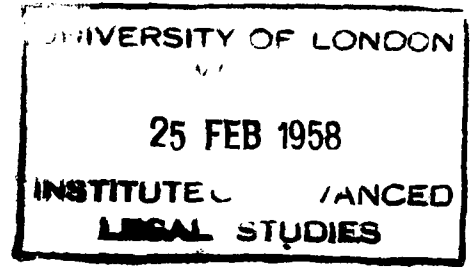


In the Privy Council.

ON APPEAL  
FROM THE FIJI COURT OF APPEAL.



BETWEEN—

RATU TAITO NALUKUYA (Plaintiff) *Appellant*

— AND —

THE DIRECTOR OF LANDS (Defendant) and  
THE NATIVE AFFAIRS BOARD  
(Amicus Curiae) *Respondents*

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— AND —

THE NATIVE LAND TRUST BOARD OF FIJI  
*Intervener.*

**CASE FOR THE INTERVENER.**

RECORD.

1. This is an Appeal by leave of the Fiji Court of Appeal from an order made on the 16th day of November, 1954, by the Fiji Court of Appeal (Carew, Macaskie and Higginson JJ.) setting aside an order of the Supreme Court of Fiji (Ragnar Hyne C.J.) made on the 19th day of March, 1954.

p. 36.  
p. 33, ll. 14-19,  
28-33.  
pp. 19, 20.

20 2. In 1944 approximately 434 acres of land were compulsorily acquired from the Tokatoka Nadrau by the Government of Fiji pursuant to the Crown Acquisition of Lands Ordinance (Chapter 122). Compensation in the capital sum of £7,985 0s. 0d. together with £3,393 1s. 6d. by way of interest thereon was agreed to be paid in respect thereof.

Annex A  
hereto.  
p. 47.

3. The issues before the Supreme Court were:—

p. 6, ll. 23-27.

(i) Should the capital or any part thereof of the fund in Court be paid to the present member of the Tokatoka Nadrau? and

(ii) If not, to whom should the same be paid?

4. The main questions considered by the Supreme Court in giving judgment on these issues were:—

Annex B  
hereto.

(a) Has the Native Land Trust Ordinance (Chapter 86) any application to native land which is compulsorily acquired through the machinery of the Crown Acquisition of Land Ordinance?

Annex B  
hereto.

By Section 3 of the Native Land Trust Ordinance a Board of Trustees called the Native Land Trust Board was established and by Section 5 of that Ordinance the control of all native land was vested in the Board to be administered by the Board for the benefit of the native owners. Section 6 of the Ordinance provides that "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." It is further provided by Section 8 that "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." Provision is made by Section 15 of the Ordinance for the distribution in the manner prescribed of rents and premiums received in respect of leases and licences in respect of native land and for the purchase money received in respect of a sale or other disposition of native land either to be distributed in the manner prescribed or invested, the proceeds to be distributed as the Board may decide. The Governor in Council is empowered by Section 32 of the Ordinance to make Regulations prescribing all matters which are required or are permitted to be prescribed. The Native Land (Leases and Licences) Regulations were made by the Governor in Council pursuant to this Section.

Annex C  
hereto.

The Supreme Court decided that the provisions of this Ordinance did not apply to the compulsory acquisition of native land, the judgment of the Supreme Court reading as follows:—

p. 16, ll. 13-23.

"There has been considerable argument as to whether this was a sale or an acquisition. There can be no doubt, I think, that it was a compulsory acquisition as the land was acquired under the provisions of the Crown Acquisition of Lands Ordinance, Chap. 122. Sale can only be effected under the Native Land Trust Ordinance, and the provisions of this Ordinance were not invoked. If there had been a sale under this Ordinance—and native land can now only be sold to the Crown—then the Native Land Trust Board would receive the purchase

“money. There was no such sale, and the Native Land Trust Board has no right claim or interest in the money. The compensation money cannot therefore be paid to the Native Land Trust Board.”

(b) What interest have the native owners in land vested in them?

Section 3 of the Native Lands Ordinance (Chapter 85) provides that “Native lands shall be held by native Fijians according to native customs as evidenced by usage and tradition.” The Section further provides that “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 . . . native customs and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereon.”

Annex D  
hereto.

The only evidence heard by the Supreme Court was that of Ratu Sir Lala Sukuna, Chairman of the Native Lands Commission, to the following effect. Native land is communally owned and is vested absolutely in the native owners. The owning unit was originally the mataqali but eventually to tokatoka, a sub-division of the mataqali, was accepted as the owning unit. The members of a tokatoka have only a life-interest in the land, resembling an entailed interest. If a tokatoka becomes extinct, the land goes to the mataqali to which the tokatoka belongs. Prior to 1875, some Fijians owned land personally either by conquest or first settlement: there were also gifts of small parcels of land. Prior to the Deed of Cession, 1875, land was alienated by the natives in return for guns, clothing, etc., but this was done in breach of custom and there can be no such alienation of native land now. The definition of native owners in the Ordinance correctly described their rights in native land.

p. 6, l. 31.  
p. 9, l. 18.  
p. 7, l. 4.  
p. 7, ll. 4-12.  
p. 7, ll. 16-18.  
  
p. 9, ll. 24-25.  
p. 8, ll. 34-36.  
p. 9, ll. 3-5.  
p. 8, ll. 23-31.  
p. 9, l. 6.  
p. 9, ll. 9, 24.  
p. 7, ll. 19-20.

On this issue, the Supreme Court held that “land belonging to a tokatoka is land in which the existing members of the tokatoka have only a life interest. It is land granted to them for their occupation and use and it cannot be alienated except with the permission of the Native Land Trust Board. It is a well-known fact that the only form of alienation, if alienation it can be termed, which at present exists in relation to native land is alienation by way of lease, the ownership of the land remaining in the owning unit . . . it seems to me to be abundantly clear that the members of a land-owning unit have only a life interest in the land and that the land is held in perpetuity by successive members of the tokatoka. A tokatoka cannot therefore be said to be holder of the land in fee, nor indeed are they described in the proclamation as such. They are merely referred to as ‘recorded owners’ and ‘owners’.”

Annex B  
hereto.  
p. 15, ll. 2-9.

p. 15, ll. 19-24.

Annex D  
hereto.

(c) Does this dispute relate to native land to be governed by native custom in accordance with Section 3 of the Native Lands Ordinance?

p. 15, l. 25.

p. 15, l. 38.

p. 15, ll. 41-44.

The Supreme Court held that this matter related to native land and that there was nothing but native custom to guide the Court in determining the disposal of the compensation monies. After holding that the Tokatoka Nadrau was entitled to the compensation monies in lieu of the land, the judgment of the Court continued:—

p. 15, ll. 44-50.

p. 16, l. 1-4.

“This money does not, in my view, belong absolutely to the present members of the Tokatoka. Can it be argued that because the property of the owning unit has been changed from land to money the rights of succeeding members of the owning unit are absolutely extinguished? I do not think so. Succeeding generations in the Tokatoka must have an interest in this money as they would have had in the land if it had not been acquired by the Crown and I cannot agree therefore that members to come of this Tokatoka can be deprived of their interest in the compensation granted; and the only way in which an interest can be reserved to them is by the investment of the capital sum of £7,985 . . . .”

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(d) Would non-payment of the capital monies to the present members offend against the rule against perpetuities?

p. 17, l. 28.

p. 16, ll. 43-49.

p. 17, ll. 1-26.

The Supreme Court held that the rule against perpetuities did not apply to this matter and cited the case of *Cooper v. Stuart* (1899) 14 A.C. 286.

(e) To whom should the monies be paid for investment and to whom and in what manner should the income therefrom be paid?

p. 18, ll. 32-41.

p. 19.

The Supreme Court ordered that the capital monies should be paid to the Public Trustee for investment, the income therefrom to be paid at half-yearly intervals to the members of the Tokatoka Nadrau in equal shares.

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p. 21.

pp. 29-33.

p. 33, ll. 14-19.

5. From the judgment and order of the Supreme Court the Appellant appealed to the Fiji Court of Appeal and by the judgment of the Court of Appeal the order of the Supreme Court was set aside and it was ordered that the capital sum should be paid to the Native Land Trust Board to be applied by the Board in accordance with the provisions of the Native Land Trust Ordinance.

Annex B  
hereto.

p. 32, ll. 6-8.

Annex B  
hereto.

6. The Court of Appeal reached this decision after holding that the Native Land Trust Ordinance applied in respect of land compulsorily acquired through the machinery of the Crown Acquisition of Land Ordinance. Section 8 of the Native Land Trust Ordinance provides that

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subject to the provisions of the Crown Acquisition of Lands Ordinance, no native land shall be sold, leased or otherwise disposed of save under and in accordance with the provisions of this Ordinance. The Court held that the term "or otherwise disposed of" in the Section was sufficiently wide to include a compulsory acquisition and cited the case of *Duke of Northumberland and Another v. Attorney-General* (1905) A.C. p. 406.

p. 32, ll. 38-45.

p. 31, ll. 27-35.

Annex B  
hereto.

p. 31, ll. 42-49.

p. 32, ll. 1-37.

10 Further, the fact that Section 8 of the Ordinance provides machinery for the sale, lease or other disposition of native land outside the provisions of the Native Land Trust Ordinance did not alter the character of native land and the incidence attaching to such land. It remained native land and under the control of the Native Land Trust Board until transfer or acquisition had been finalised. That this was so appeared from Section 7 of the Ordinance which provides for the execution of a certificate when native land is transferred to or acquired by the Crown. Although Section 11 of the Crown Acquisition of Land Ordinance also makes provision for the execution of such certificates, this Section on its proper construction did not displace the provisions of Section 7. Finally, the Court held that the procedure provided by the Crown Acquisition of Land Ordinance did not displace but was subordinate to the provisions of the Native Land  
20 Trust Ordinance.

Annex B  
hereto.Annex A  
hereto

p. 32, l. 49.

p. 33, ll. 1-3.

Having decided that the Native Land Trust Ordinance was applicable to the compulsory acquisition of native land, the Court of Appeal considered it unnecessary to express any opinion upon the other points raised in the Appeal, but drew the attention of the Native Land Trust Board to the cases of *Amodu Tijani v. The Secretary Southern Nigeria* (1921) 2 A.C. p. 309, and *Sakariyawo Oshodi v. Mariamo Dakolo and Others* (1930) A.C. p. 667.

p. 33, ll. 20-22.

p. 33, ll. 23-27.

7. The following submissions are respectfully made on behalf of the Intervener.

30 (1) Native land is vested in the tokatoka as a whole to be held in perpetuity for the benefit of present and succeeding members of the tokatoka. Present members of the tokatoka only have a life-interest in the land and the land is inalienable by them save to the Crown and in accordance with the Native Land Trust Ordinance.

(2) The provisions of the Native Land Trust Ordinance apply in respect of the compulsory acquisition of native land.

(3) The rule against perpetuities does not apply in respect of transactions in relation to native land or the compensation monies payable in respect thereof.

40 (4) The capital sum of £7,985 0s. 0d. should be paid to the Native Lands Trust Board to be applied in accordance with the provisions of the Native Land Trust Ordinance and the relevant Regulations made thereunder.

8. The Intervener therefore respectfully submits that the Judgment of the Fiji Court of Appeal should be affirmed and the Appeal should be dismissed with costs, for the following amongst other

**REASONS**

1. BECAUSE the intervener is entitled to be paid the capital sum of £7,985 to be applied in accordance with the provisions of the Native Land Trust Ordinance and the relevant Regulations made thereunder.
2. BECAUSE the provisions of the Native Land Trust Ordinance apply in respect of the compulsory acquisition of native land. 10
3. BECAUSE the members of a tokatoka have only a life-interest in native land and cannot alienate the same save to the Crown and in accordance with the provisions of the Native Land Trust Ordinance.
4. BECAUSE the rule against perpetuities has no application in respect of transactions relating to native lands or the compensation monies payable in respect thereof.
5. FOR the reasons given by the Fiji Court of Appeal.

WILLIAM E. DENNY 20

**ANNEX**

**A.**

**CROWN ACQUISITION OF LANDS ORDINANCE, CHAPTER 122.**

**SECTION 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.

**SECTION 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.

**SECTION 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 order in the name of the Director of Lands.

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**B.**

**NATIVE LAND TRUST ORDINANCE, CHAPTER 86.**

**SECTION 2.** In this Ordinance, if not inconsistent with the context—  
“Native owners” means the mataqali or other division or subdivision of the natives having the customary right to occupy and use any native land. . . .

**SECTION 3.** (1) There is hereby established for the purposes of this Ordinance a Board of Trustees called The Native Land Trust Board. . . .

**SECTION 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.

. . . . .

SECTION 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.

SECTION 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.

SECTION 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.

SECTION 15. Rents and premiums received in respect of leases or licences in respect of native land shall be subject to a deduction of ten per centum, which shall be payable to general revenue as and for the expenses of collection and administration, and the balance thereof shall be distributed in the manner prescribed, and the purchase money received in respect of a sale or other disposition of native land shall either be distributed in the manner prescribed or invested and the proceeds so distributed as the Board may decide:

. . . . .

SECTION 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. . . .

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**C.**

**NATIVE LAND (LEASES AND LICENCES) REGULATIONS.**

SECTION 3. (1) Ten per centum shall be deducted as and for 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.

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:

Provided that when a mataqali is sub-divisible 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.

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**D.**

NATIVE LAND ORDINANCE, CHAPTER 85.

SECTION 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.

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No. 30 of 1955.

In the Privy Council.

**ON APPEAL**  
FROM THE FIJI COURT OF APPEAL.

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BETWEEN—

**RATU TAITO NALUKUYA**

— AND —

**THE DIRECTOR OF LANDS and  
THE NATIVE AFFAIRS BOARD**

— AND —

**THE NATIVE LAND TRUST BOARD OF  
FIJI.**

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**CASE**

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