IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review HBJ No. 5 of 2014

IN THE MATTER of an application for Leave to apply for Judicial Review by **SEMI TAWADOKAI** ("The Applicant")

AND IN THE MATTER of the iTaukei Lands Act, Cap 133

IN THE MATTER of the decision of the iTaukei Lands Appeals Tribunal purported to be made on the 27th day of February 2014

BETWEEN : **STATE**

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

RESPONDENT

EX-PARTE : **SEMI TAWADOKAI** of Tarai Village in the District of Totoya in the Province of Lau, Villager for and on behalf of the descendants of Semesa Vakaloloma

APPLICANT

AND : **SEMI MATAI BESE NACANIELI CAMA** of Tarai Village in the District of Totoya in the Province of Lau, Villager.

INTERESTED PARTY

Counsel : **Mr. Bukarau T for the Applicant**
Ms. Ramoce L for the Respondent

Date of Hearing : **2nd May, 2016**
Date of Judgment : **31st May, 2016**

JUDGMENT

INTRODUCTION

1. The Applicant had filed this action for judicial review seeking to review the decision of the Appeals Tribunal under iTaukei Lands Act (Cap133). The Appeals Tribunal reversed the decision of the Native Lands and Fisheries Commission under the same Act. The Applicant was appointed by the Native Land Commission as the 'headman' (Tui Vanua) of the Mataqali Rukunikoro, Yavusa Nauluvatu of Taira Village Vanuavatu in the District of Totoya in the Province of Lau. But upon an appeal to the Appeals Tribunal said decision was quashed and the Interested Party was appointed. Being aggrieved by the said decision the Applicant filed this application for judicial review against the said decision. The Applicant was granted the leave for judicial review, but the hearing of the matter had to be vacated several occasions as the Applicant failed to submit the English translation of the documents filed in this court. The counsel for the Applicant strenuously contended that the Appeals Tribunal had adduced fresh evidence including a person who is of unsound mind, so the translation of all the documents that were filed in this court are vital. A considerable time was taken for that by the Applicant, but the counsel failed to allude to such fresh evidence being adduced in the Appeals Tribunal.

2. The affidavit of the Secretary to the Appeals Tribunal state the brief background of the matter and it states as follows;

   "a. THAT this matter concerns a dispute between rival claimants of the chiefly title of the Tui Vanua, the head of the Yavusa (Tribe) Nauluvatu on the island of Vanuavatu in Lau.

   b. THAT the Applicant is the grandson of the late Semesa Vakaloloma who was holding the title of Tui Vanua when the Native Lands Commission (as it was then) began the registration of native lands, landowners, traditional structures and hereditary chiefly titles in 1939.

   c. THAT the Interested Party is the great grandson of Mesake Soro, the older brother of Semesa Vakaloloma (applicant's grandfather). The relationship between the Applicant and the Interest Party is therefore, of uncle and nephew.

d. THAT the Applicant was traditionally installed to the position of Tui Vanua on the 26th of December 2011. On the same day, a letter from the Interested Party opposing the appointment and installation of the Applicant was received by the Native Lands and Fisheries Commission ("Commission").

e. THAT in 2012, the Applicant and the Interested Party through the Commission and the Roko Tui Lau attempted to have the matter resolved through mediation. After three mediation sittings, the parties were unable to reach an amicable resolution and the matter was then referred to the Commission for Hearing.

f. THAT the Commission Hearing took place on the 23rd of August 2013 at Taira Village in Lau and evidence was adduced by various members of the Yavusa including the applicant and the Interested Party. The Ruling of the Commission was delivered on the 27th of August 2013 in favour of the Applicant.

g. THAT following the Commission's Ruling, the Interest Party and others by way of letter dated 26 September 2013 to the iTaukei Lands Appeals Tribunal ("Tribunal") sought to appeal the decision of the Commission. A copy of the letter is attached as Annexure ST "119" in the Applicant's Affidavit in Support ("Applicant's Affidavit") dated 2nd June 2014 and filed on 3rd June 2014.

h. THAT the Tribunal responded on the 7th of October 2013 confirming that the application to appeal will be head by the Tribunal on a date to be determined by the Tribunal. A copy of the Letter is attached as Annexure ST "20" in the Applicant's Affidavit.

I. THAT a second letter from the dated 29th October 2013 was then issued informing the Interested Party of the appointment of the members of the Tribunal by the Prime Minister and the scheduled Appeal Hearing to be heard in Vanuavatu, Lau on December 2013 depending on that boat schedule. On the same letter the parties were informed that they needed to submit whatever documents and produce evidence that they think could assist the case. Attached as Annexure "PW1" is a copy of the said letter.

J. THAT the Tribunal heard the Appeal on the 2nd of December 2013 and the Ruling was delivered on the 26th of February 2014 in favour of the Interested Party. The outcome of the Tribunal's Ruling has led to the Judicial Review application that is currently before this Honourable Court.'

3. At the hearing of the leave for Judicial Review, the Applicant did not file translation of the proceedings before the Appeals Tribunal and contended that some fresh evidence was adduced before it. The Applicant also sought a restraining order against the decision of

the Appeals Tribunal, which I refused as the English translations were not available at that time to determine alleged conduct of the Appeals Tribunal.

4. When I granted the leave for Judicial Review this issue of alleged consideration of fresh evidence by the Appeals Tribunal, and whether it amounts to denial of natural justice and or lack of jurisdiction was a matter that needed hearing of this judicial review. This was stated in the decision regarding the leave of this matter.

5. Even at the hearing this matter needed to be adjourned for lack of English translation of the said proceedings which were annexed to the affidavit in support. For these translations a considerable time was taken and the hearing was ultimately fixed after translations were filed on 16th March, 2016,

Law

6. A person aggrieved by the decision of the Native Land Commission may appeal against the decision of the said Commission in terms of the Section 17(3) of the Native Lands Act (Cap 133). Section 7(5) of the iTaukei Lands Act (Cap 133) (Amended by Act No 44 of 1998) states as follows

> *'(5) Decisions of the Appeals Tribunal are to be final and conclusive and cannot be challenged in a court of law'*

7. The latest decision that I could find on the said provision of law is the concurring decision of Calanchini P in the unreported case of ***Ramasi v Native Lands Commission*** [2015] FJCA 83; ABU0056.2012 (decided on 12 June 2015). Both sides did not submit any case law on the vital issue of applicability of 'ouster clauses'[1] in Fiji.

8. His Lordship after discussion of earlier cases in Fiji relating to 'private clauses' in the said case of ***Ramasi v Native Lands Commission*** (supra) at paragraph 14 concluded as follows,

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[1] Also known as preclusive, restrictive, or private Clauses.

'[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.' (Per Calanchini P)

9. I am bound by the said decision of the President of the Fiji Court of Appeal, hence there should be an issue of jurisdiction or denial of natural justice alleged in this application in order to grant judicial review.

10. I will be failing in my duty if I do not quote the obiter statement of Lord Diplock[2] in ***O'Reilly v Mackman and others*** [3]- [1982] 3 All ER 1124 at 1129 in following manner regarding the ouster clauses.

    'It was this provision that provided the occasion for the landmark decision of this House in Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208, [1969] 2 AC 147, and particularly the leading speech of Lord Reid, which has liberated English public law from the fetters that the courts had theretofore imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that Anisminic made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being a 'determination' within the meaning of the empowering legislation, was accordingly a nullity.'

11. As I stated earlier, the two grounds on which the Fiji Court of Appeal had recognized the judicial review of a decision of Appeals Tribunal are '*lack of jurisdiction or a denial of natural justice*' (Per Calanchini P). So the applicant should demonstrate that the Appeals Tribunal acted in lack of jurisdiction or the Applicant was denied of natural justice.

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[2] See De Smith's Judicial Review(6th Edi), p192

[3] Referred to in Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346(Privy Council)

12. The grounds for the judicial review application are stated as follows

a. 'The Applicant is the only surviving grandson of the first registered Title holder of Tui Vanua as registered in the VKB Register – Semesa Vakaloloma (VKB Reg No. 1).

b. The grounds relied upon the Interested Party is based on uncertain evidential material that are of pre VKB – registration era and there outside the jurisdiction of the Court.

c. The evidential material taken in account by the Respondent from evidence that was not taken in the first instance by the Commission do not pass the threshold test as set by the Section 7(3) of the iTaukei Lands Act, Cap 133.

d. There is ample evidence in documents before the Respondent asserting that the Interested Party and or his relatives or sympathizers do not object to the Applicant being installed as the Tui Vanua; and that they only objected to the process of installation. Despite these numerous admissions the Respondent still went ahead to find untested evidence to the contrary.

e. The applicant has strong legitimate expectation to be accepted by the Respondent as the candidate to be registered as **Turaga Ni Mataqali Rukunikoro, Turaga ni Yavusa Nauluvatu and Tui Vanua.**

f. There is no basis or information available to confirm the finding that Semi Matai or his son Mesake Soro No. 2 were Tui Vanuas' because the VKB Register does not express this to be so. The Interested Party accordingly has no evidential nexus to the title of Tui Vanua.

g. The evidence is clear that the eligibility to the Title of Tui Vanua is through blood lineal relations and is not dependent on whether a potential candidate is of an elder bloodline to the other potential candidates. Notwithstanding this fact that the Respondents contradicted that evidence by ruling in the contrary.

h. Following the registration process created by the then Native Lands Act, Cap 133 created for Yavusa Nauluvatu on 1st July 1939 the only recognized chiefly household after the registration process is the one that finds their lineage to the first registered Tui Vanua i.e. Semesa Vakaloloma (VKB Reg No. 1/1060).

i. The Respondent was not within jurisdiction in overruling the Commission and substituting the Interested Party for the Applicant in the title of the Tui Vanua.

j. The Respondent misinterpreted the quote by the former Commissioner Ratu Sir Lala Sukuna in a 1944 Tavua Case (unnamed case as the ratio for its decision in the ruling made on the 26th and delivered to the Yavusa Nauluvatu on 27th February 2014. That misinterpretation made the Respondent to commit a pivotal error of law in its decision.

k. The Respondent had failed to deal with the question remitted to it'

13. The above grounds are dealing with the merits of the decision of the Appeals Tribunal except the grounds (c), (i), (j) and (k). The ground (k) is vague and non specific so I do not think that it can be dealt by judicial review.

14. The counsel for the Applicants main contention from the initiation of this action was that the Appeals Tribunal had considered fresh evidence, but when the translations were available he could not allude to such an action by the Appeals Tribunal. There is no merit in the appeal ground (c). Section 7(3) of the iTaukei Lands Act (Cap133) deals with the hearing of fresh evidence, in the absence of such fresh evidence before Appeals Tribunal the said ground has not merits.

15. The ground (i) relate to the jurisdiction. The iTaukei Lands Act (Cap 133) Section 7 confer the power to the **Appeals Tribunal to determine** any appeal from the decisions made in pursuant to **Section 6 and Section 17** of the said Act. This decision relate to a decision of 'headship' in terms of Section 17 of the said Act and Section 17(3) expressly state that a person aggrieved by 'a decision of the Commission under Section 17 may appeal to the Appeals Tribunal in terms of Section 7' of the said Act. This confers the jurisdiction to the Appeals Tribunal and there is no merit in ground (i).

16. The ground (j) refers to a reference to a decision and that also lacks merits to challenge the jurisdiction of the Appeals Tribunal.

17. The affidavit in support of the Applicant filed on 3rd June, 2014 contains merits or facts but failed to state any jurisdictional errors or denial of natural justice by the Appeals Tribunal.

18. There is no allegation of denial of rules of natural justice at the hearing before the Appeals Tribunal.

19. At the hearing the counsel for the Applicant stated that the Appeals Tribunal has relied on the evidence other than the VKB. This is a matter for the Appellate Tribunal and goes to the merits of the matter.

CONCLUSION

20. The Applicant is seeking judicial review against the decision of the Appeals Tribunal. In terms of Section 7(5) of the iTaukei Lands Act (Cap 133) 'decisions of the Appeals Tribunal are final and conclusive and cannot be challenged in a court of law'. Fiji Court of Appeal had specified the scope of the judicial review of such decision for lack of jurisdiction or denial of natural justice. The Applicant had failed to substantiate these grounds. In the circumstances the application for judicial review is dismissed. The cost is summarily assessed at $2,000.

FINAL ORDERS

a. The Judicial Review application is struck off.

b. The cost is summarily assessed at $2,000.

Dated at Suva this 31st day of May, 2016

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Justice Deepthi Amaratunga
<u>High Court, Suva</u>