In the High Court of Fiji at Suva
Civil Jurisdiction

Judicial Review No. HBJ 6 of 2012
The State

And

1. Minister for Housing and Urban Development
2. The Director of Lands
3. iTaukei Land Trust Board
4. The Director of Town & Country Planning
5. Labasa Town Council

Respondents

Ex parte: Paul Jaduram, Charan Jeath Singh and Naunit Lal

Bashir Khan, Faizal Khan and Anwer Ali, Intervenors

COUNSEL: Mr H. Nagin for the applicants
Mr A.Prakash for the first, second and fourth respondents
Ms E. Raitamata for the third respondent
Mr S.Sharma for the fifth respondent

Date of hearing: 26th May, 2017
Date of Judgment: 1st June, 2017

Judgment

1. The applicants moved for judicial review of a decision of the respondents of 2nd April, 2012, "*whereby they purported to approve a Sublease or alienation of the property known as Jaycees Park to Hotel Northpole*". Bashir Khan and Faizal Khan "*on their own behalf and trustees of Vanualevu Muslim League*" together with Anwer Ali intervened as parties. On 2nd February, 2016, I granted leave to apply for judicial review. The matter was fixed for hearing on 6th April, 2016.

2. On 4th April,2016, the fifth respondent filed summons for the vacation of the hearing and that the application be struck out on the ground that it is an abuse of Court process or alternatively, that the proceedings be stayed pending the outcome of HBC no.32 of 2011 filed in the High Court of Labasa.

3. Jitendra Prasad, Chief Executive Officer of the fifth respondent, in his affidavit in support of the summons stated that Vanua Levu Muslim League and one of its trustees, Bashir Khan instituted HBC no.32 of 2011. The declarations sought by the applicants in the instant case are the same or similar to the orders sought in HBC no.32 of 2011. He is advised that this is a matter of res judicata. If this application for judicial review proceeds to hearing, it will be an abuse of process.

4. The second applicant, Charan Jeath Singh, in his affidavit in reply on behalf of all other applicants stated that the relief sought in the two actions are neither the same nor similar. The Labasa High Court Action is a civil action. This is a judicial review. The principle of res judicata is only applied to matters already determined between the same parties. The proper channel to litigate the decision of a statutory body is through an application for judicial review.

5. On 1st November, 2016, counsel for all parties agreed that the hearing of the summons of the fifth respondent be deferred until judgment in HBC no.32 of 2011 is delivered. Judgment in HBC no.32 of 2011 was delivered on 11th May,2017.

The hearing

6. Mr Sharma, counsel for the fifth respondent relied on his written submissions filed on 25th April,2016, and addressed the matter of res judicata arising from the judgment of Wati J in HBC no.32 of 2011.

7. Mr Sharma submitted that Wati J has decided the issues raised in the application for judicial review. She held that it was within the powers of the fifth respondent under section 91 of the Local Govt Act, to surrender the lease to the third respondent. Proper procedures were followed before the land was leased to VCORP. Wati J held that there was a public hearing on 12th July, 2012, before the decision was made. The same issues are raised in the application for judicial review. The matter is res judicata .

8. Mr Nagin, counsel for the applicants advanced the following contentions. Firstly, he argued that res judicata arises only in matters between the same parties. The applicants in the application for judicial review were not parties in HBC no.32 of 2011, which dealt with the issue of a drainage easement. That judgment is not binding on the applicants.

9. Secondly, the applicants grievance is that the impugned decision was made, before the public hearing. Mr Nagin submitted that there was a "*predetermination*" and the hearing on 12th July, 2012, was a "*farce*".

10. Thirdly, he submitted that the writ procedure adopted in HBC no.32 of 2011L was inappropriate to a public law challenge. Public law issues cannot be determined in private law.

11. Finally, Mr Nagin submitted that the application for judicial review is concerned with the conversion of the Jaycees Park, a public amenity to a hotel, contrary to the legitimate expectations of the people of Labasa.

12. Mr Prakash, counsel for the first, second and fourth respondents adopted the submissions of Mr Sharma. He submitted that Wati J has made findings of fact in paragraphs 87 to 95 of her judgment on the same issues raised in the application for judicial review. In answer to Court, Mr Prakash said that there was no predetermination before the hearing.

13. In his reply, Mr Sharma contended that it would be an abuse of process for the issues decided in HBC no.32 of 2011L to be determined once again in an application for judicial review.

The determination

14. The only relief in the summons of fifth respondent, to be considered by Court is the application for striking out of the judicial review on the ground that it is an abuse of process of Court.

15. Mr Nagin submitted that the summons of fifth respondent was filed two days before the hearing. He submitted that there cannot be a striking out of an application for judicial review under Or 18 and after leave was granted.

16. In my opinion, the application for judicial review cannot be considered an abuse of process of Court, since it was filed before the writ in HBC no.32 of 2011 was instituted.

17. The fifth respondent's summons fails.

18. I proceed to determine the matter of res judicata, as raised by Mr Sharma.

19. HBC no.32 of 2011L was filed by Trustees of Vanualevu Muslim League and Bashir Khan. The defendants were 1. VCORP Limited; 2. Labasa Town Council (LTC); 3. The I-TAUKEI Land Trust Board;4.The Ministry of Lands and Mineral Resources(MOLMR);5.The Ministry of Local Govt, Urban Development, Housing and Environment, and 6. The AG.

20. The plaintiffs, in that case had sought declarations that: (1)"*the 2nd Defendant's approval for the surrender and release of Lease No. 6068 being Lots 1 and 2 on Plan No. M 2605 to the 3rd Defendant is unlawful and ultra vires their powers without approval and or consent of the 4th Defendant; and*";(2)"*the 3rd Defendant's acceptance of the release and surrender of Lease No. 6068 and being Lot 1 & 2 on Plan No. 2605 from the 2nd Defendant was unlawful without the consent of the 4th Defendant*".

21. On 11th May, 2017, Wati J delivered judgment in HBC no.32 of 2011L consolidated with HBC no.22 of 2012L. I reproduce paragraphs 87 to 95 of the judgment:

> *The land in dispute is Lot 1 and 2 on M 2605. This was under the control of LTC. There is no evidence of any lease being given to LTC over this land.* ***However since LTC was owned this property, it agreed for a rezoning for commercial use by VCORP.*** *It wrote to the 5th defendant asking for approval and permission for re-zoning. The permission was granted on 18th September 2012.*
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> ***The re-zoning was agreed to by LTC because the land that it owned and was used for public purpose was misused by the public. It was better and more economically viable that it be rezoned for special use by VCORP. In its wisdom, LTC made a proper and sound decision as it did not have the capability or the resource to maintain the land any longer and it became the most dreaded and scary place of the town where drinking and other improper activities took place.***
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> *LTC did not surrender the lease. There is no evidence of any lease but evidence was adduced that LTC agreed for a rezoning.* ***It did agree to surrender the use from public to special use and it has the right under s.91 (2) (b) of the LGA to do so, ..***
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> ***The 5th defendant had granted a provisional approval for re-zoning on 6 July 2012 and Exhibit 27 is clear evidence of that. Through the letter for provisional approval, the 5th defendant had also advised VCORP that a public hearing would be conducted on 12 July 2012. After the public hearing the decision was made to grant a final approval by the 5th defendant for re-zoning. The final approval was granted on 16 August 2012 and the letter was tendered as Exhibit 28 in the proceedings.***
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> ***VML and Mr. BK****(Bashir Khan) say that there was no permission by the MOLMR to surrender the land. In fact Exhibit 30 is a letter from the* ***MOLMR which approved the re-zoning and transferring of the property to ITLTB to be leased to VCORP****. The letter dated 7 June 2012 in its material part reads:..*
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> *Exhibit 30 clearly shows that the* ***MOMLR had approved the re-zoning and approved the transfer of the property to ITLTB for leasing.*** *Exhibit 30 also shows that* ***the MOMLR's consent for re-zoning was granted before the 5th defendant conducted a public hearing and gave a final approval for the re-zoning.***(emphasis added)

22. In my view, the issues raised in the application for judicial review have been conclusively decided in the judgment in HBC no.32 of 2011. The matter is res judicata.

23. AL Smith LJ in ***Stephenson v Garnett*** [1989] I QB 677 at 680-681 as cited by Lord Diplock in ***Hunter v Chief Constable of West Midlands and another***,[1981] 3 All ER 727 at pg 733 stated:

> *...the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexations, yet it ought to do so when, as here, it has been decided shewn that the identical question sought to be raised has been already decided by a competent court.*

24. Mr Nagin advanced the contention that res judicata arises only in matters between the same parties. His clients were not parties in HBC no.32 of 2011.

25. I disagree. The principle of res judicata applies to decisions in rem, as laid down in ***Nagan Engineering(Fiji)Ltd v Raj*** [2010] FJHC 47 and cited by Mr Nagin, in his written submissions filed on 26th April,2016.

26. In ***Nagan Engineering (Fiji) Ltd v Raj***, Singh J expounded with clarity and authority the elements of a plea of res judicata as follows:

> *A party who wishes to set up res judicata by way of estoppel must establish six ingredients according to Spencer Bower & Turner: The Doctrine of Res Judicata, 2nd Edn., 1969, pp. 18, 19.*
>
> (i) *that the alleged judicial decision was what in law is deemed such.*
>
> (ii) *that the particular judicial decision relied upon was in fact pronounced, as alleged.*
>
> (iii) *that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf.*
>
> (iv) *that the judicial decision was final .*
>
> **(v) *that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision as conclusive in rem.*** (emphasis added)

27. In my view, Wati J has made conclusive findings of fact. The findings in the paragraphs of the judgment I have reproduced are "*conclusive in rem*".

28. Smith LJ in ***Ballantyne v Mackinnon,*** [1896] 2 QB 455 at 462 stated:

> ....(in)*a judgment in rem,..* ***'the point adjudicated upon(which in a judgment in rem is always as to the status of the res) is conclusive against all the world as to that status,*** .. (emphasis added)

29. It was next argued that the impugned decision was made, before the public hearing. Mr Nagin submitted that there was a predetermination by the respondents.

30. The applicants sought (a) an order of certiorari to remove the decision of the respondents of 2nd April, 2012, and (b) a declaration that the respondents "*exceeded and/or did not properly exercise their jurisdiction and/or made errors of law and/or abused its discretion and/or acted unreasonably and/or irrationally and/or acted in breach of the legitimate expectations of the Applicants in purporting to approve a Sublease or alienation of the property*".

31. Charan Jeath Singh, in his affidavit in support of the application for judicial review filed on behalf of the applicants avers that the fifth and other respondents made a decision to hand over the Jaycees Park "*without consulting the local residents or ratepayers or calling any other expressions of interest..in breach of the rules of natural justice*". The grounds upon which relief is sought provide that the respondents acted unfairly and in breach of the rules of natural justice and their legitimate expectations in failing to give "*the Applicants and the Labasa residents and ratepayers a fair hearing*", before purporting to approve a sublease or alienation of the property.

32. Bashir Khan, in his affidavit in support as President of the Vanualevu Muslim League and the other intervenors stated that they are greatly affected by the alteration of the zoning of Lot 1 (part of) and Lot 2 M2605 Jaycees Park from open space to special use (tourism) by the respondents, without consulting the residents or ratepayers or calling expression of interests.

33. The case for the applicants and the intervenors was that the residents and ratepayers were not given a hearing before the decision was made. It was not their case that there was a predetermination, as is now contended.

33. In support of the contention that the writ procedure is inappropriate to a public law challenge, Mr Nagin referred to the decision of the FCA in ***Digicel v Pacific Connex Investment Ltd & Ors,*** [2009] FJCA 64; ABU0049.2008S and ***O'Reilly v Mackman***,[1983] 2 AC 237.

34. Significantly, the objection that it was an abuse of process of court to raise matters falling within the realm of public law in private law litigation, had been taken up in ***Digicel v Pacific Connex Investment Ltd & Ors,*** by a notice of motion filed in the High Court at an interlocutory stage.

35. Moreover, the FCA said the "*general rule*" laid down by the House of Lords in ***O'Reilly v Mackman***, that it would "*be contrary to public policy, and as such as abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action*", does not apply where none of the parties had not objected to the procedure.

36. The judgment of the Court cited the following passage from the judgment of Lord Diplock in ***O'Reilly v Mackman,***(*supra*) at pg 285 :

> ***My Lord I have described this is as a general rule;*** *for though it may normally be appropriate to apply it by the summary process if striking out the action,* ***there may be exceptions****, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under the private law,* or ***where none of the parties object to the adoption of the procedure by writ or originating summons.*** (emphasis and underlining mine)

37. The words that I have highlighted in Lord Diplock's speech provides a complete answer to the proposition advanced. I find it inexpedient to say anything more except to add that HBC no.32 of 2011 was instituted by two of the three intervenors in this case.

39. ***Digicel Fiji Ltd v Director of Town & Country Planning and Shireen Lateef,*** ,[2010] FJCA 43 as cited by Mr Nagin is distinguishable from the present case. In that case, it was found that the respondents were not given an opportunity to be heard on the proposal to build a tower in Flagstaff.

40. In the present case, Wati J has reached a conclusive finding that there was a hearing and " *the land..*(owned by LTC) *used for public purpose was misused by the public. It was better and more economically viable that it be rezoned for special use by VCORP. In its wisdom, LTC made a proper and sound decision as it did not have the capability or the resource to maintain the land any longer and it became the most dreaded and scary place of the town where drinking and other improper activities took place*".

41. I would reiterate that Wati J's judgment has addressed all the issues in this application for judicial review.

42. In my judgment, it is an abuse of process to re-litigate the issues decided finally by a court of competent jurisdiction.

43. In the result, the application for judicial review fails and is declined with no order as to costs.

44. ***Orders***

1. The fifth respondent's summons fails.
2. The application for judicial review is declined.
3. I make no order as to costs.

HIGH COURT OF FIJI SUVA

A.L.B. Brito Mutunayagam
JUDGE
1st June, 2017