

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 256 of 2010**

**BETWEEN: WAKAYA LIMITED**

**PLAINTIFF**

**A N D: MARSHA NUSBAUM**

**1<sup>ST</sup> DEFENDANT /**  
**1<sup>ST</sup> COUNTERCLAIM PLAINTIFF**

**KENNETH CHAMBERS**

**2<sup>ND</sup> DEFENDANT /**  
**2<sup>ND</sup> COUNTERCLAIM PLAINTIFF**

**DAVID H. GILMOUR**

**1<sup>ST</sup> COUNTERCLAIM DEFENDANT**

**MELIKI T. TUINAMUANA**

**2<sup>ND</sup> COUNTERCLAIM DEFENDANT**

**RENEE D. S. LALA**

**3<sup>RD</sup> COUNTERCLAIM DEFENDANT**

**DILIP K. JAMNADAS**

**4<sup>TH</sup> COUNTERCLAIM DEFENDANT**

**REGISTRAR OF TITLES**

**5<sup>TH</sup> COUNTERCLAIM DEFENDANT**

**ATTORNEY-GENERAL OF FIJI**

**6<sup>TH</sup> COUNTERCLAIM DEFENDANT**

**BEFORE : His Lordship Hon. Justice Kamal Kumar**

**COUNSELS :** Mr. J. Apted and Mr. K. Jamnadas for the Plaintiff, 1<sup>st</sup> and 4<sup>th</sup>  
Counterclaim Defendants

Ms. A. Tuiketeti for the 1<sup>st</sup> Counterclaim Plaintiff

2<sup>nd</sup> Counterclaim Plaintiff in Person

**DATE OF HEARING:** 24 January 2017

**DATE OF RULING:** 31 October 2017

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**RULING**  
**(Application to File Third Amended Counterclaim)**

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**1.0 Introduction**

- 1.1 On 23<sup>rd</sup> January 2014, Defendants/Counterclaim Plaintiffs (hereinafter referred as “**Applicants**”) filed Application by way Summons for Leave to file Third Amended Counterclaim.
- 1.2 Following Affidavits were filed and relied by the parties.

**For Applicants**

- (i) Affidavit of Kenneth Chambers sworn and filed on 11 November 2013 (**“Chambers 1<sup>st</sup> Affidavit”**).
- (ii) Affidavit of Kenneth Chambers sworn and filed on 23 January 2014 (**“Chambers 2<sup>nd</sup> Affidavit”**).
- (iii) Affidavit of Edward Daniel Nusbaum sworn on 21 January 2014, and filed on 23 January 2014 (**“Edward Nusbaum Affidavit”**).

**Respondent**

- (i) Affidavit of Dalip Kumar Jamnadas sworn and filed on 26 February 2014 (**“Jamnadas Affidavit”**).
- 1.3 Parties also filed submissions.

**2.0 Background Facts/Chronology of Events**

**Background Facts**

- 2.1 On or about 28 May 1969, property comprised and described in Certificate of Title No. 42/4168 was transferred to the Plaintiff.

- 2.2 On or about 29 May 1973, property comprised and described in Certificate of Title No. 42/4168 was transferred to Pacific Hotels Development Limited ("**PHDL**").
- 2.3 Subsequently PHDL subdivided the property comprised in Certificate of Title No. 42/4168 in stages and sold some lots.
- 2.4 On 10 February 1983, Certificate of Title No. 42/4168 (excluding lots sold) was transferred to Plaintiff.
- 2.5 On or about 5 July 1985, Wakaya Limited as Vendor entered into a Sale and Purchase Agreement with one Edward Daniel Nusbaum, for sale of lot known as Lot 94 at that time and subject to proposal plan approved by Director of Town and Country Planning on 18 April 1974.
- 2.6 On 10 February 1993, lot known as Lot 6 on Deposited Plan No. 4648 (formerly Lot 94) (hereinafter known as "**Lot 6**") was transferred to Edward Daniel Nusbaum.
- 2.7 Subsequently Certificate of Title No. 27687 was issued over Lot 6 in favour of Edward Daniel Nusbaum.
- 2.8 On or about 19 September 2007, Edward Daniel Nusbaum transferred Lot 6 on Deposited Plan No. 4648, Island of Wakaya, District of Wakaya containing 1 acre 3 roods and 5 perches comprised and described in Certificate of Title No. 27687 (hereinafter referred to as "**CT 27687**") to Marsha June Ferre Nusbaum, the 1<sup>st</sup> Defendant/1<sup>st</sup>Counterclaim Plaintiff pursuant to terms of Marriage Settlement filed in the Cass Country Superior Court in the State of Indiana, USA on 3 April 1998.
- 2.9 On 14 June 2013, Marsha June Ferre Nusbaum transferred one undivided half share in CT 27687 to Kenneth Chambers the 2<sup>nd</sup> Defendant/2<sup>nd</sup> Counterclaim Plaintiff subject to the following:-
- (i) Registered Mortgage No. 748851;
  - (ii) Easement Certificate No. 162746;
  - (iii) Restrictive Covenant No. 333584 'A';

- (iv) Right of Way Easement No. 333585;
- (v) Easement Certificate No. 333586.

### **Chronology of Events**

- 2.10 On 25 August 2010, Plaintiff, Wakaya Limited filed Writ of Summons with Statement of Claim against the Defendants seeking damages, cost and interest.
- 2.11 On 25 August 2010, his Lordship Justice Hettiararchchi (as he then was) granted interim injunction in favour of Plaintiff restraining the Defendants/Counterclaim Plaintiffs from entering Wakaya Island or CT 27687.
- 2.12 On 1 September 2010, Defendants/Counterclaim Plaintiffs applied to expedite the hearing of the injunction application, for Plaintiff to produce Meliki Togavua Tuinamuana for cross-examination at the inter-parte hearing of injunction application and for Plaintiff to consolidate all actions for rate recovery.
- 2.13 On 6 September 2010, his Lordship Justice Hettiararchchi (as he then was) delivered Interlocutory Judgment whereby he dismissed the application to dissolve interim injunction.
- 2.14 On 21 September 2010, Defendants filed Appeal in Court of Appeal which appeal was allowed and Court of Appeal made following Orders:-
  - “(i) The interim injunction granted by Justice Hettiarachchi on 25<sup>th</sup> August 2010 be dissolved and other orders, if any, in the Court below be set aside.*
  - “(ii) Any caveat lodged by the respondent preventing registration of a transfer of 50% interest in Lot 6 to Kenneth Chambers to be removed by Wakaya Limited forthwith.*
  - “(iii) The matter be referred to the Master for the assessment of damages suffered by the appellants Kenneth Chambers and Marsha Nusbaum by reason of the respondent's interim injunction.*

*(iv) The Respondent is to pay the appellant's costs of \$3,000.00 in this Court and \$ 3,000.00 for their costs below.”*

- 2.15 On 23 September 2010, Defendants/Counterclaim Plaintiffs filed Statement of Defence and Counter-claim.
- 2.16 On 10 November 2010, Plaintiff filed Reply to Defence and Defence to Counter-claim.
- 2.17 On 1 December 2010, Defendants/Counterclaim Plaintiffs filed Reply to Defence to Counter-claim.
- 2.18 On 31 January 2011, Order on Summons for Directions was made by the Court.
- 2.19 On 1 March 2011, Court directed parties to file Affidavit Verifying List of Documents and Copy Pleadings. Since 2<sup>nd</sup> Defendant/2<sup>nd</sup> Counterclaim Plaintiff was acting in person Pre-Trial Conference was not to be held.
- 2.20 On 2 March 2011, Plaintiff filed Affidavit verifying List of Documents.
- 2.21 On 14 March 2011, Plaintiff filed Petition in Supreme Court of Fiji to appeal the Fiji Court of Appeal decision.
- 2.22 On 29 April 2011, Defendants/Counterclaim Plaintiff filed Application to join Counterclaim Defendants.
- 2.23 On 12 May 2011, the 2<sup>nd</sup> Defendant/Counterclaim Plaintiff filed Application for Further Discovery.
- 2.24 On 24 June 2011, the above Applications were adjourned to 5 July 2011 for Oral Submissions and after which was adjourned to 22 August 2011, for ruling.
- 2.25 On 27 January 2012, ruling on joinder application was delivered whereby the four counterclaim Defendants were joined as parties to this action.
- 2.26 On 3 February 2012, Application for Further Discovery was dismissed.
- 2.27 On 6 March 2012, the Defendants as Counterclaim Plaintiffs filed claim against the Counterclaim Defendants.

2.28 On 3 April 2012, 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counter-claim Defendants filed Statement of Defence to Counterclaim.

2.29 On 9 May 2012, the Supreme Court of Fiji delivered its Judgment and made following Orders:-

*“37.(1) The petition for special leave to appeal is granted.*

*(2) The judgment of the Court of Appeal is varied to the effect that the interim injunction issued by the High Court is dissolved and the direction to refer the matter to the Master for assessment of damages is quashed;*

*(3) The parties are directed to proceed with the trial before the High Court on the substantive matters;*

*(4) The costs awarded in the Court of Appeal in favour of the Respondents to stand;*

*(5) There will be no costs regarding this application and the parties to bear their own costs.”*

2.30 On 20 April 2012, 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counter-claim Defendants filed Application to Strike out Claim against them.

2.31 On 23 May 2012, Defendants/Counterclaim Plaintiffs filed Application to Strike out Plaintiff's Claim.

2.32 On 25 May 2012, the then Master of the High Court referred the Applications in 2.30 and 2.31 to a Judge.

2.33 The Applications were adjourned for hearing on 30 October 2012.

2.34 On 18 September 2012, the Applications were called before his Lordship Justice Kotigalage (as he then was) when his Lordship directed that all applications be placed before him and adjourned the Applications to 5 November 2012.

2.35 On 5 November 2012, his Lordship directed parties to file amended pleadings and for this matter to take normal course. This matter was adjourned to 10 December 2012.

- 2.36 On 30 November 2012, 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counterclaim Defendants filed Application to Strike out 1<sup>st</sup> and 2<sup>nd</sup> Amended Claim against them on the ground that it discloses no reasonable cause of action.
- 2.37 On 10 December 2012, his Lordship Justice Kotigalage (as he then was) directed parties to file pleadings by 24 December 2012, and adjourned this matter to 6 February 2013.
- 2.38 On 24 and 27 December 2012, the 3<sup>rd</sup> Counterclaim Defendant and 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counterclaim Defendants filed Defence to Second Amended Counterclaim and Statement of Defense to the Counterclaim respectively.
- 2.39 On 31 December 2012, Defendants/Counterclaim Plaintiffs filed Reply to Defense to Counterclaim.
- 2.40 On 11 January 2013, Defendants/Counterclaim Plaintiffs filed Affidavit Verifying List of Documents.
- 2.41 On 6 February 2013, parties were directed to file Submissions and this matter was adjourned to 14 May 2013.
- 2.42 On 14 May 2013, the Court dealt with Defendants/Counterclaim Plaintiffs Application to Strike Out Plaintiff, Wakaya Limited's claim, when by consent following Orders were made:-
- (i) Plaintiff's claim be struck out;
  - (ii) Defendants to pursue their counterclaim.
- 2.43 On 11 November 2013, Defendants/Counterclaim Plaintiffs filed Ex-parte Application to extend Caveat No. 786396 lodged against Certificate of Title No. 42/4168.
- 2.44 On 18 November 2013, Caveat No. 786396 was dealt inter-parte and extended until further Order of the Court when this matter was adjourned to 28 January 2014.
- 2.45 On 22 November 2013, his Lordship delivered his ruling in respect to 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counterclaim Defendants Application to Strike Out Amended

Counterclaim, whereby the Application to Strike out the Amended Counterclaim was dismissed with costs.

2.46 On 28 January 2014, following applications were called before his Lordship Justice Kotigalage (as he then was):-

(i) Application by Defendants/Counterclaim Plaintiffs to join Edward Daniel Nusbaum, Registrar of Titles and Attorney-General of Fiji as Counterclaim Defendants;

(ii) Application to Amend Counterclaim and file Third Amended Counterclaim;

(iii) Application for Extension of Caveat.

Parties were directed to file Affidavits, and the Applications were adjourned to 7 April 2014.

2.47 On 29 January 2014, Application to Extend Caveat was called before his Lordship when parties were directed to file Affidavits and Applications were adjourned to 7 April 2014.

2.48 On 7 April 2014, the Application to join Edward Daniel Nusbaum, Registrar of Titles and Attorney-General of Fiji as Counterclaim Defendants; Application to Extend Caveat and Application to file Third Amended Counterclaim were called before his Lordship Justice Kotigalage (as he then was). Ms Chand appearing for Registrar of Titles and Attorney-General of Fiji informed Court that she has no objection for Registrar of Titles and Attorney-General of Fiji being joined as parties. Mr K. Jamnadas, Counsel for the Plaintiff and 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counterclaim Defendants, however, objected to the application for joinder.

2.49 Action against 2<sup>nd</sup> and 3<sup>rd</sup> Counterclaim Defendants was discontinued by consent with costs in favour of 2<sup>nd</sup> Counterclaim Defendant reserved for determination at the conclusion of the substantive matter.

2.50 All Applications were then adjourned to 12 May 2014, for hearing and parties were directed to file Affidavits.



- 2.51 On 12 May 2014, all the Applications in paragraph 2.46 were heard by his Lordship Justice Kotigalage (as he then was) and adjourned for ruling on notice.
- 2.52 No ruling having been delivered by his Lordship this matter was referred to this Court and was called before me on 10 September 2015.
- 2.53 On 10 September 2015, parties submitted that the Applications be re-heard by this Court and as such all Applications were adjourned to 2 October 2015, for review and fix hearing date.
- 2.54 On 25 September 2015, and 28 September 2015, the Applicants filed two Applications, one to strike out Defence to Amended Counter-claim ("**Strike Out Application**") and the other for Interlocutory Injunction ("**Injunction Application**").
- 2.55 On 2 October 2015, parties were directed to file submissions in respect to Strike-out Application and Injunction Application.
- 2.56 Injunction Application was heard on 27 November 2015, and Ruling was delivered on 20 April 2016.
- 2.57 On application by Counsel for Plaintiff, 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counter-claim Defendants time for filing of Submissions in respect to Strike Out Application was extended to 11 May 2016, and Reply to Submission to 1 June 2016.
- 2.58 All pending Applications were adjourned to 25 August 2016, for hearing with matter to be called on 20 June 2016, to ensure that all documents are in order for hearing.
- 2.59 The Applications were next called on 8 July 2016, when Counsel for Plaintiff, 1<sup>st</sup> and 4<sup>th</sup> Counter-claim Defendants sought time to file Supplementary Affidavit in respect to Caveat Application when Leave was granted for them to file Supplementary Affidavit with right of Reply given to Applicants.
- 2.60 On 25 August 2016, Counsel appearing for Plaintiff, 1<sup>st</sup> and 4<sup>th</sup> Counter-claim Defendants sought time to file fresh Submissions in respect to Caveat Application in view of Injunction Ruling.

- 2.61 Hearing date was vacated and parties were directed to file Submissions on 16 September 2016. Plaintiff, 1<sup>st</sup> and 4<sup>th</sup> Counter-claim Defendants were ordered to pay Chambers cost for the day and all four Applications were adjourned to 22 November 2016, for hearing.
- 2.62 On 22 November 2016, Joinder Application, Strike Out Application and Caveat Application was heard and adjourned for Ruling on Notice. The Amendment Application was adjourned to 7 December 2016, for mention due to shortage of time.
- 2.63 On 7 December 2016, this matter was adjourned to 15 December 2016, as 1<sup>st</sup> Defendant/1<sup>st</sup> Counterclaim Plaintiff just instructed Counsel.
- 2.64 On 15 December 2016, the Application to file Third Amended Counterclaim was adjourned to 24 January 2017, for hearing.
- 2.65 On 24 January 2017, Application for Leave to file Third Amended Counter-claim was heard when Counsel for parties made Oral Submissions and the Application for Leave to file Third Amended Counter-claim was adjourned for Ruling on Notice.

### **3.0 Application To File Third Amended Counterclaim**

- 3.1 Order 20 Rule 5-(1) (2) and (5) of the High Court Rules provide:-

***“5.-(1) Subject to Order 15, rules 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.***

***(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.***

(3) .....

(4) .....

(5) *An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.*”

3.2 The test to be applied when dealing with Application to Amend Pleadings was stated by Full Court of Fiji Court of Appeal in **Sundar v. Prasad** [1998] FJCA19’ Abu0022u.97s (15 May 1998) as follows:-

*“Generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of each party’s case. For that reason amendment of pleadings which will have that effect are usually allowed, unless the other party will be seriously prejudiced thereby (G.L. Baker Ltd. v. Medway Building and Supplies Ltd [1958] 1 WLR 1231 (C.A.)). The test to be applied is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to other parties; if that test is met, leave to amend may be given even at a very late stage of the trial (Elders Pastoral Ltd v. Marr (1987) 2 PRNZ 383 (C.A.)). However, the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party waster as a result of it.”*

3.3 In **Ambaram Narsey Properties Ltd v. Khan** [2001] FJHC 306; [2001] 1 FLR 283 (16 August 2001) his Lordship Justice Gates (current Chief Justice) adopted with approval the following principles in **Cropper v. Smith** (1884) 26 Ch. D. 700 p 710 Bowen L.J. said:-

***“Now, I think it is a well-established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.”***

***and his Lordship added at p 711:***

***“It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.”***

3.4 His Lordship further stated that:-

***“Amendment may be allowed “at any stage of the proceedings” which includes during a trial The Duke of Buccleuch [1892] P. 201, at p 211 per Lord Esher MR; G. L. Baker Ltd. v. Medway Building & Supplies Ltd. [1958] 1 WLR 1216. With some reluctance the trial judge was prepared to allow the statement of claim to be amended in Loutfi v. C Czarniow Ltd. (1952) 2 All ER 823 as late as after close of the case but before judgment.”***

3.5 Applicants state that they need to amend the Counterclaim so that all relevant issues are determined properly.

3.6 Since the Registrar of Titles and Attorney General of Fiji have been joined as parties pursuant to Ruling delivered today it is obvious that Applicants as Counterclaim Plaintiffs need to amend the Counterclaim.

3.7 Respondents submit that certain clauses in the Proposed Third Counterclaim (**Annexure “X” of Chambers 2<sup>nd</sup> Affidavit**) is scandalous, frivolous, vexatious and abuse of process.

3.8 What is meant by scandalous is stated at paragraph 18/19/14 of Supreme Court practice 1993 Vol 1 (White Book) as follows:-

***“The Court has a general jurisdiction to expunge scandalous matter in any record or proceeding (even in bills of costs, Re Miller (1884) 54 L.J.Ch. 205). As to scandal in affidavits, see O.41, r.6.***

***Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v. Prythergch (1841) 12 Sim. 363; Rubery v. Grant (1872) L.R. 13 Eq.443).***

***“The mere fact that these paragraphs state a scandalous fact does not make them scandalous” (per Brett L.J. in Millington v. Loring (1881) 6 Q.B.D. 190, p.196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v. Albion Assurance Society (1876) 45 L.J.C.P. 663).”***

3.9 What is meant by frivolous or vexatious is stated at paragraph 18/19/15 of Supreme Court Practice 1993 Vol 1 (White Book) as follows:

***“By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in Attorney General of Duchy of Lancaster v. L. & N.W.Ry [1892] 3 Ch. 274;.... The Pleading must be “so clearly frivolous that to put it forward would be an abuse of the Court” (per Juene P. in Young v. Halloway [1895] P 87, p.90; ....”***

3.10 The Oxford Advanced Learners Dictionary of Current English 7<sup>th</sup> Edition defines “frivolous” and “vexatious” as:-

***frivolous: “having no useful or serious purpose”***

***vexatious: “upsetting” or “annoying”***

- 3.11 What would amount to abuse of process and Court's power to strike out pleading is stated at paragraph 18/19/17 and 18/19/18 of Supreme Court Practice Vol 1 (White Book) as follows:-

*“Abuse of Process of the Court” - Para. (1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under inherent jurisdiction where there appeared to be “an abuse of the process of the Court.” This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P.59, per Bowen L.J. p.63). See also “Inherent jurisdiction”, para.18/19/18.”*

*“Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas.665) (para 18/19/18).”*

- 3.12 This Court is of the view that each paragraph of the Propose Third Amended Counterclaim be considered.

3.13 **Paragraph 1**

The fact in paragraph 1 is not relevant to the issue or relief sought in this action, and **should be removed.**

**Paragraphs 2 and 3**

Respondents have not raised any issue in respect to these two paragraphs which are relevant or connected to the issues between the parties.

**Paragraph 4**

This Court accepts Respondents Submission that Applicants calling 1<sup>st</sup> Counterclaim Defendant “Canadian billionaire,” is scandalous. **The words “Canadian billionaire” should be removed from this paragraph.**

### **Paragraph 5**

Paragraph 5 (i) also appears to be scandalous and as such **should be removed.**

### **Paragraph 6**

Since 2<sup>nd</sup> Counterclaim cost is reserved for determination at conclusion of the substantive matter it is appropriate that parties name be left as described in the existing pleadings.

There is no issue with this paragraph except that **3<sup>rd</sup> Counterclaim Defendant be changed to 5<sup>th</sup> Counterclaim Defendant.**

### **Paragraph 7**

There is no issue with this paragraph except that **4<sup>th</sup> Counterclaim Defendant be changed to 6<sup>th</sup> Counterclaim Defendant.**

### **Paragraphs 8, 9, 10, 11 and 12**

No issues have raised in respect to content of these paragraphs. However, as Application to join Edward Daniel Nusbaum has been refused the words **3<sup>rd</sup> Counterclaim Plaintiff in paragraphs 8 and 9 should be deleted and replaced with Edward Daniel Nusbaum.**

### **Paragraph 13**

This Court agrees with Respondents Counsels submission that use of words conspirators and conspiracy is scandalous.

Therefore the word (**“the conspirator”**) and **conspiracy should be deleted, and replaced with names of alleged parties.**

### **Paragraph 13 (a) (i) (ii) and (iii)**

This Court accepts Respondents Counsels' submission that content of these paragraphs are not relevant to the issues or relief or remedy sought and such **should be removed.**

### **Paragraph 13 (b)**

Respondent's submit that this paragraph has nothing to do with the current proceedings whatsoever.

Applicants in their submission state that the particulars allege breach of provision in Instrument No. 333858.

This Court is of the view that fact stated in this paragraph needs to be established at trial and such will permit it to be pleaded.

**Paragraph 13 (c)**

No issues have been taken by Respondents in respect to this paragraph and as such it is allowed.

**Paragraphs 13 (d) and (e)**

This Court accepts Respondents submission that the Applicants have no standing to bring such a claim and they are not relevant to the issues and relief or remedies sought by them. **Therefore these paragraphs should be removed.**

**Paragraph 13 (f)**

No issue have been raised by Respondents in respect to fact pleaded and such will be allowed.

**Paragraph 13 (g)**

Since Application to Join Edward Daniel Nusbaum as 3<sup>rd</sup> Counterclaim Plaintiff has been refused **this paragraph should be removed.**

**Paragraph 13 (h) (i)**

No issues have been taken by Respondents in respect to these paragraphs which is somewhat relevant to cause of action and as such will be left as pleaded.

**Paragraph 13 (j)**

This paragraph **should be removed** for reason stated in respect to paragraph 13 (g).



**Paragraph 13 (k)**

Respondents submit that Applicants have no standing to bring this claim. Applicants submit that the paragraph addresses entitlement to access. The designation of Wakayalailai Reserve in common land in CT 4168 for tourist development is not related to Applicants cause of action or remedy sought and **should be removed.**

**Paragraph 13 (l)**

This paragraph **should be removed** for reasons stated in respect to paragraph 13 (g).

**Paragraphs 13 (m) to (r)**

No issues have taken by Respondents and these paragraphs appear to be related to Applicants cause of action and remedies sought.

**Paragraph 13 (s)**

Respondents submit that fact pleaded in this paragraph has already been addressed by the then Master of the High Court when Applicants applied for an “unless order” which was refused and Applicants withdrew Application for Leave to Appeal that decision.

To plead this matter again when it was dealt with by then Master is to “appeal that decision by back door”. **This paragraph therefore should be removed.**

**Paragraphs 13 (t) (u) (v)**

No issues have been taken by Respondents in respect to these paragraphs and it appears to be somewhat related to the cause of action.

**Paragraph 13 (w)**

This Court fails to understand how Magistrate’s Court Civil Action No. 186 of 2011 relates to cause of action in this proceedings.

**This paragraph should be removed.**

The particulars pleaded on page 8 of the Proposed Amended Counterclaim under the heading “Particulars of fraudulent and wrongful debt recovery proceeding” **should be removed.**

**Paragraph 13 (x) (y)**

No issues have been taken by Respondents in respect to these paragraphs and it appears to be somewhat related to the cause of action.

**Paragraph 13 (z)**

This Court accepts Respondents submission that this paragraph is vague.

Parties when filing pleadings must plead facts precisely so that the other party can fully respond to it.

Vague statement such as in paragraph 3 (z) should never form part of any pleadings.

**This paragraph therefore, should be removed.**

**Paragraph 14**

Respondents submit that this paragraph has to do with trespass and dates back to 1992 and is well beyond limitation period.

This court will allow this paragraph and if Respondents intend to plead limitation defence then they can plead it in their Statement of Defence.

However to enable Respondent to properly respond to this paragraph the words **“conspirators” in 1<sup>st</sup> and 2<sup>nd</sup> line should be deleted and replaced with names of parties against whom the allegation is made.**

Also since Edward Daniel Nusbaum has not been joined as a party **paragraph 14(e) should be removed.**

**Paragraph 15**

No issue has been taken by Respondent.

This paragraph can remain subject to following variation:-

(i) The words **“conspirators” in lines 1, 2 and 3 be removed and replaced with names of alleged parties.**

(ii) Word **“conspiracy” in 4<sup>th</sup> line be removed.**

### **Paragraph 16**

The Court agrees with Respondents submission that without prejudice letter should not be pleaded and such **this paragraph should be removed.**

### **Paragraphs 17, 18, 19 and 20**

No issues have been taken by Respondents and this Court is of the view that these paragraphs should remain **except that paragraph 19 (b) should be removed** as Edward Daniel Nusbaum has not been joined as 3<sup>rd</sup> Counterclaim Plaintiff.

### **Prayers for Counterclaim Plaintiffs claim (Page 11)**

**Paragraph A (iii) should be removed** for reason stated above in respect to paragraph 19 (b).

3.14 This processing has been pending since 2010, which is more than seven years ago and there is a need to make it see light of the day as soon as possible.

3.15 This matter can only go for trial if parties refrain from filing interlocutory applications that can be avoided to save time and indulge in timely sorting out of pre-trial matters to ensure that, matter is ready for trial.

3.16 Respondents submit that they will be prejudiced if Amendment Application is allowed.

3.17 This Court does not accept that Respondents will be prejudiced in anyway because of the fact that:

(i) this matter has been pending for seven years;

- (ii) various Affidavit have been filed addressing issues subject to this proceedings

3.18 After analysing the Affidavit evidence before this Court and submissions, this Court is of the view that in order to finalise this matter as soon as possible the Third Amendment Counterclaim be allowed with strict time table for parties to comply with.

#### **4.0 Cost**

This court is of the view that it is just and equitable that costs of the Application to file Third Amended Counterclaim be costs in the cause.


#### **5.0 Orders**

- (i) Leave is granted for Applicants (Defendants/Counterclaim Plaintiffs) to file and serve Third Amended Counterclaim in terms of Annexure X of Kenneth Chambers' Affidavit sworn and filed on 23 January 2014, with variations appearing in paragraph 3.13 of this Ruling by 14 November 2017;
- (ii) Respondents (Plaintiff, 1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendants), Registrar of Titles and Attorney General of Fiji do file and serve Statement of Defence to Third Amended Counterclaim by 14 December 2017;
- (iii) Applicants do file and serve Reply to Statement of Defence by 28 December 2017;
- (iv) Applicants, Plaintiff, 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Counterclaim Defendants do file and serve Affidavit Verifying List of Documents by 28 January 2018;
- (v) Parties exchange documents by 16 February 2018;
- (vi) Applicants do file and serve Copy Pleadings consisting of Third Amended Counterclaim, Statement of Defence to Third Amended

Counterclaim and Reply to Statement of Defence to Third Amended Counterclaim by 16 February 2018;

- (vii) This matter be called in this Court on 23 February 2018 at 9.30 am, for mention only;
- (viii) Cost of Application for Leave to file Third Amended Counterclaim be costs in the cause.



  
Kamal Kumar  
**JUDGE**

At Suva  
31 October, 2017

**Jamnadas & Associates for the Plaintiff; 1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendants**  
**A.P. Legal for the 1<sup>st</sup> Counterclaim Plaintiff**  
**2<sup>nd</sup> Counterclaim Plaintiff in Person**