within the meaning of the Act is on the plaintiff. In establishing that this is a native reserve the plaintiff relied on the certain averments in the affidavit sworn by Mr. Savenaca Ralagi who was the Acting Manager (Central/Eastern) of the Native Land Trust Board.

[11] In paragraphs 5 and 6 of his affidavit dated 08th March, 2010 Mr. Ralagi avers in paragraphs 5 and 6 as follows:

5. To my knowledge and understanding, the said land had been set aside as native reserve land but never actually proclaimed as such until 1983, by which time, the lease had been already issued.
6. Further, notices to set aside all such land as native reserve land were notices of intent rather than proclamation.

[12] The learned counsel for the plaintiff considered this as an admission by the 1st defendant that the land in dispute is a native reserve land.

[13] Section 15 of the Act provides that:

- (1) It shall be lawful for the Board, by notice in the Gazette, to set aside to set aside any portion of native land as a native reserve.
- (2) Every such notice in the Gazette shall also be published in a newspaper published in the Fijian Language and circulating in Fiji.

[14] The question then arises for determination whether the averments in the affidavit of Mr Ralagi referred to above is sufficient for the court to decide that the land has been proclaimed as native reserve land.

[15] Averments contained in an affidavit are undoubtedly evidence before any court of law. However, the evidentiary value of affidavit evidence is very much less than the evidence given before a court of law which can be challenged by the other party in cross-examination. The veracity of the affidavit can be checked only if the affirmant of the affidavit is called to testify in court. The plaintiff whose burden it was to establish the land is a native reserve should have called Mr. Ralagi to explain the facts contained

in his affidavit. It is also pertinent to note that in the statement of defence the 1st defendant has denied that the portion of land in question is a reserved native land.

- [16] The court also observes that the plaintiff for reasons best known to him sought not to produce the relevant newspaper and the Gazette which would have been the best evidence that the land has been pronounced as a native reserve in terms of section 15 of the Act nor did he give the court the details of the newspaper and the gazette for the court to ascertain whether there was in fact such a publication.
- [17] The court has no power under the Act to pronounce a native land as native reserve. It is the iTaukei Land Trust Board that has the power to declare a particular native land as a native reserve. Here what the court was called upon to decide is whether such a proclamation has been made by the iTaukei Land Trust Board.
- [18] The plaintiff has failed to establish that the land which is the subject matter of this action has been pronounced as a native reserve within the meaning of the iTaukei Land Trust Act 1940.
- [19] For the reasons set out above the court makes the following orders.

ORDERS

- (1) The plaintiff's action is dismissed.
- (2) The plaintiff is ordered to pay each defendant \$1500.00 as costs of this action (summarily assessed).




~~Lyone Seneviratne~~

JUDGE

07th February, 2018