

IN THE HIGH COURT OF FIJI
AT LAUTOKA, FIJI
CIVIL JURISDICTION

JUDICIAL REVIEW HBJ NO.003 of 2014L

BETWEEN : **STATE**

AND : **ITAUKEI LAND APPEAL TRIBUNAL** a body duly constituted under the iTaukei Lands Act

RESPONDENT

AND : **POATE RATU** of Moala Village, Nadi, Farmer for and on behalf of himself and Yavusa Natutale.

APPLICANT

AND : **NIKOTIMO DRIU** of Sikituru Village, Nadi.

INTERESTED PARTY

Appearances: Mr Kitone Vuataki for the Applicant
Ms. M. Lee for the Respondent
Mr K. Tunidau for the Interested Party

RULING

(Leave for Judicial Review)

Introduction

1. The Applicant has applied pursuant to Order 53 Rule 3 of the High Court Rules for Leave to apply for Judicial Review of the decision of the Respondent given on the 6th June 2014 at Moala Village in Nadi that it had Jurisdiction to hear an appeal from Nikotimo Driu against a decision of the iTaukei Lands Commission given on 9th December, 2011 concerning removal of Nikotimo Driu's name from Mataqali Sauvana and its proceeding to hear and determine the said appeal.
2. The relief which the Applicant is seeking are as follows:

- (i) A declaration that the decision of the Chairman of the then Native Land Commission given on the 16th day of November, 1990 that Nikotimo Driu's name be removed from Mataqali Sauvana was a final and binding decision on Nikotimo Driu and the iTaukei Land Commission and Respondent and are estopped from further considering the issue.
- (ii) A declaration that the Respondent had exceeded jurisdiction in erroneously deciding to hear an appeal from a decision of the Chairman of the iTaukei Lands Commission under Section 10(2) of the iTaukei Lands Act that Nikotimo Driu's name be removed or struck out from Mataqali Sauvana Vola ni Kawa Bula as reiterated by the iTaukei Land Commission that it will no longer consider the matter.
- (iii) Alternatively, a declaration that the Respondent failed to consider the relevant consideration that the removal of Nikotimo Driu's name from Mataqali Sauvana was a decision under Section 10(2) of the iTaukei Lands Act and not within its jurisdiction and it therefore exceeded jurisdiction in hearing an appeal against the removal or striking out of his name from Mataqali Sauvana Vola ni Kawa Bula.
- (iv) A declaration that the Respondent had exceeded jurisdiction in conducting hearing of an appeal outside the 90 day appeal period.
- (v) A declaration that the Respondent did not consider the relevant consideration to give rights of natural justice to Yavusa Natutale by giving them a copy of the decision of the iTaukei Lands Commission dated 9th December, 2011 and the purported appeal of Nikotimo Driu via his Solicitor dated 9th January, 2014 so they could seek legal advice thereon and question them on their jurisdiction.
- (vi) A declaration that upon Nikotimo Driu informing Chairman of Respondent at the hearing that said Chairman was his teacher there was perceived bias in said Chairman not reclusing himself and thereby the Respondent was not within jurisdiction as an unbiased tribunal.
- (vii) A declaration that the hearing conducted by Respondent at Moala village on 6th June, 2014 regarding removal of Niko Driu's name from Vola ni Kawa Bula of Mataqali Sauvana was in excess of jurisdiction and any decision resulting therefrom is null and void.

- (viii) Certiorari to issue quashing decision of Respondent to hear the Interested Party's Appeal dated 9th January, 2014 and any decision given pursuant to the 6th June, 2014 hearing of said purported appeal.
 - (ix) Stay of Proceedings pursuant to the Respondent's decision to hear Nikotimo's appeal from decision of iTaukei Land Commission dated 9th December, 2011 and any decision by Respondent pursuant to Respondent's hearing conducted at Moala village on the 6th of June, 2014.
 - (x) Other declarations or Mandamus Orders as the honourable Court may decide.
 - (xi) Costs on indemnity basis.
3. The Applicant has submitted this application by way of Summons filed on the 30th July, 2014 with an affidavit in Support sworn by him on 29th July, 2014.
 4. He also filed an Inter Parte Notice of Motion on 31st July, 2014 and sought a stay Order to stop the Respondent from determining the appeal by Nikotimo Driu until hearing and determination of Leave application.
 5. A supplementary affidavit was filed by the applicant on 6th August, 2014 to undertake damages on the Yavusa lease income.
 6. Upon reading the Inter Parte Motion filed on 31st July, 2014, Affidavit in Support of Poate Ratu, Summons for Leave for Judicial Review and Notice of Statement of the Applicant and upon hearing Counsel for the Applicant and Counsels for the Respondent and the Interested Party the Court made an order to stay the Respondent pronouncing the relevant Order on the 7th August, 2014 till decision is given regarding the Orders prayed for in the Inter Parte Notice of Motion.
 7. The Respondent and the Interested Party filed Submission opposing the Motion and the Applicant filed his Submissions in Reply on 8th September, 2014.
 8. The following Affidavits have been filed by the Interested Party and the Respondent in opposing the application for Judicial Review:

- (i) Affidavit in Opposition of the Interested Party filed on 19/08/2014.
- (ii) Affidavit in Opposition sworn by the Secretary of the Respondent filed on 24/10/2014.

9. When the matter was mentioned in Court on 2nd March, 2015 the Learned State Counsel appearing for the Respondent submitted that a hearing date be fixed on the Leave application. With the agreement of the Counsels appearing for the Applicant and the Interested Party Leave application was fixed for hearing on 10th April, 2015.

The Application – Form 32

10. Before I delve into the merits of the Leave Application I would draw my attention to an irregularity in the application filed by the Applicant. The Leave Application in this matter is made by filing a Summon, Affidavit in Support and a Notice of Statement.

11. Order 53 Rule 3 (2) (a) of the High Court Rules provides as follows:

(2) An application for leave must be made upon filing in the Registry;

(a) a notice in Form 32 in the Appendix hereunder containing a Statement of:

- (i)*
- (ii)*
- (iii)*
- (iv)*
- (v)*

12. The Applicant in this matter has not filed a Notice in Form 32 at the time he initiated these proceedings. However he has filed a Notice in Form 32 on 14th October, 2014. In my view the non-compliance with the requirements of Order 53 Rule 3(2) could be treated as an irregularity under Order 2 of the High Court Rules. And I hold that the said irregularity did not nullify the proceedings in the matter till the filing of Form 32 and furthermore that the irregularity was cured by filing the same on 14th October, 2014.

Hearing

13. When the matter was taken up for hearing the Learned Counsel for the Applicant made Oral Submission in Support of the Application and tendered to Court a written submission with the relevant authorities attached. The Respondent and the interested party did not file their submission on the due date but their Counsels made oral Submissions at the hearing opposing the Leave Application.

14. Briefly the facts deposed by the Applicant in his affidavits and stated in the submissions filed are as follows:
 - (i) The Applicant is a member of Yavusa Natutale of Moala Village in Nadi and is authorized by 63% of adult members of the Yavusa to represent them in this application. The Yavusa is of Moala Village and received 426-13 hectares of Mataqali Sauvana Lands after the interested party's name was removed from the Vola ni Kawa Bula of said Mataqali and said Mataqali became extinct.

 - (ii) The Respondent is the iTaukei Land Appeals Tribunal appointed and constituted under iTaukei Lands Act with duties under the said Act.

 - (iii) The named interested party is Nikotimo Driu of Sikituru Village in Nadi who was written into Mataqali Sauvana Vola Ni Kawa Bula of Moala Village and his name was struck out of the said record on 24th April, 1992 pursuant to a decision of the Chairman of the then Native Lands Commission and was the Appellant before the Respondent Tribunal at its sitting on 6th June, 2014 at Moala Village.

 - (iv) The then Native Land Commission had on 11th October, 1990 heard evidence on removal of name of Nikotimo Driu from Mataqali Sauvana and the Chairman of the Commission decided on the 16th day of November, 1990 that Nikotimo Driu's name be removed from Vola ni Kawa Bula ("VKB") of Mataqali Sauvana Sauvana and Yavusa Sauvana.

 - (v) The Chairman of the then Native Land Commission has powers under Section 10(2) of the then Native Lands Act to order deletion of a name of any iTaukei recorded and registered in any proprietary unit other than the proper unit.

- (vi) Such decision of the Chairman of the then Native Land Commission was final and binding on Nikotimo Driu and the iTaukei Lands Commission and both were stopped from considering the matter further.
- (vii) On removal of Nikotimo Driu's name from Tokatoka Sauvana, Mataqali Sauvana and Yavusa Sauvana on 24th April 1992 Mataqali Sauvana became extinct and its lands were gazette on 23rd February, 2001 as belonging as reserves of 426.13 hectares to Yavusa Natutale, 76.02 hectares to Mataqali Nagatagata and balance to Yavusa Nacaqaru and leases have been issued over said lands by iTaukei Land Trust Board.
- (viii) The Respondent at a sitting at Moala village on 6th June, 2014 claimed jurisdiction under the iTaukei Lands Act of an appeal within 90 days from a decision of the Chairman of iTaukei Lands Commission.
- (ix) The decision of the Chairman of iTaukei Lands Commission was dated 9th December, 2011 and the appeal was dated 9th January, 2014. The purported appeal was 1 year 10 months out of time and there is no provision for extension of time to hear an appeal out of time.
- (x) Under Section 7(1) of the iTaukei Lands Act the Respondent only has powers to hear and determine appeals from decisions of the iTaukei Lands Commission under Section 6 and 17 of the Act and Section 16 decision of a Commissioner.
- (xi) The Respondent failed to consider the relevant consideration of its powers under Section 7(1) or exceeded its jurisdiction in hearing an appeal against a decision of the Chairman of the Commission under Section 10(2) of the Act.
- (xii) The Respondent also failed to consider the relevant consideration that the Chairman of the iTaukei Land Commission had decided the removal of Nikotimo Driu's name on 16th November, 1990 and this decision was final and binding and both the Chairman of the Commission and Nikotimo Driu were stopped from fresh reconsideration of the issue and the Respondent thereby exceeded jurisdiction.
- (xiii) The Respondent also failed to consider the relevant consideration that any Party to a

dispute must be given rights of natural justice in disclosure of the decision being appealed and the grounds before the appeal so it could prepare itself for the hearing.

- (xiv) Yavusa Natutale being a Party affected by the removal of Nikotimo Driu's name from the Mataqali Sauvana was not given copy of the 9th December, 2011 decision of Chairman of iTaukei Lands Commission and the grounds of appeal of Nikotimo Driu's purported appeal. The Respondent was thereby not within jurisdiction.
- (xv) The Chairman of the Respondent on being told at the hearing that he was a former teacher of Nikotimo Driu did not recluse himself from the hearing and there was perceived bias taking the Respondent outside of its required unbiased jurisdiction to determine and hear appeals.

Requisites to be looked into at the Leave Stage

15. Order 53 Rule 3(5) of the High Court Rules lays down that:

"The Court shall not grant Leave unless it considers that the Applicant has a sufficient interest in the matter to which the application relates"

16. The Applicant in his affidavit sworn on 29th July, 2014 states that he is a member of Yavusa Natutale of Moala Village and have been appointed by one hundred adult members to represent Yavusa Natutale in seeking Judicial Review and stay of Proceedings of the iTaukei Lands Appeals Tribunals held on Moala Village on the 6th June, 2014. It is stated further that on 16 November 1990 the Chairman of Native Lands Commission decided that the name of the Interested Party Niko Driu be removed from Mataqali Sauvana and upon removal of his name and one Apenisa Sauvana, Mataqali Sauvana and Yavusa Sauvana became extinct. The applicant has deposed that Tokatoka Sauvana lands were then gazette on 23rd February, 2001 with 426.13 hectares reserved to the Applicants Yavusa Natutale comprising Tokatoka Numbers 25, 32, 33 and 34. It is also stated that the Registrar of Native Lands of Tokatoka Matarasiga of Mataqali Sauvana were amended by deleting the said Tokatoka and Mataqali and the land was registered in the name of the Applicants Yavusa. The Applicant contends that if the Respondent upheld the Interested Party's appeal it would result in Interested Party being written into Tokatoka Sauvana and Applicant losing 426.13 hectares of land.

17. On the facts deposed by the applicant in his affidavit as above I find that his Yavusa will be directly affected and has sufficient interest in the decision of the Respondent that it has jurisdiction to hear the appeal of the Interested Party.
18. Other requests to be considered at the Leave stage is set out by the Fiji Court of Appeal in the *Native Farmers Union and Sugar Industry Tribunal and two other in Civil Appeal No. 08 of 1990 (Judicial Review No. 11 of 1989)*. The Court of Appeal said;

“we accept that at the leave stage of an application for Judicial Review the Court is not required to do more than decide whether the applicant (leaving aside the questions of locus standi and delay which are not in issue here) has shown prima facie an arguable case on the merits on each ground of relief.”

19. In this matter there is no question of locus standi as the Applicant has a adduced affidavit evidence to prove that his Yavusa Natutale has a sufficient interest in the matter to which the application relates and that he is representing 63% of adult members to represent Yavusa Natutale in seeking Judicial Review and stay proceedings.
20. The Respondent’s decision on jurisdiction to hear the appeal was given on 6th of June 2014 and the application for Judicial Review was filed on 30 July 2014. Therefore I find that there is no issue of an inordinate delay in filing this application.
21. I will now consider whether the applicant has shown prim facie an arguable case on the merits on each ground of relief.

Grounds in Support

22. In summarizing the facts deposed by the Applicant in his affidavit I find that the application is made on the following grounds:
- a) The Respondent has no Jurisdiction to hear appeals out of the 90 days appeal period.
 - b) The Respondent has no jurisdiction to determine decisions of the Chairman of iTaukei

Lands Commission made under Section 10 (3) of the iTaukei Lands Act.

- c) Nikotimo Driu's name was removed from Mataqali Sauvana by Order of the Chairman of then the Native Lands Commission on 16 November 1990 and Nikotimo Driu and the said Commission is stopped from further consideration of the issue.
- d) The Respondent fail to consider that party to the dispute must be given rights of natural justice in disclosure of the decision being appealed and the grounds before the Appeal so he could prepare himself for the hearing and the Respondent was thereby not within Jurisdiction.
- e) The Chairman of the Respondent on being told at the hearing that he was a former teacher of Nikotimo Driu did not recluse himself from the hearing and there was perceived bias taking the Respondent outside of its required unbiased jurisdiction to determine and hear appeals.

Is the Appeal of Nikotimo Driu Out of Time

- 23. The Applicant in his affidavit deposed that the Appeal of the interested party was out of time as it was 1 year 10 months late if the decision was dated 9th December, 2011. The Applicant state that he received a letter dated 9th January, 2014 from Nikotimo Driu's lawyer regarding a decision of the iTaukei Lands and Fisheries Commission decision of 9 December 2011. Applicant refers to section 7(2) of the Native Lands Act Cap 133 where it is stated that any person aggrieved by a decision of the Commission or of a Commissioner shall within 90 days of the announcement thereof give notice of his desire to appeal to the Appeals Tribunal.
- 24. In the submissions filed by the interested party opposing the application for stay it is stated that he is appealing against a decision given by the Commission by letter dated 30th October, 2013. Therefore the Interested Party's appeal to the Tribunal made on 9th January, 2014 is not out of time and the first ground on which Judicial Review is sought is patently devoid of merit.

Does the Respondent have the Jurisdiction

- 25. I will now get on to the next ground upon which the application is made that is to see whether the

Respondent has jurisdiction to determine decision of the Chairman of iTaukei Lands Commission made under Section 10 (3) of the Act.

26. The Respondent's powers to hear and determine appeals is set out in Section 7(1) of the iTaukei Lands Act:

7(i) "..... it shall be the duty of the Appeals Tribunal to hear and determine appeals from decisions of the Commission under Section 16 and 17 and from a Commissioner under Section 16;....."

27. The submission filed by the Interested Party does not address the issue whether the Tribunal is empowered to hear an appeal made against a decision of the Commission given under Section 10(3) of the Act. In my view the Respondent should first make a ruling whether the Interested Party appeal was from a section 6 or section 17 decision of the Commission. I find this as an arguable ground which holds some merit. Whether the Respondent has jurisdiction to determine decision of the Chairman of iTaukei Lands Commission made under Section 10 (3) of the Act or whether the said decision is final and binding on Nikotimo Driu and the iTaukei Lands Commission are important issues to be determined in this matter.
28. The Applicant allege that Yavusa Natutale being a party affected by the removal of Nikotimo Driu's name from Mataqali Sauvana was not given by the Respondent a copy of the 9th December 2011 decision of the Chairman of iTaukei Lands Commission and the grounds of appeal of Driu's purported appeal and thereby not within the jurisdiction. It is also stated that the Respondent being told at the hearing that he was a former teacher of Nikotimo Driu did not reclude himself from the hearing and there was perceived bias taking the Respondent outside of its required unbiased jurisdiction to determine and hear appeal.
29. In the affidavit sworn by the Secretary to the Respondent Tribunal he has deposed that the grounds of Appeal is usually given to the Respondent to issue his side of the story and in this case Yavusa Sauvana is Extinct and Poate Ratu is from a different Yavusa altogether, hence he was not given a copy of the appeal.
30. It is further stated in the said affidavit that Tribunal was always very conscious of the rules of

“NATURAL JUSTICE” and their verbatim report (Annexure “PW3”) clearly shows that all were given the chance to give sworn evidence and to be cross-examined.

31. In my view giving a chance to the Applicant to give evidence without making him aware of the decision being appealed and the grounds of appeal does amount to a breach of “NATURAL JUSTICE”. The Applicant has sufficient interest in the matter before the Tribunal. Therefore the Applicant should have been offered a chance to prepare for the hearing by making him aware of the decision being appealed and the grounds of appeal prior to the hearing.
32. In reply to the allegation of bias the Respondent has deposed in the affidavit in opposition that the Chairman only knew that Nikotimo Driu was a student when he was a teacher at Ratu Navula Junior Secondary School when Driu mentioned it in his verbal evidence during the hearing on 6 June 2014 and denies any allegation of bias or favoritism.
33. When the Interested Party revealed that he was a student at the school where the Chairman was a teacher there is a likelihood of bias. The Court of Appeal in *Pacific Transport Ltd v Sunbeam Transport Limited* [1994] FJCA 40; Abu 0039j 93S (17 Nov 1994) said:

“We consider it important not to lose sight of the fact that bias is simply one way in which the requirements of natural justice may be breached.”

34. As discussed above, I find that the grounds upon which this application is made are arguable grounds. I also find that the issue of breach of “Natural Justice” and bias are also important issues to be dealt with in this matter.”

Notice of Opposition

35. The Respondent sets out three grounds of objections in its Notice of Opposition. Those grounds were;
 - i) There is no reviewable decision of the iTaukei Lands Appeals Tribunal dated 6th of June, 2014.
 - ii) The Applicant has failed fully exhaust the statutory right of appeal to the iTaukei Lands

Appeals Tribunal as the appeal has not been determined.

- iii) There is no breach of rules of Natural Justice or Procedural Impropriety to the Applicant.
36. The Notice in Form 32 to be given under Order 53 r 3 (2) requires a Statement of the particular of the Judgment, Order, **Decision or other proceeding** in which judicial review is being sought.
37. In this matter the Respondents decision to determine an appeal in my view is a **“proceeding”** under an enactment and an intermediate decision, as a step along the way in a course of reasoning. As such I hold that a decision as well as a proceeding can be reviewed.
38. Second ground of Notice of Opposition is that the Statutory right of appeal to Respondent has not been exhausted by the Applicant. The Applicant being satisfied with the decision of the Commission under Section 10 (2) of the Act has no reason to appeal. Therefore, I find no merit in this ground of opposition.
39. Whether there is a breach of the rules of Natural Justice was discussed in the above paragraphs and I have determined that there is merit in the Applicants allegations.
40. On the Affidavit evidence I find that the Applicant has shown a prima facie an arguable case which needs to be tried in a judicial review proceedings.

Injunction Against the State

41. In the written submission filed by the Learned State Counsel opposing the application for stay it is stated that injunctions cannot be granted against the State. She quotes Section 15(1) of the Crown Proceedings Act, Order 53 r 8 of the High Court Rules and submits **Pradath –v- President of Fiji [2013] FJHC 116; HBC 33.2013 (14 March 2013)** in support of her argument.
42. In **State –v- Minister of Immigration ex-parte Kaisiepo [1996] FJHC 177 [1996] 42 FLR 26 Pain J** said ;

“For the reasons I have given, I consider that this Court should now follow the House of Lords decision in M v Home Office (supra) and accept that the Court has


jurisdiction to grant injunctions, including interim injunctions against Ministers and other officers of the State in judicial review proceedings. In those circumstances it is immaterial whether or not a stay under Order 53 Rule 3(8) is tantamount to an injunction. A stay can be granted and, even if it is tantamount to an injunction, the Courts jurisdiction is not negated by Section 15 of the Crown Proceedings Act."

43. The above authority confirms that a stay under order 53 Rule 8 tantamounting to an injunction can be granted and Section 15 of the Crown Proceedings Act does not negate the Courts' jurisdiction to do so.

The Final Order

44. Accordingly I make the following order:

- 1) Leave is granted to the Applicant to issue judicial review Proceedings.
- 2) The Applicant is to proceed by way of Motion in accordance with Order 53.
- 3) The operation of the decision of the Respondent to determine the appeal by Nikotimo Driu on removal of his name from Mataqali Sauvana of Moala Village in Nadi be stayed until the determination of the application for Judicial Review or further order of this case.
- 4) There shall be costs in the Cause.


Lal S. Abeygunaratne
[Judge]



At Lautoka
15 May 2015