IN THE COURT OF APPEAL
ON APPEAL FROM TH E H IGH COURT

CIVIL APPEAL NO.ABU 0056 OF 2012
(High Court Civil Case No. HBJ 15 of 2009)

BETWEEN	:	JEMESA RAMASI *Appellant*
AND	:	1. THE NATIVE LANDS COMMISSION 2. THE NATIVE LANDS APPEALS TRIBUNAL 3. THE ATTORNEY GENERAL OF FIJI 4. I TAUKEI LAND TRUST BOARD *Respondents*
Coram	:	Calanchini P Basnayake JA Kumar JA
Counsel	:	Mr. I. Fa for the Appellant Mr. N. Chand for the 1st, 2nd and 3rd Respondents Ms. L. Komaitai for the 4th Respondent
Date of Hearing	:	7 May 2015
Date of Judgment	:	12 June 2015

JUDGMENT

Calanchini P

[1] I have read in draft the judgment of Basnayake JA and agree that the appeal should be dismissed. I venture to make some further comments relating to when judicial review

may be available to challenge decisions of the iTaukei Lands Commission (the Commission) and the Appeal Tribunal (the Tribunal) established under sections 6 and 7 respectively of the iTaukei Lands Act Cap 133 (The Act).

[2] The effect of section 7(2) of the Act is that any person who is aggrieved by a decision of the Commission has an unrestricted right of appeal to the Tribunal on the one condition that the notice of his intention to appeal, setting out the grounds of appeal, is given to the Commission within 90 days of the announcement of the Commission's decision. That unrestricted right of appeal allows an aggrieved person to raise grounds of appeal that relate to the merits of the decision as well as grounds that would otherwise be the basis of an application for judicial review and as a result would include issues such as lack of jurisdiction and denial of natural justice. When such an unrestricted right of appeal to the Tribunal is given by statute then in my judgment there can be no prior or subsequent right to apply for judicial review of the Commission's decision. There can be no prior right to apply for judicial review on the basis of the generally accepted principle that available remedies should be exhausted before applying for judicial review. There can be no subsequent application for judicial review after the appeal challenging the Commission's decision simply because the Tribunal has had an unrestricted opportunity to adjudicate on the grievances raised by the Appellant. An omission on the part of an appellant to include an issue in his grounds of appeal to the Tribunal is not sufficient reason to allow a subsequent application for judicial review to challenge the Commission's decision.

[3] However, the issues are different when considering whether judicial review is available to challenge a decision of the Tribunal. The problem arises because section 7(5) of the Act provides that decisions of the Tribunal are to be final and conclusive and cannot be challenged in a court of law. This clause is of a class that is known as an ouster clause and in the past referred to as a "*privative clause.*"

[4] The learned High Court Judge acknowledged that the effect of section 7(5) is that a decision of the Tribunal is final and cannot be challenged in court. However, as the

learned Judge observed, an examination of the decision-making process is not prohibited by section 7(5) of the Act.

[5] The learned Judge concluded that it remains open to the court to examine the decision-making process by way of an application for judicial review. Of the accepted grounds upon which an application for judicial review may be made, the issues of jurisdiction and natural justice are more relevant to the decision-making process than to the merits of the decision and therefore can be reviewed by a court.

[6] What this means is that it is open to an aggrieved person to apply for judicial review of a decision of the Tribunal alleging either lack of jurisdiction or a denial of natural justice. A denial of natural justice may mean either the existence of bias on the part of the Tribunal or procedural impropriety. These issues are not directly concerned with the merits of the decision.

[7] These observations are consistent with previous decisions of this Court. In **Natauniyalo –v- The Native Land Commission and Koroimata** [1998] FJCA 41 (1998) 44 FLR 280 the Court was required to consider the effect of section 100 (4) of the 1990 Constitution which stated:

> *"For the purpose of this Constitution the opinion or decision of the Native Lands Commission on*
>
> *(a) matters relating to and concerning Fijian customs, traditions and usages or the existence, extent, or application of customary laws; and*
>
> *(b) disputes as to the headship of any division or sub-division of the Fijian people having the customary right to occupy and use any native land,*
>
> *shall be final and conclusive and shall not be challenged in a court of law."*

[8] The Court held that the section did not exclude an examination by the High Court to determine whether the principles of natural justice had been breached in reaching the decision impugned.

[9] Under the present legislative scheme the ouster clause now applies to decisions of the Tribunal under section 7(5) of the Act and not decisions of the Commission.

[10] In **Kubou –v- The State, The Appeals Tribunal and Another** [2008] FJCA 60 (unreported ABU 10 of 2006, 29 October 2008) this Court revisited the question and following its decision in the **Natauniyalo** decision (supra) applied the same principle when considering section 7(5) of the Act. At paragraph 15 the Court stated:

> *"The Courts have held that the effect of [section 7(5)] is that decisions of the Tribunal are unimpeachable provided that they are valid decisions, reached in accordance with the principles of natural justice."*

[11] Therefore, in my judgment, whenever a challenge to a decision of the Tribunal is based on a lack of jurisdiction or a denial of natural justice, the High Court has the necessary jurisdiction to consider an application for judicial review under Order 53 of the High Court Rules notwithstanding section 7(5) of the Act. However in this case the challenge by the Appellant went to the merits of the Tribunal's decision and for that reason there was no right to apply for judicial review.

[12] On the issue of delay, the Appellant's challenge was based on the failure of the Judge to consider the difficulties faced by the Appellant. The test for delay is set out in Rule 4(1) of Order 53 and is considered by Basnayake JA in his judgment. I agree that the test was correctly applied by the learned High Court Judge on the facts of the application.

[13] However, as a result of the Supreme Court decision in **Public Service Commission –v- Singh** [2010] FJSC 3 (unreported CBV 11 of 2008; 27 August 2010) there is an issue as to whether it was open to the learned Judge to consider delay at the leave stage since the

application for judicial review did not include an order for certiorari although it was filed well outside the 3 months period required by Order 53 Rule 4(2). It is not necessary to discuss the issue as it was not raised in the grounds of appeal and was not directly raised in the written submissions.

[14] For all of the above reasons I agree that leave to apply for judicial review of the Commission's decision and the Tribunal's decision was correctly refused.

Basnayake JA

[15] The appellant is seeking to have set aside the judgment of 3 August 2012 of the learned High Court Judge of Suva. By this judgment the learned Judge had refused the application for leave for judicial review.

[16] The dispute relating to this case arose in the island of Tokoriki. This island was owned by four Mataqalis namely, Vunativi, Vunaivi, Vucunisai and Namatua. In 1930 the Native Land Commission (1st Respondent) determined the boundaries of the four Mataqalis. A dispute arose in the year 2003 between Mataqali Namatua (the appellant) and Mataqali Vunativi, in respect of their common boundary in the land called Matabeto or Motuku Mound.

[17] The appellant having instituted legal proceedings under the Native Lands Act (the Act) (Cap 133), the 1st respondent held an inquiry and a decision was made on 6 October 2005, by which Mataqali Vunativi was declared the owner. The appellant appealed against this order in terms of section 7 of the Act to the 2nd respondent. After an inquiry, on 14 December 2006 (annexure *'G'* in Tab *'HI"* of the Record of the High Court), the 2nd respondent dismissed the appeal.

[18] The appellant submitted that the decision of the 1st respondent is flawed for the reason that the decision arrived at was contrary to the decision of the Native Lands Commission

delivered in 1930 where the boundaries of the four Mataqalis were conclusively determined.

[19] The appellant filed a judicial review application dated 27 November 2009 (Tab *'JK'* of RHC) in the High Court of Suva, seeking a declaration *inter alia* that the decisions of the 1st and the 2nd respondents are contrary to the decision of the 1st respondent of 1930.

The Judgment

[20] The learned Judge firstly dealt with the issue relating to jurisdiction. Sub section 5 of section 7 of the Native Lands (Amendment) (Appeals Tribunal) Act 1998 declares that the ***"decisions of the Appeals Tribunal are to be final and conclusive and cannot be challenged in a court of law"***. Referring to the section the learned Judge held that the section includes the decision and not the decision making process (Ratu Akuila Kubon v The State, the Appeals Tribunal and the Attorney General of Fiji (ABU 0110 of 2006S unreported). The learned Judge having found that there is no complaint of any breach of natural justice, procedural impropriety or excess of jurisdiction, refused leave on the basis that there is no arguable case. Section 6 (1) of the Act empowers the 1st respondent to institute inquiries into the title to all land claimed by Mataqali. Section 6 (5) empowers the 1st respondent to inquire into any dispute and after hearing evidence decide the question of ownership. The 1st respondent has held an inquiry in terms of section 6 of the Act.

[21] The learned Judge found that no dispute arose in the year 1930. A dispute arose in 2003 and the 1st respondent had heard and determined the dispute by exercising its statutory function and thus the 1st respondent was held to have acted within the jurisdiction.

[22] The application dated 27 November 2009, seeking judicial review was filed in court on 10 December 2009, to review the decision of the 1st respondent of 6 October 2005 and the 2nd respondent of 14 December 2006. The learned Judge having referred to Order 53

Rule 4 (1) of the High Court Rules found that the delay in filing this application was excessive and is detrimental to good administration and dismissed the application.

The grounds of Appeal

[23] Seven items were listed as grounds of appeal (Tab C of the Record of the High Court) which could be summarised into three items and are as follows:

- The learned Judge erred in holding that the 1st respondent did not act in excess of jurisdiction.
- The learned Judge erred in holding that the matter is not *res judicata.*
- The learned Judge erred in holding that there was undue delay in making the application for judicial review.

Submissions of the learned counsel for the appellant

[24] The learned counsel for the appellant submitted that the 1st and the 2nd respondents in arriving at their decision made an error of law and had taken into account irrelevant considerations. By proceeding to arrive at a decision contrary to its decision of 7 November 1930, the 1st respondent had exceeded its jurisdiction and as such its decision is in excess of its jurisdiction. It was further submitted that the decision is based on irrelevant considerations and as such is a nullity. The appellant submitted that the 1st respondent made a determination on the land boundaries of the four Mataqalis in 1930. The decisions of the 1st and the 2nd respondents on 6 October 2005 and 14 December 2006 respectively are contrary to the determination in 1930. Having determined the boundaries in 1930 the 1st respondent was not permitted by law to make another determination to change those boundaries. The appellant submitted that this is unlawful. The determination of the 1st respondent in 1930 is final and binding on all the parties. Learned counsel also submitted that the determination of 1930 was *res judicata* and therefore the order made by the 1st respondent is null and void. The learned counsel submitted that there is no time limit for applications involving judicial review.

Submissions of the learned counsel for the 1st, 2nd and 3rd respondents

[25] The learned counsel for the 1st to 3rd respondents submitted that the appellant had been seeking to review the merits of the decisions of the 1st and the 2nd respondents. The appellant never sought to review the decision making process. The appellant never questioned the decision making process in the High Courts. No allegations were made with regard to breach of natural justice or procedural impropriety. The appellant was concerned with the decision and it's rationale. The only issue raised by the appellant is that the boundaries of 1930 are different to the boundaries determined at the inquiry in 2005 by the 1st respondent. In a judicial review the courts' function is to review not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself (New India Assurance Company Ltd v Permanent Secretary of Labour, Industrial Relations, Tourism and Environment [2012] Supreme Court Civil Appeal No. CBV0002 of 2010). The learned counsel submitted that the appellant continued to stress on the substantive argument which is a matter for consideration after the grant of leave.

The legal matrix

[26] It has become absolutely clear that the appellant had only challenged the decisions (as opposed to the decision making process) of the 1st and the 2nd respondents. Thus in effect the appellant sought the court's intervention to correct the ultimate decisions of the 1st and the 2nd respondents. In the High Court and this Court submissions were made on behalf of the appellant on the merits of the decisions. Judicial review is the exercise of the courts inherent power to determine whether action is lawful or not. It is in an appeal that the courts are concerned with merits, whether the decision is right or wrong.

Jurisdiction, Illegality and *Res Judicata*

[27] A complaint of the appellant is that the decision of the 1st respondent is illegal for the reason that the Commissioner having determined the boundaries in 1930 has no

jurisdiction to make a different determination. The appellant thus pleads *res judiciata.* Relevant sections of the Itaukei Lands Act (Cap 133) are as follows:-

> 6 (1): *The Commission shall institute inquiries into the title to all lands claimed by mataqali or other divisions or subdivisions of the people and shall describe in writing the boundaries and situations of such lands together with the names of the members of the respective communities claiming to be owners thereof.*
>
> *6(5): If there is a dispute as to the ownership of any lands marked out and defined as aforesaid the Commission shall inquire into it and, after hearing evidence and the parties to the dispute, decide the question of ownership and record its decisions: (the proviso is not reproduced).*

[28] Thus the 1st respondent has power not only to describe the boundaries, but also to inquire into the disputes of the owners and to decide the ownership. These powers have been given to the 1st respondent by statute. I am of the view that the learned Judge correctly rejected the argument of the appellant that the decision of the 1st respondent is illegal. The law provides for an aggrieved party to appeal against a decision made under section 6 of the Act to an Appeals Tribunal within ninety days (Section 7 (2)). It shall be the duty of the Appeals Tribunal to hear and determine such appeals from decisions of the Commission under section 6 and from a Commissioner under section 16 (Section 7 (1)). An appeal was made in terms of the above provisions to the Appeals Tribunal. The Appeals Tribunal having heard the parties dismissed the appeal. The appellant does not find fault with the procedure adopted by the respondents. There is no complaint of any denial of natural justice of the decisions challenged. The solitary argument of the appellant is that the respondents cannot deviate from the determination made in 1930. It is on the same breath that the appellant complains that the decision is made without jurisdiction, *res judicata* and is illegal which the learned High Court Judge had correctly rejected.

Undue delay

[29] The learned Judge found that the application for review was made 2 years and 8 months after the dismissal of the appeal by the Appeals Tribunal. However the appellant

submitted that in a judicial review application delay cannot be considered as a ground to deny relief:

[30] **Order 53, rule 4 (1) of the High Court rules** (as far as it is applicable) is as follows:-

> "*Subject to the provisions of this rule, where in any case the court considers that there has been undue delay in making an application for judicial review or....the court may refuse to grant (a) leave for the making of the application*".

Rule 4 (2) refers particularly to certiorari where the application should be made within 3 months.

[31] The Supreme Court in PSC v Singh [2010] FJSC 3; CBV 0011.2008 (27 August 2010) referring to Order 53 rule 4 (1) held that, "*Where there is a delay in making an application for judicial review the court may refuse to grant the relief....if it thinks that granting it would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or* ***would be detrimental to good administration***" (emphasis added). The refusal of the application by the learned High Court Judge was on the basis that the delay would be detrimental to good administration and is thus within the ambit of the Supreme Court decision mentioned above.

[32] There is no statutory limit imposed by the rules with regard to the time limit within which an application could be made under Order 53 rule 4 (1) of the High Court Rules. The limit is the *"undue delay"*. The *"undue delay"* gives discretion to court which has to be judicially exercised. The question is whether the undue delay has been satisfactorily explained by the appellant. The only explanation given was due to lack of funds to find a lawyer which the learned Judge had correctly rejected as not legitimate. I am of the view that the delay has not been satisfactorily explained and the learned Judge was correct in the rejection.

[33] For the above reasons I am of the view that this appeal has to fail and the same is dismissed. Considering the facts of this case I am of the view that there should be no costs.

Kumar JA

[34] I agree with the decision and reasoning of Basnayake JA.

The Order of the Court are:

1. *Appeal is dismissed.*
2. *No orders as to costs.*

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Hon. Justice W. D. Calanchini

President, Court of Appeal

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Hon. Justice E. Basnayake

Justice of Appeal

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Hon. Justice K. Kumar

Justice of Appeal