

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

**CIVIL APPEAL NO. ABU 59 OF 2015**  
**(High Court No. HBJ 3 of 2015L)**

**BETWEEN** : ITAUKEI LAND TRUST BOARD  
*Appellant*

**AND** : 1. LUSIANA RADUA  
2. SAMUELA RATU  
3. ITAUKEI LANDS & FISHERIES COMMISSION  
*Respondents*

**Coram** : Chandra RJA

**Counsel** : M. L. Komaitai for the Appellant  
Mr. K. Vuataki for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents  
Mr. J. Pickering for the 3<sup>rd</sup> Respondent

**Date of Hearing** : 3 June 2016

**Date of Ruling** : 7 December 2016

**R U L I N G**

[1] This is an application filed on 20 August 2015 for leave to appeal out of time pursuant to section 20(1)(a)(b) of the Court of Appeal Act, 1998. The Appellant also filed an

application on 25 August 2015 for stay of proceedings which was withdrawn when the application was taken up for hearing on 3 June 2016.

[2] The 1<sup>st</sup> Respondent filed an Originating Summons on 10 April 2015 seeking the following:

- a) Declaration that Mataqali Natogo has not ceased to exist.
- b) A Declaration that the Respondent had exceeded its powers under section 19(1) of the iTaukei Lands Act, in vesting lands of Mataqali Natogo in itself and allotting NLC Lot 8 to Yavusa Mali.
- c) A Declaration that the Respondent failed to consider the relevant consideration that Lusiana Radua was still registered as a member of Mataqali Natogo as at 23 April 2004 and that the said Mataqali was not extinct when it did cause a gazette notice to be published on that date giving notice that such Mataqali was extinct and Lot 8 of its lands allotted to Yavusa Mali.
- d) A Declaration that the Respondent had exceeded jurisdiction, in not receiving a Report from the Chairman of the iTaukei Lands and Fisheries Commission or the Reserves Commissioner that Mataqali was extinct before it deprived Mataqali Natogo of ownership of its lands and allotting such lands to Yavusa Mali.
- e) Alternatively, A Declaration that the Respondent had acted on a mistake of fact that Mataqali Natogo was extinct as at 23 April 2004 when it did gazette that such Mataqali was extinct when in fact Lusiana Radua was alive on that date and was a member of said Maaqali.
- f) A Declaration that sub-sections 19(2) to (6) of the iTaukei Lands Trust Act are unconstitutional under section 27(1) of the Constitution in arbitrarily depriving Mataqali Natogo of its lands under the procedures set out therein.
- g) Certiorari to remove the decision of the Respondent to this Court that Mataqali Natogo is extinct and lot 8 of Mataqali Natogo lands be allotted to Yavusa Mali of

Naseyani Village and such decision and orders, vesting and allotment made therein be quashed.

- h) Order of Mandamus directing the Respondent by itself, its servants and employees to issue a notice to be published in the Fiji Government Gazette and a local newspaper in vernacular iTaukei and English revoking notice number 2 claim number 56A published 23 April 2004 and issue notice that Mataqali Natogo was not extinct from 23 April 2004.
- (i) Order of Mandamus directing the Respondent by itself, its servants and employees to revoke and Order made by it under section 19(1) of the iTaukei Lands Trust Act vesting Mataqali Natogo lands in itself and or allotting Lot 8 of Mataqali Natogo lands to Yavusa Mali and such revocation and cancellation of registration of Yavusa Mali as owner of NLC Lot 8 Sheet Reference number H/54, H10/2, J6/1 in the Register of iTaukei Land.
- j) Stay of further allotments of Mataqali Natogo lands NCL Lot 6 on Map Reference H/54,H10/2,J6/1,J1/3.
- K) Other Declarations or Mandamus Orders as the Honourable Court may decide.
- l) Costs on an indemnity basis.

[3] The Summons of the 1<sup>st</sup> Respondent was supported by her affidavit.

[4] On 26 May 2015 the matter proceeded to hearing and Judgment was delivered on 4 June 2015.

[5] The learned Judge of the High Court for the reasons set out in his judgment stated that the 1<sup>st</sup> Respondent was entitled to the relief prayed for in her originating summons and made the following Orders/Declarations:

- (1) That, Mataqali Natogo has not ceased to exist.
- (2) That the Respondent had exceeded its powers under section 19(1) of the iTaukei Lands Trust Act, in vesting lands of Mataqali Natogo in itself and allotting NLC Lot 8 to Yavusa Mali.
- (3) That, the Respondent failed to consider the relevant consideration that Lusiana Radua was still registered as a member of Mataqali Natogo as at 23 April 2004 and that the said Mataqali was not extinct when it did cause a gazette notice to be published on that date giving notice that such Mataqali was extinct and Lot 8 of its lands allotted to Yavusa Mali.
- (4) That, the Respondent had exceeded jurisdiction, in not receiving a Report from the Chairman of the iTaukei Lands and Fisheries Commission or the Reserves Commissioner that Mataqali Natogo was extinct before it deprived Mataqali Natogo of ownership of its lands and allotting such lands to Yavusa Mali.
- (5) That the Respondent had acted on a mistake of fact that Mataqali Natogo was extinct as at 23 April 2004 when it did gazette tht such Mataqali was extinct when in fact Lusiana Radua was alive on that date and was a member of said Mataqali.
- (6) That, sub-sections 19(2) to (6) of the iTaukei Lands Trust Act are unconstitutional under section 27(1) of the Constitution in arbitrarily depriving Mataqali Natogo of its lands under the procedures set out therein.
- (7) Hereby issue a writ of Certiorari to remove the decision of the Respondent of that Mataqali Natogo is extinct and lot 8 of Mataqali Natogo lands be allotted to Yavusa Mali of Naseyani Village and such decision and orders, vesting and allotments made therein be quashed.
- (8) Hereby issue a Writ of Mandamus directing the Respondent by itself, its servants and employees to issue a notice to be published in the Fiji Government Gazette and a local newspaper in vernacular iTaukei and English revoking notice number 2 claim number 56A published 23 April 2004 and issue notice Mataqali Natogo was not extinct from 23 April 2004.

- (9) Hereby issue a Writ of Mandamus directing the Respondent by itself, its servants and employees to revoke any Order made by it under section 19(1) of the iTaukei Lands Trust Act vesting Mataqali Natogo lands in itself and or allotting Lot 8 of Matqali Natogo lands to Yavusa Mali and such revocation and cancellation of registration of Yavusa Mali as owner o NLC Lot 8 Sheet Reference number H/54, H10/2, J6/1 in the Register of iTaukei Lands.
- (10) Hereby permanently stay of further allotments of Mataqali Natogo lands NLC Lot 6 on Map reference H/54, H10/2, J6/1 in the Register of iTaukei Lands.
- (11) Indemnity Cost of FJD\$ 12.075.00 to be paid to the Applicant by the Respondent.

[6] The main issue before the learned Judge was whether in allotting the land in question to Yavusa Mali, the Appellant had exceeded its powers under section 19(1) of the iTaukei Lands Act.

[7] In arriving at his conclusion the learned Judge considered the provisions of section 19 of the iTaukei Land Trust Act [as amended under the iTaukei Land Trust (Amendment) Decree No.14 of 2000] regarding the processes to be followed in declaring a Mataqali lands as extinct, and concluded that the Reserves Commission had made recommendation for the allotment of the land in question without first ascertaining the extinction of Mataqali Natogo. He went on to state that he cannot find a confirmation of extinction from TLC nor a gazette notice of extinction in the file. He further stated that the Appellant had failed to follow the required procedures, namely in failing to obtain a report from the 3<sup>rd</sup> Respondent that Mataqali Natogo was extinct, failing to gazette a notice in the prescribed form and to make an order in the prescribed form set out in the Regulations under the Act.

- [8] The Appellant filed an application seeking leave to appeal out of time on the 20<sup>th</sup> of August 2015 with supporting affidavit of Mosese Ratubalavu.
- [9] The 1<sup>st</sup> Respondent filed its Affidavit in reply of Josefa Dunadamu on the 9<sup>th</sup> of October 2015 whilst the 3<sup>rd</sup> Respondent filed its affidavit in reply on 16<sup>th</sup> November 2015 opposing the application of the Appellant.
- [10] The Appellant filed its affidavit in response to both affidavits of the 1<sup>st</sup> and 3<sup>rd</sup> Respondent on 4 December 2015.
- [11] Written submissions were filed by the parties and they made oral submissions as well.
- [12] Pursuant to section 20(1) of the Court of Appeal Act (Cap.12) a single judge of the Court may exercise the power of the Court of Appeal to extend the time within which a notice of appeal may be given.
- [13] In an application seeking leave to appeal out of time, the Court is generally concerned with four issues: (1) the length of the delay; (2) the reasons for the delay; (3) The chances of the proposed appeal succeeding and (4) prejudice to the Respondent. (**Datt v Datt** [2013] FJCA 58; Civil Misc. Action 33.2011 (7 June 2013)).

#### **Length of Delay**

- [14] The Appellant has failed to file its notice of appeal and grounds of appeal within the allocated period of 42 days in accordance with the Court of Appeal Rules 15 and 16. The

judgment was delivered on 4<sup>th</sup> June 2015 and the application for leave to appeal out of time was filed on 20<sup>th</sup> August 2015, a period of 79 days from the date of the judgment.

[15] The Appellant submits that a delay of 37 days from the expiry of the time to lodge an appeal is not excessive considering its grounds of appeal which is based on a Gazette Notice which was not available during the hearing of the matter.

[16] On the face of it a delay of 37 days can be said to be excessive and it remains to be seen whether such a delay can be excused in view of the relevance and importance of the merits of the grounds of the proposed appeal.

#### **Reasons for the delay**

[17] The reasons for the delay as adduced by the Appellant is that it could not have filed the notice of appeal without having the crucial item of evidence which it was relying on. The reason being the unavailability of the Gazette Notice dated 28 April 1972 at the time of the hearing, and that it was discovered later.

[18] The Gazette notice dated 28 April 1972 sets out a “Notice of Extinction of Mataqali” of Mataqali Natogo of which the 1<sup>st</sup> Respondent is a member. The notice states that the Commissioner of Native Lands (the Commissioner of the 3<sup>rd</sup> Respondent) has reported under section 19(2) of the Native Land Trust Ordinance that Mataqali Natogo has ceased to exist. The Gazette Notification also refers to a Memorandum of the Commissioner of Native Lands to the Secretary of the Native Land Trust Board and confirmation from the Roko Tui Ra the extinction of Mataqali Natogo, Yavusa Nadokana in Tavua old Tikina. It also states that “May the necessary action be taken to have the above 2 blocks of land recorded as the property of the Crown as “ultimus haeres”. These are the steps that have to be taken in declaring a Mataqali as extinct.

- [19] This information was not available with the 3<sup>rd</sup> Respondent although it should have been available in their records.
- [20] As the said Gazette Notification refers to the subject land as extinct Mataqali land, it was a vital item of evidence for the hearing of the application of the 1<sup>st</sup> Respondent.
- [21] The said item of evidence according to the affidavit filed on behalf of the Appellant had not been available with them at the time of the hearing and had been discovered only later at which time only the Appellant decided to file its application seeking leave to appeal out of time.
- [22] Although it would seem that the Appellant should have been more vigilant in trying to trace the relevant Gazette Notification, as the circumstances that they have disclosed in their affidavit that they could not trace the number of the Gazette, that it was found in a file which did not relate to the relevant Mataqali, that although there should have been a memorandum recording the extinction of the Mataqali with the 3<sup>rd</sup> Respondent, that they too did not have it in their records are not sufficient reasons for the exercise of the discretion conferred on the single judge in granting leave.

### **Merits of the Appeal**

- [23] In considering whether there is merit in the appeal, what has to be considered is whether the appeal is wholly unmeritorious or unlikely to succeed. At this stage it is not necessary to go into the merits of the appeal. In **Reddy's Enterprises Limited v The Governor of the Reserve Bank of Fiji** [1991] FJCA 4' ABU 0067.90s it was said regarding the function of a single judge is assessing the merits of the appeal :

*"It is not my function to assess the actual merits of the appeal but if prima facie it is obvious that the appeal is wholly unmeritorious*



*or wholly unlikely to succeed then it would be appropriate for me to say so. As to the contention that the points raised are not novel all I can say is that the issue of novelty is not crucial. The important point is whether there is a serious question for adjudication as opposed to it being frivolous or vexatious”.*

- [24] The learned Judge in his reasons for the judgment in this case had referred to the procedure that should have been followed in declaring a Mataqali extinct and noted that there was no confirmation of extinction nor was there a gazette notice regarding extinction in the file. If the Gazette Notification which was later discovered was in fact available at the time of the hearing it would have been a matter which would have drawn the attention of the learned Judge.
- [25] Therefore the gazette notification which the Appellant had discovered later would become important in considering the merits of the appeal of the Appellant as the documents accompanying the Gazette notification refers to steps that had been taken for declaring the extinction of the Mataqali. The question as to the validity of such steps is a matter that would have to be determined in the appeal.
- [26] In those circumstances the consideration of the said Gazette Notification would be material in the determination of the appeal of the Appellant and therefore the exercise of the discretion of the Court in granting leave to appeal out of time weighs in favour of the Appellant, although the delay and the reasons for the delay are not in favour of the Appellant.
- [27] The evidence relating to the Gazette Notification relied on by the Appellant is fresh or additional evidence and for it to be considered at the hearing of an appeal, the Appellant must make an application to the Court of Appeal under Rule 22(2) of the Court of Appeal Rules.

[28] The Appellant in its supporting affidavit had raised issues relating to the position of the relevant lands being former Crown Land Schedule A and B lands and therefore questions arose as to the allotment of such lands. This is also a matter which can be considered in appeal.

### **Prejudice to the Respondent**

[29] The 1<sup>st</sup> Respondent submits that prejudice will be caused to her if leave is granted to the Appellant but the merits of the appeal are fairly substantial and would outweigh such prejudice.

[30] In the affidavit filed on behalf of the 1<sup>st</sup> Respondent opposing the grant of leave, it has been stated that the Mataqali Natogo lands are still registered with the Register of Native Lands and has not been cancelled. That the 1<sup>st</sup> Respondent has entered into an agreement in regards to a water extraction project adjoining Mataqali Natogo lands, but there is no material to support such an agreement.

[31] It would be in the best interests of the parties concerned to consider the effect of the Gazette Notification that had been discovered which declares the particular Mataqali as extinct.


[32] These are matters that may be considered in the appeal and a consideration of all these factors would meet the ends of justice.

[33] In the above circumstances I would grant leave to the Appellant to appeal out of time.

**Orders of Court:**

1. *The application for an extension of time to appeal is granted.*
2. *The Appellant is to file and serve an amended Notice of Appeal within 14 days from the date of this Ruling.*
3. *The Appellant is to file and serve an application for leave to adduce fresh evidence returnable before the Court of Appeal. Such application together with a supporting affidavit is to be filed and served within 28 days from the date of this decision.*
4. *There will be no order as to costs regarding this application.*



  
**Hon. Justice S. Chandra**  
**RESIDENT JUSTICE OF APPEAL**