

6, 1957

In the Privy Council.

No. 30 of 1955.

ON APPEAL FROM THE FIJI COURT OF APPEAL

UNIVERSITY OF LONDON
25 FEB 1958
INSTITUTE OF ADVANCED
LEGAL STUDIES
49826

BETWEEN

RATU TAITO NALUKUYA ... (Plaintiff) APPELLANT

AND

THE DIRECTOR OF LANDS ... (Defendant)

AND

THE NATIVE AFFAIRS BOARD ... (Amicus Curiae) RESPONDENTS

10

AND

THE NATIVE LAND TRUST BOARD OF FIJI ... INTERVENER

CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal from the Judgment of the Fiji Court of Appeal, dated the 16th November, 1954, varying an Order of the Supreme Court of Fiji made by the Chief Justice on his Judgment dated the 19th March, 1954. p. 29 p. 12

2.—The issue for determination in this Appeal is to whom a sum of £7,985, being compensation in respect of the compulsory acquisition of approximately 434 acres of native land by the Government of Fiji from the Tokatoka Nadrau, is to be paid. The Chief Justice ordered that the said sum should be paid to the Public Trustee. The Court of Appeal ordered it to be paid to the Native Land Trust Board of Fiji (Intervener). The Appellant submits that it should be paid to the members of the Tokatoka Nadrau. 20

3.—There is appended to this Case an annexure containing relevant statutory provisions of Fiji.

4.—The Appellant is the head of the Tokatoka Nadrau. In Fiji native land is vested absolutely in native owners and the unit of ownership is the Tokatoka. p. 2, l. 23 p. 7, ll. 4 & 10

RECORD

- p. 38
pp. 39-41
- 5.—In 1943 the Crown by virtue of the provisions of the Crown Acquisition of Lands Ordinance (Cap. 122), acquired compulsorily some 5 acres of land from the Tokatoka Nadrau and in 1944 the Crown acquired likewise a further 434 acres odd. Compensation was agreed upon in respect of the 5 acres and was paid at the request of the native owners (i.e. the Tokatoka Nadrau) to a war charity.
- p. 48
pp. 1-2
- 6.—In respect of the said 434 acres odd the Crown, at the time of compulsory acquisition, offered the owners, i.e. the Tokatoka Nadrau, the sum of approximately £2,000 by way of compensation, which offer was refused. On the 12th March, 1953, the Appellant issued an Originating Summons under Section 9 of the said Ordinance against the Director of Lands asking the Court to determine the amount of compensation due in respect of the said 434 acres, and four weeks later the Acting Director of Lands by letter dated the 9th April, 1953, agreed that the sum of £7,985 claimed by the Tokatoka Nadrau in respect of the said acquisition, plus interest in the sum of £3,393 ls. 6d. should be paid by way of compensation. 10
- p. 47, Ex. 3
- 7.—On the 7th July, 1953, the Appellant filed in the Court a Notice of an application asking for the Court's approval on behalf of his infant children to the compromise of the action on the terms agreed in the preceding paragraph, for the allocation and payment of the total sum of £11,378 ls. 6d. (that is £7,985 plus £3,393 ls. 6d.) as in the said Notice provided, and for directions. 20
- p. 5
- 8.—On the 26th August, 1953, the Fijian Affairs Board was given leave to appear in the action as *amicus curiae*. Subsequently the said sum of £11,378 ls. 6d. was paid into Court.
- p. 6
- 9.—The Originating Summons came on for hearing before the Chief Justice on the 17th February, 1954 and two issues were framed for the determination of the Court, namely
- (1) Should the capital or any part thereof of the fund in Court be paid 30
to the present members of the Tokatoka Nadrau, and,
- (2) If not, to whom should the same be paid ?
- p. 6-p. 12
pp. 2-4
pp. 38-54
- 10.—At the hearing one witness gave evidence, namely, Ratu Sir Lala Sukuna, who was called by the Fijian Affairs Board (*amicus curiae*), and two affidavits and certain correspondence was put in by the Appellant.
- p. 12-p. 18
p. 18, l. 11
p. 18, l. 32
- 11.—The Chief Justice gave judgment on the 19th March, 1954. He settled the amount of compensation for the land at the agreed figure of £7,985, together with interest at the agreed figure of £3,393 ls. 6d. He directed that the capital sum, after certain deductions, was to be paid to the Public Trustee, to "be held in trust by him for the Tokatoka and 40
"invested by him." The income derived therefrom was to be paid in

equal shares to those members of the Tokatoka living at the time when the payments became due. The sum of £3,393 1s. 6d. was to be paid to the nine present members of the Tokatoka in equal shares.

• RECORD

p. 20, l. 8

In the course of his Judgment the Chief Justice held that, on the evidence of Ratu Sir Lala Sukuna, he could only come to the conclusion that land belonging to a Tokatoka was land in which the existing members of the Tokatoka had only a life interest. He further held that the matter before the Court related to native land and that it was "laid down in the "Native Land Ordinance, Chapter 85, Section 3 that native land was
10 "held by native Fijians according to native customs as evidenced by "usage and tradition."

p. 15, l. 1-

p. 15, l. 21

p. 15, l. 25

He held that the land had been compulsory acquired under the provisions of the Crown Acquisition of Land Ordinance and that as there had been no sale the Native Land Trust Board had no right claim or interest in the sum of money concerned.

p. 16, l. 15

p. 16, l. 20

The Chief Justice further held, contrary to the submission of the Appellant, that the "Rule Against Perpetuities" did not apply, and consequently that the non-payment of the capital sum to the present members of the Tokatoka did not offend against that rule. He held also
20 that the payment of compensation in relation to the compulsory acquisition of some 5 acres of land in 1943 to the members of the Tokatoka was wrongly made and could not be taken as an authority or precedent for payment outright of the sum in question to the present members of the Tokatoka.

p. 17, l. 26

p. 17, l. 45-

p. 18, l. 3

12.—The Appellant appealed by Notice of Appeal dated the 31st March, 1954, against that part of the said Judgment directing payment of the said sum of £7,985 to the Public Trustee.

p. 21

13.—The Judgment of the Court of Appeal (Carew, Macaski and Higginson, JJ.) was delivered on the 16th November, 1954, and included the following passages—

pp. 29-33

30 "Mr. Rice, for the Appellants, contended that the present "members of the Tokatoka Nadrau are entitled now to the "compensation payable by the Government of Fiji. He submitted "that as customary law related only to land and had no application "to money, the Court could not tie up the capital in violation of "the rule against perpetuities.

p. 30, l. 37-

p. 31, l. 26

40 "The first question to be examined is whether the Native "Land Trust Ordinance (Cap. 86) has any application to native "land which is compulsorily acquired through the machinery "of the Crown Acquisition of Land Ordinance (Cap. 122). If the "Native Land Trust Ordinance does apply, then the answer to "the dispute would appear to be provided by Section 15 (2) of "that Ordinance.

RECORD

“ Section 8 of the Native Land Trust Ordinance (Cap. 86) lays down that, with certain exceptions, native land can be alienated only in accordance with that Ordinance.

* * * * *

“ It is not, of course, suggested by either party that a compulsory acquisition of native land constitutes a sale. Mr. Rice, however, urged the view that compulsory acquisition of native land cannot be included in the term ‘ otherwise disposed of ’ employed in Section 8. He argued that a disposition can only be brought about by act of the parties ; that a compulsory acquisition of land does not fall within this description, and that therefore the Native Land Trust Ordinance (Cap. 86) has no application to native land compulsorily acquired. 10

“ The Attorney-General, who appeared for the Crown, contended that having regard to the intention of the Native Land Trust Ordinance (Cap. 86), the words ‘ otherwise disposed of ’ should be given the widest meaning ; that they should accordingly be construed to include a compulsory acquisition of native land ; and consequently the Native Land Trust Ordinance (Cap. 86) should apply. He argued further that if the words ‘ otherwise disposed of ’ were not intended to include a compulsory acquisition then there would be no need to have introduced the first eleven words, namely, ‘ subject to the provisions of the Crown Acquisition of Lands Ordinance ’ into Section 8. 20

* * * * *

p. 31, l. 42-
p. 32, l. 3

“ The fact that Section 8 of the Native Land Trust Ordinance (Cap. 86) provides machinery for the sale, lease or other disposition of native land outside the provisions of the Native Land Trust Ordinance (Cap. 86) does not, it seems to us, alter the character of native land and the incidence attaching to such land. It is still native land and remains, in our opinion, under the control of the Native Land Trust Board until a transfer or acquisition has been finalised. This appears to be recognised by Section 7 of the Native Land Trust Ordinance (Cap. 86). Whether native land is transferred or acquired, this section requires certain procedure to be followed. The section demonstrates that the Native Land Trust Board is the controlling body. 30

* * * * *

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p. 32, l. 28-
p. 33, l. 13

“ Since the words ‘ or acquired by ’ were inserted into Section 7 of the Native Land Trust Ordinance (Cap. 86) by the Crown Lands Ordinance of 1945, by reason of the definition of ‘ Crown Land ’ in that Ordinance, it is clear that the word ‘ acquired ’ in Section 7 includes a compulsory acquisition. ‘ Crown Land ’

“ is defined as including, *inter alia*, ‘ all lands which have been or
 “ ‘ may be hereinafter acquired by or on behalf of Her Majesty
 “ ‘ for any public purpose (including native land acquired under
 “ ‘ Section 4 of the Crown Acquisition of Lands Ordinance) or
 “ ‘ otherwise howsoever.’ In our opinion the words in brackets
 “ are not intended to be restrictive.

10 “ The question then remaining to be determined is whether
 “ the words ‘ otherwise disposed of ’ in Section 8 of the Native
 “ Land Trust Ordinance (Cap. 86) include a compulsory acquisition
 “ of native land. Bearing in mind the purpose of the Ordinance,
 “ namely, the control and administration of all native land by the
 “ Native Land Trust Board for the benefit of the native owners,
 “ we are of the opinion that in order to give effect to this intention
 “ the words ‘ otherwise disposed of ’ ought to be construed to
 “ include a compulsory acquisition of native land.

20 “ If (*Sic*) it is therefore our view that the provisions of the
 “ Native Land Trust Ordinance (Cap. 86), where applicable, must
 “ be invoked in cases of compulsory acquisition of native lands.
 “ The procedure provided by the Crown Acquisition of Lands
 “ Ordinance (Cap. 122) is subordinate and additional to, but does
 “ not displace, the provisions of the Native Land Trust Ordinance
 “ (Cap. 86).

30 “ The Crown Acquisition of Lands Ordinance (Cap. 122)
 “ contains no provisions concerning the method of payment of
 “ money to the owners of native land : the Native Land Trust
 “ Ordinance (Cap. 86), on the other hand, does contain such
 “ provision. Section 15 (2) of this Ordinance contains the
 “ necessary directions. This section refers to ‘ purchase money
 “ ‘ received in respect of a sale or disposition of native land.’
 “ Having regard to the circumstances, we consider that the
 “ expression ‘ purchase money ’ should be read to include
 “ compensation.

“ For these reasons we consider that the proper body to
 “ receive the capital sum now in Court is the Native Land Trust
 “ Board.”

14.—For the above reasons the Court of Appeal varied the Judgment p. 33, l. 14
 of the Chief Justice by ordering that the payment of the sum of £7,985
 should be made to the Native Land Trust Board (Intervener).

40 15.—On 21st January, 1955, Leave to Appeal to Her Majesty in Council p. 36
 was granted by the Court of Appeal.

By Order dated 22nd March, 1956, Her Majesty in Council granted p. 37
 leave to the Native Land Trust Board to intervene in this Appeal.

16.—The Appellant humbly submits that this Appeal should be allowed
 with costs for the following amongst other

REASONS

1. BECAUSE the sum of £7,985 should have been paid to the members of the Tokatoka Nadrau.
2. BECAUSE the Native Land Trust Ordinance has no application.
3. BECAUSE the payment of the capital sum to the Native Land Trust Board offends against the "Rule against Perpetuities."
4. BECAUSE the transaction was a compulsory acquisition of land under the Crown Acquisition of Land Ordinance (Ch. 122) 10 and does not come within the phrases "otherwise disposed of" or "other disposition" in Sections 8 and 15 as amended of the Native Land Trust Ordinance (Ch. 86).
5. BECAUSE the expression "purchase money" in Section 15 as amended of the Native Land Trust Ordinance does not include compensation payable in respect of a case of compulsory acquisition.
6. BECAUSE the word "acquired" in Section 7 of the Native Land Trust Ordinance (Ch. 86) as amended does not apply to a case of compulsory acquisition. 20
7. BECAUSE there are no statutory provisions authorising the payment of the said compensation to the Native Land Trust Board.
8. BECAUSE the Judgment of the Court of Appeal was wrong.

PHINEAS QUASS, Q.C.

BIDEN ASHBROOKE.

ANNEXURE OF ORDINANCES

NATIVE LANDS ORDINANCE CH. 85.

Sec. 3. Native lands shall be held by native Fijians according to native customs as evidenced by usage and tradition. Subject to the provisions hereinafter contained such lands may be cultivated, allotted and dealt with by native Fijians as amongst themselves according to their native customs and subject to any Regulations made by the Fijian Affairs Board and approved by the Legislative Council, and in the event of any dispute arising for legal decision in which the question of the tenure of land amongst native Fijians is relevant all courts of law shall decide such disputes according to such Regulations or native customs and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon.

NATIVE LAND TRUST ORDINANCE CH. 86.

Sec. 2. In this Ordinance, if not inconsistent with the context—

“ native grant ” means a grant of land by native owners ;

“ native land ” means land which is neither Crown land nor the subject of a Crown or native grant but includes land granted to a mataqali under Section 19 of this Ordinance ;

“ native owners ” means the mataqali or other division or subdivision of the natives having the customary right to occupy and use any native land.

Sec. 3. (1) There is hereby established for the purposes of this Ordinance a Board of Trustees called the Native Land Trust Board which shall consist of—

The Governor as President.

The Secretary for Fijian Affairs.

The Director of Lands.

One native member nominated by the Governor.

The Director of Agriculture.

(Amended by 16 of 1943, s. 2.)

Sec. 5. (1) The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the native owners.

Sec. 6. (1) Native land shall not be alienated by native owners whether by sale, grant, transfer or exchange except to the Crown, and shall not be charged or encumbered by native owners, and any native Fijian to whom any land has been transferred heretofore by virtue of a native grant shall not transfer such land or any estate or interest therein or charge or encumber the same without the consent of the Board.

Sec. 7. When any native land has been transferred to the Crown a certificate shall be executed in such form as may be prescribed. Such certificate shall contain a diagram of the land to be comprised therein on such scale as may be prescribed and shall be executed by the Board under seal on behalf of the native owners and by the Director of Lands on behalf of the Crown. A record of such transfer shall be made in the "Register of Native Lands" kept under the provisions of Section 7 of the Native Lands Ordinance.

Sec. 8. Subject to the provisions of the Crown Acquisition of Lands Ordinance, the Forest Ordinance, the Oil Mines Ordinance and the Mining Ordinance, no native land shall be sold, leased or otherwise disposed of and no licence in respect of native land shall be granted save under and in accordance with the provisions of this Ordinance. 10

Sec. 15. (As amended by the Native Land Trust Amendment Ordinance Ch. 30 of 1945, Section 9.)

(1) Rents and premiums received in respect of leases or licences in respect of native land shall be subject to a deduction of such amount as the Board may from time to time determine not exceeding nineteen per centum of such rent or premium, which shall be payable to the Board as and for the expenses of collection and administration, and the balance thereof shall be distributed in the manner prescribed. 20

(2) The purchase money received in respect of a sale or other disposition of native land shall, after deduction therefrom of any expenses incurred by the Board in respect of such sale or other disposition, be either distributed in the manner prescribed or invested and the proceeds so distributed as the Board may decide.

Sec. 32. The Governor in Council may make regulations not inconsistent with this Ordinance prescribing all matters which are required or are permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance, 30

NATIVE LAND (LEASES AND LICENCES) REGULATIONS.

(Made under Section 32 of the Native Land Trust Ordinance Ch. 86.)

Reg. 3. (1) Ten per centum shall be deducted as and from the expenses of collection and administration from all sums of money received for rents of and premiums in respect of leases or licences of native land and shall be paid to general revenue :

Provided that in the case of the premium obtained from the sale of a lease the actual disbursements on account of the sale shall be deducted in full. 40

The following shall be the division of every sum of twenty shillings of the balance remaining—

- (a) to the funds of the province wherein the land is situated, one shilling ;
- (b) to the buli of the tikina wherein the land is situated, one shilling ;
- (c) to the turaga i taukei, if any, one shilling ;
- (d) to the chief of the qali, two shillings ;
- (e) to the chief of the mataqali, three shillings ;
- (f) to the mataqali, the balance of the sum :

10 Provided that when a mataqali is subdivisible into persons or bodies of persons known by the Fijian term tokatoka, and such tokatoka is the owner of the land leased, the balance of such sum instead of being paid to the mataqali, as above provided, shall be distributed equally among the members of such tokatoka.

(2) The purchase money received in respect of a sale or other disposition of native land shall, unless the Board decides that it shall be invested and the proceeds distributed in some other way, be distributed in the manner set out in the preceding sub-regulation for the distribution of the balance of rents and premiums.

20 CROWN ACQUISITION OF LANDS ORDINANCE CH. 122.

Sec. 3. The Governor may acquire any lands required for any public purpose for an estate in fee simple or for a term of years as he may think proper, paying such consideration or compensation as may be agreed upon or determined under the provisions of this Ordinance.

30 Sec. 9. If at the expiration of three months from the service and publication as aforesaid of such notice no claim shall have been lodged with the Director of Lands in respect of such lands, or if the person who may have lodged any claim and the Governor shall not agree as to the amount of the compensation to be paid for the estate or interest in such lands belonging to such person, or if such person has not given satisfactory evidence in support of his claim, or if separate and conflicting claims are made in respect of the same lands, the amount of compensation due, if any, and every such case of disputed interest or title, shall be settled by the Court, which shall have jurisdiction to hear and determine in all cases mentioned in this section upon an originating summons taken out by the Director of Lands or any person holding or claiming any estate or interest in any land named in any notice aforesaid.

40 Sec. 11. The Registrar of Titles shall upon presentation to him of a certified copy of any judgment or order of the Court made under the provisions of Section 9 hereof register the Crown as proprietor and issue a certificate of title according to the judgment or other in the name of the Director of Lands.

CROWN LANDS ORDINANCE NO. 15 OF 1945. (1st August, 1946.)

Sec. 2. In this Ordinance, unless the context otherwise requires—

“ Crown land ” means all public lands in the Colony, including fore-shores and the soil under Colonial waters, which are for the time being subject to the control of His Majesty by virtue of any treaty, cession or agreement, and all lands which have been or may be hereafter acquired by or on behalf of His Majesty for any public purpose (including native land acquired under Section 4 of the Crown Acquisition of Lands Ordinance) or otherwise howsoever.

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Sec. 44. (2) The Ordinance set out in Part II of the Schedule hereto is hereby amended to the extent specified in the third column thereof.

PART II.

AMENDMENT.

<i>Chapter.</i>	<i>Short Title.</i>	<i>Amendment.</i>
Cap. 86	Native Land Trust Ordinance	By the insertion in line 1 of Section 7 immediately after the word “ to ” of the words “ or .acquired by”.

In the Privy Council.

No. 30 of 1955.

ON APPEAL FROM THE FIJI COURT OF APPEAL.

BETWEEN

RATU TAITO NALUKUYA
(*Plaintiff*) APPELLANT

AND

THE DIRECTOR OF LANDS
(*Defendant*)

AND

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BOARD (*Amicus Curiae*) RESPONDENTS

AND

THE NATIVE LAND TRUST
BOARD OF FIJI ... INTERVENER

CASE FOR THE APPELLANT

AND

ANNEXURE OF ORDINANCES

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