IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0051 OF 2007
(High Court Judicial Review 5 of 2003)

BETWEEN : THE NATIVE LAND TRUST BOARD

Appellant

A N D: MANOA RATINAISIWA

Respondent

Coram: **Byrne, AP**
Pathik JA
Calanchini, JA

Date of Hearing : 10 March 2010

Counsel : Mr S Valenitabua for Appellant
Mr N Nawaikula for Respondent

Date of Judgment: 21 October 2010

JUDGMENT OF THE COURT

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[1] This is an appeal against a decision of the High Court (Singh J) handed down on 2 April 2004. The Court quashed the decisions of the Native Reserves Commission and the Native Land Trust Board made on 20 November 2002 and 17 December 2002 respectively assigning ownership of land to the

Yavusa Yanawai in judicial review proceedings under Order 53 of the High Court Rules (as amended). The application for judicial review had been commenced by the Respondent for and on behalf of himself and on behalf of the Yavusa Naisamuwaqa.

[2] The Hon. Mr Justice Pathik has retired. On 24 September 2010 the parties indicated to the Court that they consented to the two remaining members of the Court hearing the appeal to give judgment.

[3] The land in question is described in the Register of Native Lands Volume 10 Folio 1019 as being 368 acres situated in the district of Wailevu West in the Province of Cakaudrove being more particularly described as the land delineated and marked as Lot 13 on plans E/5, 4 and F/1, 3. Under the title the land was registered to the Mataqali Navisoi of the Yavusa Yanawai. Ownership of the land had been determined by the Native Lands Commission (third respondent in the Court below) as a result of its inquiries into customary ownership of native land at its sittings held at Valeni Wailevu West on 24 November 1923.

[4] It was not disputed that the Mataqali Navisoi had become extinct some years later. There was no indication in the judgment nor in the affidavit material as to when mataqali membership had become extinct.

[5] Be that as it may, it was also not disputed that the land that had been registered to the mataqali became subject to section 19 of the Native Land Trust Act Cap 134 (the Act).

Section 19 (1) states:

> ***"(1) If any mataqali shall cease to exist by the extinction of its members its land shall fall to the (State) as ultimus haeres to be allotted to the qali of which it was a part or other division of the people which may apply for the same or to be retained by the***

(State) or dealt with otherwise upon such terms as the Board may deem appropriate."

[6] Section 19 (2) to (5) provide for reporting, notices and claims in respect of the land and persons claiming to be surviving mataqali members.

[7] Section 19 (6) then states:

"If no notice of objection as provided for in subsection (4) is received by the Board or if such objection having been duly made is disallowed, the Board may make an order in the form prescribed and such order shall on presentation to the Registrar of Titles be filed by him and the land shall be deemed to be (State) land for all purposes."

[8] By Proclamation No. 4 of 1992 dated 4 May 1992 pursuant to powers conferred on him by section 18 of the Native Land Trust Act the President set aside for the use maintenance and support of Yavusa Naisamuwaqa the land that had been formerly registered to the extinct mataqali Navisoi and which by virtue of section 19 had become State land "for all purposes".

[9] Section 18 (1) states:

"If the (President) is satisfied that land belonging to any mataqali is insufficient for the use, maintenance or support of its members it shall be lawful for the (President) by proclamation to set aside such (State) land ... as in his opinion may be required for the use maintenance or support of such mataqali. Any area so set aside shall be deemed to be a native reserve."

[10] In the Proclamation it is clearly stated that the land set aside for the use maintenance and support of the Yavusa Naisamuwaqa is State land in the Tikina of Wailevu West in the Province of Cakaudrove.

[11] It would appear that the allotment to the Yavusa Naisamuwaqa was not recorded in the Register of Native Lands.

[12] By a letter dated 3 January 2002 the Mataqali Vunibua requested the Yavusa Naisamuwaqa to allow the Mataqali to have the use and occupation of the extinct Mataqali Navisoi land, i.e. the land the subject of the Proclamation dated 4 May 1992.

[13] By letter dated 4 January 2002 the Cakaudrove Provincial Council passed a copy of the Mataqali Vunibua's request to the Native Lands Commission. Also enclosed was a copy of a letter confirming the consent of the Yavusa Naisamuwaqa to the request that the subject land that formerly belonged to the extinct mataqali Navisoi should be reserved for the Mataqali Vunibua.

[14] By letter dated 12 August 2002 the Native Land Trust Board (the Appellant) wrote to the Cakaudrove Province advising that:

> ***"I want to confirm to you the result of our visit with Assistant Roko Meli Namasi to yavusa Yanawai and yavusa Naisamuwaqa of Dawara Village of 6 August 2002.***
>
> ***You will know that there is a dispute relating to land belonging to extinct mataqali Navisoi Lot 13 F/5, 4; F/1, 3 that is currently reserved under yavusa Naisamuwaqa. According to the recommendation of former Native Reserve Commission Ian Thompson in 1962. The reserve claim was made by mataqali Vunibua but reservation is currently under yavusa Naisamuwaqa.***
>
> ***At the meeting at Dawara on 6 August 2002 I have confirmed to those who are present of both yavusa's that there will be a change on the reservation status of the land, which is to be reserved only for mataqali Vunibua.***
>
> ***I have also explained on that date that the reservation will mean that they will only have the***

right for use and occupation but that they will not be entitled to receive any rent."

[15] By a letter dated 14 September 2002 the yavusa Naisamuwaqa replied to the Appellant protesting its plan for the land. Not all the letter is relevant to this appeal, but the following extract is of interest:

> ***"The above piece of land comprising 368 acres was reserved for yavusa Naisamuwaqa of Wailevu West, Cakaudrove vide Fiji Gazette Proclamation No. 14 dated 4 May 1992 ....***
>
> ***....***
>
> ***The interpretation by the Native Land Trust Board back in 1992 on the strength of the Proclamation was that the affected land has to be allotted to the yavusa Naisamuwaqa as the land owning unit.***
>
> ***The Native Land Trust Board went on to issue a lease over part of the same piece of land to Mount Kasi Limited by dereserving the affected portions. The consent to the dereservation was signed by members of the Yavusa Naisamuwaqa as landowners. Yavusa Naisamuwaqa was receiving all the rental income from the said land since the commencement of the lease.***
>
> ***The original RNL (Register of Native Land) at the Native Land Commission office shows that the said land was owned by mataqali Navisoi, yavusa Yanawai of Dewara Village. Navisoi was reported extinct and the land was reverted to the state. Under reserve claim 40 of 1962 – the Turaga ni Yavusa Naisamuwaqa claimed that piece of land on behalf of mataqali Vunibua. The reserve commissioner recommended that the land be reserved for the Yavusa Naisamuwaqa instead.***
>
> ***The Yavusa Naisamuwaqa traditionally approached the Yavusa Yanawai and completed all ceremonial attachment including the "magiti" before occupying the said land.***
>
> ***....***

Yavusa Naisamuwaqa is the other division of the people (under section 19) whom the state has allotted the land by proclamation under section 18 (1) of the Native Land Trust Act.

We are advised by the Commissioner of Reserves – NLTB that the Board will be reverting ownership of the said land to Yavusa Yanawai, A meeting will be shortly called at Dawara Village to formalise the change.

While we appreciate your decision to return the land to the original "Qali", the motive behind the sudden change is questionable. We are surprised and concerned that we were not consulted fully on this important matter.

...."

[16] By letter dated 1 October 2002 the Commissioner of Reserves – NLTB replied in the following terms:

"....

Following a meeting at Dawara Village on Thursday 6 August 2002 of members of Yavusa Yanawai and Yavusa Naisamuwaqa with the Reserves Commissioner it has been decided that a new formal Reserves Commission inquiry will have to be conducted in future to confirm the change required for the reserve on land belonging formerly to extinct mataqali Navisoi Yavusa Naisamuwaqa to Mataqali Vunibua.

I also wish to confirm that reserves as specified under section 18 of the Native Lands Trust Act vest only usage rights to the land and that full ownership rights will be deemed vested in the Yavusa or Mataqali once the Board has informed NLC for the allotment to be registered in the Register of Titles Office."

[17] It would appear that the further inquiry by the Reserves Commission was conducted on 20 November 2002. It also appears not to be disputed that

when the inquiry sitting took place at Dawara on 20 November 2002 there was no objection raised by the members of Yavusa Naisamuwaqa. It is not clear how many, if any, members of the yavusa were present. It is clear, however, that adequate notice of the inquiry had been given to all interested parties through local media.

[18] As a result of the inquiry, the Reserves Commission made a recommendation to the Appellant which was subsequently endorsed by the Appellant's Board. The recommendation was to confirm the initial decision taken on 6 August 2002 since there were no objections expressed at the inquiry conducted on 20 November 2002. A resolution of the Appellant's Board on 17 December 2002 confirmed that the land in question was to be assigned to the Yavusa Yanawai

[19] The Respondent sought judicial review of the decisions. On page 13 of the Record the decision in respect of which relief is sought was stated as:

> ***"The Applicant brings this application to judicially review the decision of the 1st (Native Reserves Commission) and 2nd (Native Land Trust Board) Respondents respectively whereby the 1st and 2nd Respondents decided to assign the customary ownership of (the land) belonging to the Applicant's yavusa, being Yavusa Naisamuwaqa, to Yavusa Yanawai."***

[20] On page 20 of the Record in its statement filed pursuant to Order 53 Rule 2, the Respondent stated the decision subject to judicial review as:

> ***"The application for Judicial Review is being made in respect of the decision whereby the 1st Respondent (Native Reserves Commission) on 20 November 2002 purportedly assigned the ownership of the Plaintiff's land to Yavusa Yanawai and whereby the 2nd Respondent (Native Land Trust Board) on 17 December 2002 endorsed the decision of the 1st Respondent ."***

[21] The Respondent challenged the decision or decisions on the basis of (a) the Wednesbury principle of being unreasonable, (b) no reasons provided, (c) exceeding jurisdiction (d) bias and denial of natural justice and (e) breaching the applicant's legitimate expectations.

[22] By way of relief the Respondent sought a total of 16 declarations and/or orders.

[23] The learned judge found that the Commission made an error of law in concluding that the Proclamation of 1992 only granted usage rights to the applicant and no more and therefore the Commission could re-allocate the land. As a result he ordered that certiorari to issue to quash the decision of the Commission made on 20 November 2002 and the decision of the Appellant made on 17 December 2002 to assign the customary ownership of the land to Yavusa Yanawai.

[24] The learned judge approached the application as involving a central issue being whether the Proclamation dated 4 May 1992 vested customary ownership to the Respondent's Yavusa or only usage rights. He noted that the decision taken by the Native Reserves Commission to assign customary ownership of the land to the Yavusa Yanawai following the inquiry on 20 November 2002 was the trigger for the challenge.

[25] The learned judge rejected the claim that the Respondent had not been given an opportunity to be heard.

[26] The judge noted that a proclamation by the President under section 18 could only be made in respect of state land. The land in question had become State land by operation of section 19. The extinct mataqali land had passed to the State as ultimus haeres (ultimate heir).

[27] The learned judge also noted that under the Proclamation the land when set aside for usage maintenance and support of the Yavusa Naisamuwaqa was

deemed to be a native reserve. Under the Act a native reserve is native land that has been gazetted as such and the effect of which is to place restrictions on its alienation by way of lease or licence. By virtue of the definition of native land in section 2 of the Act, the extinct mataqali land which prior to the Proclamation had been State land by virtue of section 19 of the Act, as a result of the grant to the yavusa Naisamuwaga under the Proclamation had become first native land and then a native reserve.

[28] However the crucial question remains unanswered. Did the setting aside of the land as a native reserve for use maintenance and support constitute a grant of ownership to the Yavusa Naisamuwaqa? The learned judge concluded that the proclamation had the effect of passing the ownership to the proprietary unit in the traditional customary sense of ownership.

[29] In reaching this conclusion His Lordship was fortified by the arrangements concerning a 1997 lease over part of the land. The lease was between the Appellant and Mount Kasi Limited. The lease indicated that the Yavusa Naisamuwaqa owned the land. The lessee made certain payments direct to the yavusa Naisamuwaqa and the Appellant made lease payments to the same yavusa. His Lordship took the view that such payments were evidence of ownership rights and not merely usage rights to the land.

[30] The Appellant now appeals to this Court and seeks an order that the High Court judgment be set aside and/or quashed. The grounds of the appeal are:

> ***"1. The learned judge of the High Court erred in law in holding that the Presidential Proclamation of 4 May 1992 confirmed ownership rights over native land (the land) to the Yavusa Naisamuwaqa. In law such a Presidential proclamation only conferred "use, maintenance and support rights" over native land and State land including the land subject to this Appeal.***

2. ***The learned judge of the High Court erred in law in holding that the ownership of the subject land had been assigned to the Yavusa Naisamuwaqa by the said Presidential proclamation when in law the land ought to have been assigned or allotted to the qali of which the extinct owners were part. The offer of first refusal ought to have been given to the Yavusa Yanawai which is the qali the extinct owners, Mataqali Navisoi, were part of.***

3. ***The learned judge of the High Court erred in law in holding that section 18 of the Native Land Trust Act Cap 134 has the effect of passing ownership of State land to a proprietary unit for which such land is set aside for its use, maintenance or support".***

[31] The appeal raises two issues. First the meaning and application of section 19 and 18 (in that order) of the Act. Secondly, whether the setting aside of state land for use maintenance and support of a grouping pursuant to a Presidential Proclamation under section 18 amounts to native ownership of what then becomes a native reserve.

[32] We propose to first consider the relevant provisions of the Act. Upon a careful reading of section 19, we have concluded that the section is intended to operate in the manner which we now describe.

[33] The purpose of the section is to prescribe what should happen in the event that a landowning mataqali ceases to exist as a result of the extinction of its members. When that occurs the ownership vacuum is filled by the State as ultimate heir. However at that stage the classification of the land as native land has not changed. The ownership vacuum is filled as a matter of law at that point when there are no longer any members of the landowning mataqali alive.

[34] That position becomes formalized when the Board (meaning the Native Land Trust Board) has received a report from the Native Lands Commission to the effect that a mataqali has ceased to exist by the extinction of its members with a description of the land and confirming that in consequence of such the said land falls to the State as ultimate heir. However even upon receipt of this report by the Board, the classification of the land as native land has not changed.

[35] Upon receipt of the report from the Native Lands Commission, the land may be (a) allotted by the Board to the qali of which the extinct mataqali was a part, (b) allotted to another division of the people which may apply for the same, (c) retained by the State or (d) dealt with otherwise upon such terms as the Board may deem expedient.

[36] In determining what approach should be taken in respect of the land, the Board is required, whenever it has received a report from the Native Lands Commission, to direct a notice in the prescribed form in the Gazette and in a newspaper published in the Fijian language and circulating in Fiji. The notice is to be copied to the roko tui of the province in which any part of the land is situated. The form of the notice is set out as Form 3 in the Schedule to the Native Land (Miscellaneous Forms) Regulations as:

> ***"Notice of Extinction of Mataqali"***
>
> ***Notice is hereby given that (the Native Lands Commission) has reported under section 19 (2) of the Native Land Trust Act that the mataqali ... owner of that portion of land containing ... has ceased to exist by the extinction of its members.***
>
> ***Any person desirous of showing that the said mataqali has not ceased to exist may give notice of objection in writing to the Native Land Trust Board within three months of the publication of this Notice."***

The notice is published in the name of the Secretary to the Board.

[37] The Board is required to investigate any objection lodged within the time limit prescribed in the Notice. If the objection is determined by the Board not to be well founded, then the Board must inform the objector and the roko tui accordingly.

[38] Given the Board's role that is prescribed by section 19, it is apparent that the classification of the land as native land has not changed whilst this process is taking place.

[39] If no objection is received or if an objection is disallowed, the Board may make an order in the prescribed form. The order is presented to the Registrar of Titles and filed and then at that point the land shall be deemed to be State land for all purposes. The prescribed form of the order is set out as Form 4 in the Schedule to the same Regulations. In the form a lengthy preamble sets out the steps mandated by section 19 and then concludes with the following:

> ***"Now therefore the Native Land Trust Board doth hereby order that the above-described land shall be retained and dealt with by the (State) in terms of section 19 (1) of the Native Land Trust Act."***

[40] We have concluded that unless and until the Board has made such an order the land remains native land. Upon the order having been made and filed in the office of the Registrar of Titles, the land becomes State land. We note that there was no material before the learned judge to indicate whether such an order had been made by the Board. Under Section 18 the land which may be the subject of a Presidential Proclamation must be either State land or land acquire for or on behalf of Fijians by purchase. The Proclamation dated 4 May 1992 expressly refers to the land listed in the Schedule to the Proclamation as State land. The validity of the Proclamation was not raised at any stage in the proceedings before the learned judge and the Proclamation appears never to have been questioned in terms of its validity.

This Court must therefore presume that the requirements of section 19 had been complied with in order for the land to be set aside in the manner provided by the Proclamation.

[41] Further it must be assumed that at some point between the extinction of mataqali membership and the date of the Proclamation the land ceased to be native land and became State land. Whenever that was, it is clear that, from that point, there could be no customary dealings in respect of the land as State land.

[42] Turning now to the effect of the Proclamation and the issue of ownership. The definition of native owner in both the Native Lands Act Cap 133 and the Native Land Trust Act Cap 134 is identical. It reads:

> ***"Native owners means the mataqali or other division or sub-division of the natives having the customary right to occupy and use any native land."***

[43] Under section 18 of the Act, the President may by Proclamation set aside state land for the use maintenance or support of a mataqali and from the date of the Proclamation the land thus set aside becomes a native reserve (and ipso facto native land).

[44] The Proclamation dated 4 May 1992 set aside the extinct Mataqali Navisoi land for the use maintenance and support of the Yavusa Naisamuwaqa.

[45] The difference between the wording of section 18 and the wording of the definition of "native owner" in the legislation (Native Lands Act and Native Land Trust Act) is that the words "occupy" or "occupation" do not appear in section 18 and hence do not appear in the Proclamation.

[46] It must be presumed that the legislature intended that the wording of section 18 and any proclamation made under section 18 should be different from the

definition of "native owner". It follows that if the legislature had intended that a mataqali for whose benefit State land is aside under section 18 by way of Proclamation should take on native ownership of what becomes a native reserve then it would have used the same words that are used to define "native owner." Since the words used in section 18 are not the same as the words used in the definition of native owner, it follows that a mataqali for whose benefit State land has been set aside does not become the native owner of that land.

[47] We note that at one stage the members of the yavusa Naisamuwaqa at least implicitly appeared to recognize this to be the position. The yavusa's letter dated 14 September 2002 addressed to the Appellant (reference to which has already been made and which appears on pages 57 and 58 of the Record) contains this brief paragraph:

> ***"While we appreciate your decision to return the land to the original "Qali", the motive behind the sudden change is questionable."***

[48] Furthermore we do not consider that payment by the Appellant to the Respondent of rental from Mt Kasi Limited is necessarily conclusive of ownership in this case. The land had been set aside for the use maintenance or support of the yavusa Naisamuwaqa. Until the question of native ownership of the land had been determined, such payment was consistent with support or maintenance. The fact that they were made does not decide the question of native ownership.

[49] That being so, the obvious question then must be who is the native owner of land that is the subject of such a Proclamation. Prior to the Proclamation coming into effect the land was State land. State land is defined in the State Lands Act Cap 131 as

"all public lands in Fiji ... which are for the time being subject to the control of the State by virtue of any treaty, cession or agreement, and all lands which have been or may be hereafter acquired by or on behalf of the State for any public purpose."

[50] As we have already observed land that has reverted to the State by operation of section 19 of the Native Land Trust Act is deemed to be State land for all purposes.

[51] Under section 3 of the State Lands Act State land cannot be alienated except in accordance with the provisions of the Act and subject to the provisions of the Native Land Trust Act. Furthermore, the proviso to section 3 makes express provision for the President to set aside State Land as a native reserve in the manner provided by section 18 of the Native Land Trust Act.

[52] As the land had become a native reserve, it was within the jurisdiction of the Native Reserves Commission to determine matters relating to the tenure of native land as between Fijians pursuant to the Native Land (Native Reserves) Regulations that were made pursuant to section 33 of the Native Land Trust Act. In determining the ownership of land that had been previously caught by section 19 of the Native Land Trust Act it does seem to us that it would be reasonable and proper, having regard to the provisions of section 19, to enquire as to the qali of which the extinct mataqali was a part. It was not disputed that the Yavusa Yanawai complied with that description.

[53] As a result and for the reasons that have been set out we do not consider that the decisions taken by the Native Reserves Commission and the Appellant were unreasonable As there were no objections voiced at the meeting called by the Commission, this was not a situation where reasons would be required. We are satisfied that the Reserves Commission did not exceed its jurisdiction under the Native Land Trust Act. The yavusa Naisamuwaqa was given adequate notice and opportunity to be heard and

chose not to take advantage of that opportunity. There was no material before the Court below to indicate bias and hence we are satisfied that there was no denial of natural justice.

[54] Therefore it follows that the Appeal is allowed. We set aside the judgment of the High Court. We order the Respondent to pay the costs of Appeal which are fixed at $4000.00.

Byrne, A.P.

Calanchini, J.A.

Solicitors:

Valenitabua S R Esq. for the Appellant

Nawaikula Esquire for the Respondent.