

In the High Court of Fiji  
At Suva  
Civil Jurisdiction

Civil Action No. HBC 303 of 2019

Rosa Maria Tuvou  
First plaintiff

Josaia Asela Vosarogoci  
Second plaintiff

Lanieta Mokosoi Bolea  
Third plaintiff

v.

Attorney General  
First defendant

Ministry of Waterways and Environment  
Second defendant

Permanent Secretary for Ministry of Waterways and Environment  
Third defendant

Counsel: Mr M. Young with Ms J. Mano for the plaintiffs  
Ms S. Ali with Ms S. Kapoor for the defendants

Date of hearing: 7<sup>th</sup> and 8<sup>th</sup> March, 2022

Date of Judgment: 30<sup>th</sup> March, 2023

## Judgment

1. The plaintiffs, residents of Salababa Road,(S Rd) Waila,(described as a wide flat-bottomed valley along the Waimanu river) in the Municipality of Nausori, claim that the second and third defendants failed to take timely measures to maintain and manage the Waimana Creek,(WC) in the aftermath of two weeks of continuous rain and a landslide which completely buried the estuary of the Creek flowing into the river. The water in the drains beside their residences did not recede and their land remained partially covered with water. The plaintiffs, in their statement of claim state that despite their numerous complaints, the second and third defendants neglected to carry out their duties and responsibilities bona fide as required by section 10 of the Drainage Act.
2. The particulars of negligence pleaded against the second and third defendants read:
  - (1) *despite the weather being fine afterwards, they caused or permitted the Waimana Creek to remain buried for three (3) weeks after contact and counting;*
  - (2) *despite many Contractors available, they failed to take any or any adequate measures by maintenance and management of the Waimana Creek after the Plaintiffs had contacted them of the landslide that had buried Waimana Creek.*
  - (3) *Failing to respond instantly or in a timely manner to the maintenance and management of the Waimana Creek, refer to Paragraph 14 below for Particulars of Injury;*
  - (4) *Causing or permitting the Waimana Creek to remain buried for three (3) weeks and counting; and*
  - (5) *Failing to maintain the Waimana Creed for three (3) weeks and counting contrary to the Drainage Act 1961.*
3. The plaintiffs claim damages for pain, injury and loss suffered by them and their children in :
  - (1) *continuously walking in almost knee depth mud in front of their households, every day to commute to school, to town, to church and so forth resulting in mud-related dirt on their footwear, legs and clothes;*
  - (2) *vegetation along the Waimana Creek deteriorating and dying;*
  - (3) *stench from the filled up irrigation channels;*
  - (4) *the water filled in the drain changing colour to red "black tea-like" color within the first week then to light black by third week;*
  - (5) *odor from contact with contaminated water from irrigation channels;*
  - (6) *fear of water rise even in a light rain, and flood if there is heavy rain;*
  - (7) *unusual increase in mosquito presence and mosquito attack; and*
  - (8) *death of animal pets because of undue sickness.*

4. The defendants, in their statement of defence state that the Luvuluvu Office of the second defendant does not have records of any complaint lodged by the plaintiffs. On receipt of a letter from the plaintiffs on 19<sup>th</sup> August,2019, appropriate administrative action was taken to organize the clearing of the blockage. The Government tender process had to be complied with to hire machinery, as the second defendants' excavator was engaged in other works. On 27<sup>th</sup> August, 2019, the machine removed silt and opened the creek. The work was completed on 28 August, 2019.
5. The reply to the statement of defence states that the defendants took more than one day to clear the clogged WC. The drains in S Rd remained clogged for a month due to the negligence of the defendants.

*The determination*

6. It is agreed that the second defendant maintains waterways. Several drains in S Rd fall into the WC and flow into the Waimanu river. It is also an agreed fact that WC was buried by a landslide.
7. The question for determination is;(i) whether the defendants were negligent and failed to take timely action to clear the blockage and,(ii) as a result, the plaintiffs suffered pain, injury and loss.
8. PW1,(*the third plaintiff*) in evidence in chief said that in the first week of August,2019, heavy rain caused flooding and blockages in their drains which lasted longer than the usual flood waters, as it was caused by a landslide. landslide. The landslide occurred a kilometer away from her residence. The water was not receding and remained stagnant till September. The water was brown and turned black. The smell was horrible. She and her children had to wade through water. Water stuck to their skin. She had to disinfect her clothes, water and dogs. Two dogs died. The access road and driveway to her house were inundated with stagnant water. PW1 said that a Contractor engaged by the Ministry of Waterways,(Ministry) started clearing to access the blockage with a digger on 28<sup>th</sup> August,2019. The water receded after a week.



9. PW2,( *the first plaintiff*) in her evidence in chief confirmed the difficulties she faced with stagnant water in her drains caused by the heavy rain and landslide. They could not sleep due to the smell. The water remained for a month and started to recede after officials from the Ministry attended to the matter. She agreed in cross examination that the blockage was cleared in one day, on 28<sup>th</sup> August,2019.
10. PW3,(*Waisale Tabuya*,) also a resident of S Rd said that in August,2019, heavy rain caused flooding and filled their drains. Rubbish slid down the hill and blocked the WC. The excavator could not travel on the main road and had to be taken to the site. Since there was no access road, the Contractor had to clear a road to reach the area where the mud and debris had filled up. The blockage was cleared by the Ministry over two weeks.
11. PW1 and PW3 produced several photographs to depict the debris, drains, stagnant water, vegetation and children wading through the waters.
12. DW1,(*Samuel Mudaliar, Technical Officer, Ministry of Waterways*) said that the Ministry of Waterways looks after five provinces: Tailevu, Rewa, Naitasiri, Serua and Namosi. He explained that when a complaint is received, a site inspection is carried out and a bill of quantities prepared to evaluate the cost of the project, which is given to the senior staff in Luvuluvu, then the Director and finally the Permanent Secretary. The Ministry received a complaint on 19<sup>th</sup> August,2019, with regard to the blockage and soil erosion in WC. The matter was referred to Rajiv, their Senior Technical Officer. The technical team carried out a site inspection on 20<sup>th</sup> or 21<sup>st</sup> August, 2019. Photographs were taken and a report was prepared for the approval of their Director and Permanent Secretary. The Ministry took 7 days for the process, as it was a high risk project. A Contractor was taken to the site on 27<sup>th</sup> August, 2019. By 28<sup>th</sup> August, the silt and eroded soil were cleared. The water began receding. The project of maintenance of the remaining drains of 1000 kilometers was completed on 5<sup>th</sup> or 6<sup>th</sup> September,2019
13. In cross examination, DW3 said that the process to approve the project took one week.

14. The plaintiffs allege that the defendants failed to respond in a timely manner to their complaint.
15. PW1 said that she complained to Rajiv of the Ministry in their Luvuluvu branch in mid August,2019, but he did not attend to the matter. It was put to PW1 in cross examination that she waited for a week for the water to recede before she complained, as the flooding of drains is a common feature in their area.
16. PW1 and PW3 said that they got Rajiv's telephone number from officials at Ratu Cakobau House, who advised that he was in charge of blockages. PW3 could not recall the exact date in August he went to Ratu Cakobau House. He said that it was in the first or second week of August,2019. He spoke to Rajiv thereafter.
17. The defendants contend that the Ministry was not informed till 19<sup>th</sup> August,2019.
18. Neither PW1 nor PW3 could give an exact date when they made phone calls to Rajiv.PW1 said that it was in in mid August,2019.
19. I prefer and accept the evidence of the defendants that the plaintiffs complained on 19<sup>th</sup> August,2019.
20. DW1 testified that the government process had to be followed. A site inspection and approval of their Director and Permanent Secretary had to be obtained.
21. In my view, that process would understandably take a week.
22. It is not in dispute that the clearing commenced on 27<sup>th</sup> August,2019. An access road to the site was made and the clearing of the blockage was completed on the next day.
23. In my judgment, the second and third defendants took timely measures to clear the blockage.
24. I do not find the second and third defendants were negligent in carrying out their duties and responsibilities.

25. In any event, section 10 of the Drainage Act, as relied on by the plaintiffs in their statement of claim provides that the “*Permanent Secretary or any officer of the Ministry shall not be liable to any action, liability, claim or demand in respect of any act or matter bona fide done or omitted to be done in the exercise of (its) functions and powers*”
26. The claim fails.
27. **Orders**
- a. The action of the plaintiffs is declined.
  - b. I make no order as to costs.

*A.L.B. Brito-Mutunayagam*

**A.L.B. Brito-Mutunayagam**

**JUDGE**

**30<sup>th</sup> March, 2023**

