

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

**Civil Action No. HBC 30 of 2015**

**IN THE MATTER** of an application  
for possession of land under  
section 169 of the Land Transfer  
Act.

**BETWEEN** : **FRASERFIELD ESTATES LIMITED** a limited liability  
company having its offices at c/- Ernst & Young, 7th  
Level, Pacific House, 1 Butt Street, Suva, Fiji Islands.  
**PLAINTIFF**

**AND** : **SAKIUSA RABULI, PENI VERO, TEVITA ROVANA,**  
**MANOA DAUNIVALU, JOSESE NAQAVASE, LUKE**  
**SALAUCA, NACANIELI BUTO, ASaeli TILA,**  
**JOSATEKI MAINATUA,** and all other members (names  
of which are unknown to the Plaintiff) of the Mataqali  
Dakunivale of Nakasa Village, Savusavu, Vanua Levu,  
Fiji Islands.  
**DEFENDANTS**

**Appearances** : Haniff Tuitoga for the Plaintiff  
Lomaloma Esq for the Defendants

**Judgment** : 16 August 2017

## **JUDGMENT**

1. This is the Plaintiff's application under section 169 of the Land Transfer Act, for the Defendants to show cause why they should not give to the Plaintiff immediate vacant possession of all the property described in Certificate of Title No. 9116, Lot 1 on Deposited Plan No. 2043 of which the Plaintiff is the registered proprietor.



### The affidavits

2. The affidavits in support were sworn by Philip Moore, Director of the Plaintiff Company at the time of filing of the application; Manoj Sharma, a registered surveyor who conducted surveys and redefinition of the boundaries of the land; and by Mr. Paul M. McDonnell who is now the sole Director of the Plaintiff Company following the death of Mr. Moore in 2016
3. The answering affidavit was sworn by the first named Defendant, Sakiusa Rabuli with the consent of the rest of the Defendants. I do not set out in this judgment all the contents of the affidavits but have given them, as I have also given to counsel's submissions, due consideration.
4. Mr. Moore deposes that the Plaintiff is the registered proprietor of all the freehold property comprised in CT No. 9116, Lot 1 on Deposited Plan No. 2043 situated on either side of the Wailevu West Coast Road. The Defendants, he says, are members of the Mataqali Dakunivale of Nakasa Village, in Savusavu, and are illegally occupying and/or cultivating the property, in particular the area between the two river channels. Notices to quit were served on the Defendants but they continue in occupation.
5. Manoj Sharma is a registered surveyor and is the principal surveyor and proprietor of a land survey consultancy business that has conducted land surveys and planning work for the Plaintiff. He says he had reviewed the plans and titles of the property to ascertain its historical background. The earliest map of the property (DP 2043 and CT 9116) dated 4 June 1954 shows the existence of the Ndrakanavou Channel at the time. Then, it was a minor channel east of the main stream, taking occasional or seasonal water. Subsequently, it has



“become the main conduit for flow leaving the original channel substantially or frequently dry.”

6. Sharma says the main stream on the property is the Waibalabala Creek which is the correct registered boundary of CT 9116. This, he says, he has established with the use of proper survey methods “to agree with the establishment of the boundary on DP 2043. CT 9116 was subdivided by DP 9002 in 2004 and new certificates of title have been made over the said lots. The balance of CT 9116 is from what remained after extraction of the road and channel areas, as well as the subdivision in DP 9002.
7. Sharma goes on to say that he conducted for the Plaintiff a redefinition survey of the southern severance of CT 9116 as required under the Subdivision of Lands Act. He redefined the periphery of the southern severance by confirming the Wailevu West Coast road boundary to the north, the approved subdivision of DP 9002 to the east and south, and the Waibalabala Creek to the west. Through survey methods, calculations and approved procedures, he verified “the present Waibalabala Creek boundary to the west agreed with the original periphery description of CT 9116 as shown on DP 2043. He says the Waibalabala Creek boundary is the correct western periphery of the southern severance of CT 9116.
8. With the consent of counsel for the Defendants, the Plaintiff filed a further affidavit in support, sworn by Mr. Paul McDonnell. McDonnell is now the sole director of the Plaintiff company, Mr. Moore having passed away in April 2016. Like Mr. Moore before him, McDonnell deposes inter alia that the Plaintiff is the registered proprietor of the freehold property the subject of these proceedings; that the Defendants are illegally occupying and/or cultivating the property, in particular the area between the two river channels despite being served with notices to quit.



9. The answering affidavit for the Defendants is sworn by the first named Defendant, Sakiusa Rabuli, who says:

- he has been authorised by the rest of the Defendants to do so. He is the Acting Turaga ni Mataqali for mataqali Dakunivale;
- the land which is affected by this action is known as Nasogoi and is part of their native land containing 42 acres and 2 roods as described in the Register of Native Lands, Volume 3, Folio 377 as:

Commencing at Naikawakaivi 1 at the junction of the Naikawakawaivi creek with the right bank of the Waibalabala river thence following up the Naikawakawaivi creek passing Mumu to Navuraga thence northerly across flat land direct to Vatudamu hence northerly and direct to Vatuboroboro on the right bank of the Waibalabala river thence following down the right bank of the Waibalabala river to Naikawakawaivi 1 the point of commencement... being more particularly delineated and marked 24 in the plan B 21, 4 deposited with the Registrar of Titles.

- there are about 70 members of Mataqali Dakunivale and the only land they have is the 42 ½ acres that they use to plant food for their daily sustenance;
- they have no other land and intimately know the boundaries of their land;
- the Waibalabala River is well known to him. Waibalabala Creek is about 300 metres from his village Nakasa. The land described in the Register of Native Lands, Volume 3, Folio 377 (supra) has been used by the members of Mataqali Dakunivale for plantations for sustenance in the village since time immemorial;
- there are root crops and fruit trees on the land;



- throughout his life, Waibalabala River has not changed its course and any change in the boundary of the land has been through accretion and or erosion, not avulsion;
- the Plaintiff Company only became registered proprietors on 6 February 2013 and Moore is not qualified to swear that Drakanavou Channel existed in the property from time immemorial;
- Mr. Moore has not annexed a copy of titles or plans certified by the Registrar of Titles and the Court should therefore not accept them as correct;
- Moore has not cited the source of his information or ground for his belief and the Court should not give credit to his information;
- he (Rabuli) has caused a search of CG 282 and the certified copy he annexes does not show any "Drakanavou"

Reply to Sharma's affidavit:

10. Sharma is not qualified to say that Ndrakanavou Channel has existed on the property since time immemorial; or that in 1954, it was a minor channel east of the main stream, taking occasional or seasonal water; or that it has subsequently become the main conduit for flow leaving the original channel substantially or frequently dry;
11. Sharma has not annexed a copy of the titles or plans certified by the Registrar of Titles or the relevant official keeper of the records he refers to in his affidavit, so the Court should not accept them as correct;
12. His earliest memory of the Waibalabala River is in the early 1960s and since then, there has never been a dry creek bed more than 2 metres deep where Sharma states it to be. The whole area has been cultivated by members of Mataqali Dakunivale since he (Rabuli) was a child and in 2012, there was no dry creek bed there at all;



13. the boundary of the mataqali land is the eastern bank of the Waibalabala River which has not changed substantially since he started swimming in the river as a child;
14. his 90 year old aunt Silika Bolouga told him that she has lived the whole of her life in Nakasa village and that since she could remember, the Waibalabala river has remained on its current course;
15. he (Rabuli) had caused a search to be made of the caveat lodged by the Director of Lands on CT 9116 being Lot 1 on DP 2043 (the Plaintiff's land). A certified copy of the said Caveat is attached, showing the position of Savusavu West Coast Road and also NLC Lot 24 which is land belonging to Mataqali Dakunivale;
16. it is clear that there is a dispute in the boundary and this matter should not be dealt with by affidavit evidence only.

#### The law

17. In a section 169 application for vacant possession, the plaintiff bears the onus of satisfying the Court that it has standing to institute proceedings against the defendant. It does that by proving it belongs to one of the classes of persons under paragraphs (a) – (c) of the section. They are:
  1. the last registered proprietor;
  2. a lessor who has power of re-entry where the lessee is in arrears for a period stated in the lease, or,
  3. where there is no such provision in the lease, a lessor against a lessee who is in arrears for one month, regardless of whether there is sufficient distress on the land to countervail the rent, and whether or not a demand has been made for the rent;
  4. a lessor against a lessee or tenant in a case where a legal notice to quit has been served, or the term of the lease has expired.



18. Once the Plaintiff has shown it has locus to bring the proceedings under section 169, the onus then shifts to the Defendant to, in accordance with section 172, show cause why he refuses to give possession of the land. If he is able to satisfy the court that he has a right to possession, the summons shall be dismissed with costs against the proprietor, mortgagee or lessor. Alternatively, the court may make any order and impose any terms it considers fit.

#### Analysis

19. In this case, the Plaintiff brings its application as the last registered proprietor of the land under s. 169 (a). A copy of the certificate of title annexed to the affidavits of Moore, Sharma and McDonnell confirms this. I am satisfied the Plaintiff has discharged the burden on it to show locus.
20. The onus therefore shifts to the Defendants to show they have a right to possession of the land. In doing so, they need not prove conclusively a right to possession and it is sufficient if there is some tangible evidence establishing the existence of a right. (Morris Hedstrom Ltd v Liaquat Ali (Action No. 153 of 1987))
21. The Defendants contend that the land affected by this action is known as "Nasogoi" and is part of their native land measuring 42 acres and 2 roods, as described in the Register of Native Lands in Volume 3, Folio 377. They have attached a copy of the said RNL, certified by the Registrar of Titles, and which names the mataqali Dakunivale as the proprietary landowning unit. A description of the boundaries is shown as:

Commencing at Naikawakaivi 1 at the junction of the Naikawakawaivi creek with the right bank of the Waibalabala river thence following up the Naikawakawaivi creek passing Mumu to Navuraga thence northerly across flat land direct to Vatudamu hence northerly and direct to



Vatuboroboro on the right bank of the Waibalabala river thence following down the right bank of the Waibalabala river to Naikawakawaivi 1 the point of commencement... being more particularly delineated and marked 24 in the plan B 21, 4 deposited with the Registrar of Titles.

22. Also annexed to Rabuli's affidavit is a copy of NLC Lot 24, Sheet Ref F Plan B21,4 certified by the Native Lands and Fisheries Commission, showing the boundaries of the said land "and CG 282, from which the Plaintiff's land has been derived."
23. The Defendants' contention is that the boundary of their land is the eastern bank of the Waibalabala River. Rabuli says that since there is a dispute to the boundary, this matter should not be dealt with by affidavit evidence only.
24. The issue for the Court's determination is whether the Defendants have shown they have a right to possession. I bear in mind the summary nature of these proceedings which really is for cases where "the issues are straightforward and particularly where there are no complicated issues of fact." (Narayan v Ram Civil Appeal No. 16/83, per Gould VP)
25. In this case, the Defendants resist the application on the basis of a dispute as to the boundary between their mataqali land Nasogoi, and that of the Plaintiffs. However, the boundaries that they cite and rely on, being those stated in RNL Volume 9 (not 3) Folio 377, and in NLC Lot 24, Sheet Ref F Plan B21,4 show a common boundary between their land and CG282 and CT 9116 on DP 2043. Apart from the bare allegation of a dispute to the boundary and the absence of a "Drakanavou" on CG 282, the Defendants do not say exactly what the dispute is.



26. As to the contention on the existence of a Drakanavou channel in the sketch of CG 282, I note from DP 2043 (Annexure MS 5 of Sharma's supplementary affidavit and Annexure MS 6 of the affidavit in reply), registered on 23 June 1954, that there was then, in CT 9116, "Ndrakanavou", an "existing stream bed" in the property. That plan, despite its age, is a registered plan nevertheless.
27. Mr. Lomaloma's submissions that the Defendants rely on the doctrine of accretion is not borne out by any evidence adduced for the Defendants. Indeed, contrary to the submissions, the Defendants' position in the affidavit is that "the eastern bank of the Waibalabala River...has not changed substantially" (para 15), and that "the Waibalabala river has remained on its current course" (para 16 of Rabuli's affidavit) If what they say is true, then the boundary is, as the RNL says, from "...Vatuboroboro on the right bank of the Waibalabala river thence following down the right bank of the Waibalabala river to Naikawakawaivi 1 the point of commencement." That being the case, the boundary is one and the same as that in CT 9116 on DP 2043.
28. All that Rabuli says is that "any change in the boundary of the land has been through accretion and or erosion, not avulsion." He does not say however, that there has been such a change and if so, the nature thereof.
29. Even without considering the redefinition survey plans, I am satisfied on the evidence in CT 9116 on DP 2403, CG 282, and RNL Volume 9 Folio 377, that there is no discrepancy as to the boundaries of the land. Clearly, on the plans before the Court, the area between the 2 river channels is within the boundary of CT 9116 on DP 2043, and outside the boundaries of the land belonging to mataqali Dakunivale, as described in RNL Volume 9 Folio 377.

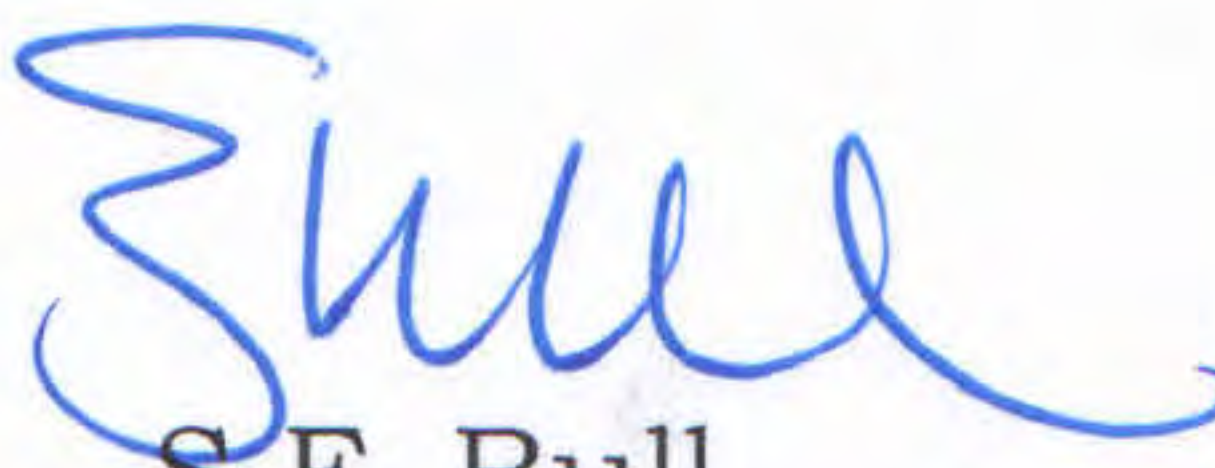


30. On the whole therefore, I am not satisfied that the Defendants have shown they have a right to be in possession. They have not pointed to any tangible evidence supporting the existence of such a right.  
(*Liaquat Ali*, supra)
31. In my view, the Plaintiff Company is entitled to an order for vacant possession.
32. Notwithstanding this finding however, the affidavit material shows the existence of plantations and gardens on the relevant portion of the land occupied by the Defendants. I consider it just that the Defendants be given some time to use, harvest and/or remove the standing crops from the land.

#### Order

1. The Defendants are to give up and deliver to the Plaintiff immediate vacant possession of the land comprised and described in Certificate of Title No. 9116, Lot 1 on Deposited Plan No. 2043;
2. Execution of the above order is stayed for a period of three months from the date of this judgment.
3. Costs for the Plaintiff, to be paid by the Defendants, jointly and severally, in the global sum of \$1000.



  
S.F. Bull  
**Acting Master**