IN THE HIGH COURT OF FIJI
WESTERN DIVISION

AT LAUTOKA

JUDICIAL REVIEW NO. 4 OF 2018
IN THE MATTER of an Application by PENI TOKAIMALO for a Judicial Review under Order 53, of the High Court Rules 1988

AND

IN THE MATTER of the Decision of the CENTRAL AGRICULTURAL TRIBUNAL dated 15th February 2018 in Central Agricultural Tribunal No. 01 of 2015.

BETWEEN : PENI TOKAIMALO of Veisaru, Ba.

APPLICANT

A N D : NARENDRA CHAND of Veisaru, Ba.

FIRST RESPONDENT

A N D : NATIVE LAND TRUST BOARD 85 Drasa Avenue, Lautoka.

SECOND RESPONDENT

A N D : CENTRAL AGRICULTURAL TRIBUNAL

THIRD RESPONDENT

Counsel : **Mr. Samuel Kamlesh Ram for the applicant.**
Mr. Ravneet Charan for the first respondent.
No appearance for the second respondent.
(Ms) Olivie Manuliza Faktaufon, A.G.'s Chambers, for the third respondent.

Date of hearing : **Thursday, 27th September 2018**
Date of ruling : **Friday, 22nd February 2019**

RULING

(A) INTRODUCTION

(i) This is the applicant's application for **'judicial review'** of the decision of the 'Central Agricultural Tribunal' dated 15th February, 2018 dismissing an appeal from the decision of the 'Agricultural Tribunal'.

The application is made pursuant to Order 53, rule 3 of the High Court Rules, 1988.

(ii) The applicant seeks the following reliefs and remedies;

6.1. ***AN ORDER ON CERTIORARI*** *to remove the decision of the CENTRAL AGRICULTURAL TRIBUNAL made on the 15th of February 2018 into this Honorable Court and that the same be quashed.*

6.2. ***AN ORDER OF MANDAMUS*** *directing the CENTRAL AGRICULTURAL TRIBUNAL to allow the appeal of the Applicant from the Agricultural Tribunal and to: -*

6.2.1. *Declare the tenancy in the name of the First Respondent unlawful and to assign the tenancy to the Applicant;*

6.2.2. *Declare a tenancy under the Agricultural Landlord and Tenant Act in favour of the applicant.*

6.3. *Damages.*

6.4. *Further declaration or other relief as to this Honourable Court may seem just.*

6.5. *Costs of this action*

(iii) The grounds on which the reliefs are sought;

7. *That the Central Agricultural Tribunal had acted beyond its powers and/or exceeded its jurisdiction and/or erred in law in dismissing the appeal of the appellant and failing to apply the provisions of the ALTA especially in regard to the definition of people who fell within the category of "landlord" as defined under section 2 of ALTA*

8. *That the Central Agricultural Tribunal had acted beyond its powers and/or exceeded its jurisdiction and/or erred in law in allowing the First Respondent to contract out of the provisions of ALTA when section 15 of ALTA clearly prohibited such actions.*

9. *That the Central Agricultural Tribunal had acted beyond its powers and/or exceeded its jurisdiction and/or erred in law by not declaring the tenancy of the first respondent unlawful when the evidence clearly showed that the transfer from a predecessor in title (Samuela Ibo Kautoga) to the First Respondent was done without the consent of the Second Respondent and was therefore unlawful under section 12(1) of the iTaukei Land Trust Act.*

10. *That the CENTRAL AGRICULTURAL TRIBUNAL abused its discretion in that:*

    10.1. *It took into consideration irrelevant matters;*
    10.2 *It did not take into consideration relevant matters;*
    10.3 *It acted unreasonably, arbitrarily or in bad faith and therefore exceeded its jurisdiction; and*
    10.4 *It did not give regard to the Applicant's legitimate expectations.*

11. *That the CENTRAL AGRICULTURAL TRIBUNAL acted in breach of the rules and principles of natural justice in that it did not give a proper hearing and/or due weight to the Applicant's Submissions.*

(B) THE BACKGROUND

(i) The proceedings before me relates to a land described as 'Veisaru' (part of) comprised in ITaukei Land Trust Board Ref. 4/1/3277, Certificate of Title No:- 7970 containing 11 acres at Veisaru, Ba.

(ii) It is common ground that the land is agricultural land within the meaning of the 'Agricultural Landlord and Tenant Act' (Cap. 270) to which for convenience I will hereinafter refer as 'ALTA'.

(iii) On 11th March 2010, the applicant filed an application in the 'Agricultural Tribunal' under section 4(1) of 'ALTA' seeking a declaration of tenancy in respect of the said land.

(iv) The history of the case, the facts and the evidence as found by the 'Agricultural Tribunal' are as follows; (I take them gratefully from the admirably clear and succinct statement to be found in page (2) and (3) of the 'Agricultural Tribunal' ruling dated 12th August 2015).

> *"The Applicant stated that he is originally from Nadarivatu and he first entered the subject land in 2001. He is a farmer and a sugar cane cutter by profession. He said that he was cutting sugar cane in another part of Veisaru when the predecessor in title, one Samuela Kautoga approached him with a proposal to occupy and cultivate the subject lease hold on 50/50 share basis.*
>
> *He agreed. Mr. Kautoga showed him the subject land and told him to build his house and cultivate the land. He was cultivating sugar cane and vegetable on the subject lease hold. He was the one who attended all the MOGA meetings and Mr. Kautoga never assisted in cultivating the subject land. The Applicant stated that he cultivated sugar cane on a large scale between 2002 to 2009. He never received any money from the cane proceeds as it all went to Mr. Kautoga. He survived by selling the vegetables and other roots crops he planted on the subject land. The applicant also stated that the land rental for the subject lease was deducted directly by the 2nd Respondent from the cane proceeds. He has not cultivated any sugar cane since 2010.*
>
> *The Applicant stated that Mr. Kautoga offered to sell the subject lease to him for the purchase price of $10,000.00. He paid a deposit of $500.00 and the balance was to be paid later. He stated that the 1st Respondent was not aware of the dealing he had with Mr. Kautoga to buy the subject lease. The Applicant also stated that before completing the sale, Mr. Kautoga sold the subject lease hold to the 1st Respondent. The Applicant then sought legal advice and subsequently filed this application to protect his interest.*
>
> *The Applicant also stated that he was served with a summons to vacate by the 1st Respondent. He did not vacate and still remain in occupation but his cultivation is now limited to vegetable farming on the land surrounding the house.*

Under Cross Examination, the Applicant confirmed that he understood that the subject lease has been transferred to the 1st Respondent. He was only dealing with Mr. Samuela Kautoga and never had any dealing with the 1st Respondent. The Applicant also confirm that he had an agreement with Mr. Kautoga to buy the subject lease. He paid the deposit of $500.00 but before completing the sale, Mr. Kautoga sold the subject land to the 1st Respondent. He has not paid the balance price of $9,500.00 and has not asked for the refund of his $500.00 deposit.

The Applicant confirmed that the 1st Respondent was occupying his own lease which was adjacent to Mr. Kautoga's lease hold. The Applicant added that he did not have any dealings with the 1st Respondent. He was dealing with Mr. Kautoga only.

In Re-Examination, the Applicant confirmed that all the cane proceeds from his cultivation went to Mr. Kautoga. He had to use his own money to pay the cane cutters and feed them. He also used his own money to pay for all the expenses in cultivating the farm."

(v) On 12th August 2015, the 'Agricultural Tribunal' at Lautoka dismissed the application for declaration of tenancy in respect of the said land.

The Agricultural Tribunal after hearing the evidence and listening to arguments from Counsel said in page (5) of the ruling;

"I have heard and evaluated all the evidence adduced by all the witnesses called during the Hearing of the matter. I find no evidence of any arrangement between the Applicant and the 1st Respondent. I also note that there was no direct claim by the Applicant against the 1st Respondent which makes me wonder as to the purpose of proceeding with this claim when all the evidence pointed in a different direction. I agree with Mr. Reddy that there is no case against the 1st Respondent in as far as the substantive application is concerned.

For the reasons given herein, the substantive application for declaration of tenancy is hereby dismissed. I am reluctant to award costs against the Appellant, he has suffered enough loss. There will be no order as to costs."

(vi) The applicant appealed to the 'Central Agricultural Tribunal' on the following grounds;

1. *The learned Tribunal erred in law in the interpretation of the Agricultural Landlord and Tenant Act when he held that because there was no evidence*

of an arrangement between the Appellant and the First Respondent, he could not make a declaration of tenancy.

2. *The learned Tribunal erred in fact and in law in not taking into account that the First Respondent had purchased the subject land while having due notice of the occupation and cultivation of the Agricultural Holding by the Appellant.*

(vii) The applicant's appeal to the 'Central Agricultural Tribunal' failed. The 'Central Agricultural Tribunal' records the following findings;

> *[10] From the evidence adduced by the appellant it appears that he had been working on the land in dispute for and on behalf of Samuela Ibo Kautoga and not on his own.*
>
> *[11] Section 4(1) of the Agricultural Landlord and Tenant Act 1966 provides thus:*
>
> > *Where a person is in occupation of, and is cultivating, an agricultural holding and such occupation and cultivation has continued before or after 29 December 1967 for a period of not less than 3 years and the landlord has taken no steps to evict him, the onus shall be on the landlord to prove that such occupation was without his consent and, if the landlord fails to satisfy such onus of proof, tenancy shall be presumed to exist under the provisions of this Act.*
>
> *[13] The above provisions do not have the effect of making an occupier automatically a tenant. It only creates a rebuttable presumption that he is the tenant and the burden is accordingly shifted to the landlord to rebut the presumption. In this instance burden was on Samuela Ibo Kautoga to rebut the presumption because it is against his rights in the property the appellant was said to be in occupation. However, Samuela Ibo Kautoga was not made a party to these proceedings.*

(viii) The 'Central Agricultural Tribunal' ruled that;

> *[16] In view of the provisions of section 5(1) the proper course for the appellant was to make an application under these provisions and sought a declaration of tenancy against Samuela Ibo Kautoga.*
>
> *[17] The Agricultural Tribunal is therefore correct in dismissing the application of the appellant.*

(ix) The applicant then sought leave of the High Court to apply for judicial review of the Central Agricultural Tribunal's decision. In a statement filed with the application for leave the applicant stated as follows the reliefs which he would seek and the grounds on which he would rely if leave were granted.

The applicant seeks the following reliefs and remedies

6.1. ***AN ORDER ON CERTIORARI*** *to remove the decision of the CENTRAL AGRICULTURAL TRIBUNAL made on the 15th of February 2018 into this Honorable Court and that the same be quashed.*

6.2. ***AN ORDER OF MANDAMUS*** *directing the CENTRAL AGRICULTURAL TRIBUNAL to allow the appeal of the Applicant from the Agricultural Tribunal and to: -*

6.2.1. *Declare the tenancy in the name of the First Respondent unlawful and to assign the tenancy to the Applicant;*

6.2.2. *Declare a tenancy under the Agricultural Landlord and Tenant Act in favour of the applicant.*

6.3. *Damages.*

6.4. *Further declaration or other relief as to this Honourable Court may seem just.*

6.5. *Costs of this action*

The grounds upon which the reliefs are sought;

7. *That the Central Agricultural Tribunal had acted beyond its powers and/or exceeded its jurisdiction and/or erred in law in dismissing the appeal of the appellant and failing to apply the provisions of the ALTA especially in regard to the definition of people who fell within the category of "landlord" as defined under section 2 of ALTA*

8. *That the Central Agricultural Tribunal had acted beyond its powers and/or exceeded its jurisdiction and/or erred in law in allowing the First Respondent to contract out of the provisions of ALTA when section 15 of ALTA clearly prohibited such actions.*

9. *That the Central Agricultural Tribunal had acted beyond its powers and/or exceeded its jurisdiction and/or erred in law by not declaring the tenancy of the first respondent unlawful when the evidence clearly showed that the transfer from a predecessor in title (Samuela Iba Tautoga) to the First Respondent was done without the consent of the Second Respondent and was therefore unlawful under section 12(1) of the iTaukei Land Trust Act.*

10. *That the CENTRAL AGRICULTURAL TRIBUNAL abused its discretion in that:*

    10.1. It took into consideration irrelevant matters;
    10.2 It did not take into consideration relevant matters;
    10.3 It acted unreasonably, arbitrarily or in bad faith and therefore exceeded its jurisdiction; and
    10.4 It did not give regard to the Applicant's legitimate expectations.

11. *That the CENTRAL AGRICULTURAL TRIBUNAL acted in breach of the rules and principles of natural justice in that it did not give a proper hearing and/or due weight to the Applicant's Submissions.*

(x) After hearing the application for leave, the court granted leave on 14th May 2018.

(C) CONSIDERATION AND THE DETERMINATION

(i) Counsel for the applicant and third respondent tendered written submissions in support of their respective cases. I am grateful to counsel for those lucid and relevant submissions and the authorities therein collected which have made my task less difficult than it otherwise might have been. I may add that the submissions are careful and competent. If I do not refer to any particular submission that has been made, it is not that, that I have not noted that submission or that submission is not relevant; it is simply that; in the time available, I am not able to cover in this decision every point that has been made before the Court.

(ii) Before I address myself to the application for judicial review, I pause here to consider the proper purpose of the remedy of judicial review, what it is and what it is not. The law was correctly stated in the speech of Lord Evershed in '**Ridge v**

Baldwin' (1963) 2 ALL.E.R. 66 at 91, (1964) AC. 40 at 96. Lord Evershed referred to;

> *"a danger of usurpation of power on the part of courts... under the pretext of having regard to the principles of natural justice.... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity of putting his case."*

(iii) Therefore, the judicial review is concerned, not with the decision, but with the decision-making process. Lord Brightman in **"Chief Constable of the North Wales Police v Evans"** (1982) 3 ALL. E.R. 142 at p 154 said unless that restrictions on the power of the court is observed, the court will under the guise of preventing the abuse of power, be itself guilty of usurping power.

(iv) Lord Templeman in **'Reg v Inland Revenue Commissioner, Ex-parte Preston** (1985) A.C. 885 at 862 said;

> *"Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which is no reasonable tribunal could have reached, or abuse its powers."*

(v) Bearing those in mind, I now turn to the **first ground** upon which the relief is sought. The first ground is in these terms;

- *"That the Central Agricultural Tribunal had acted beyond its powers and/or exceeded its jurisdiction and/or erred in law in dismissing the appeal of the appellant and failing to apply the provisions of the ALTA especially in regard to the definition of people who fell within the category of "landlord" as defined under section 2 of ALTA."*

(vi) Mr.Ram in arguing ground (1) submitted that there exists a landlord and tenant relationship between the applicant and the first respondent because;

- As an assignee, the first respondent became a landlord

AND

- The first respondent was aware of the applicants occupation and cultivation of the land when the first respondent entered into an agreement with the predecessor in title for the sale and purchase of the

agricultural land in question.

AND

- ❖ The first respondent had actual, imputed or constructive notice of the applicant's tenancy plus actual possession, occupation and cultivation of the said land.

(vii) Counsel for the applicant elaborated on this on page (10) and (11) of the written submissions filed on 07.02.2019 as follows;

> *46. This is incorrect because the statutory definition of "landlord" includes "assigns of a landlord". By contrast, the Land Transfer Act defines a "lessor" "as the proprietor of the land leased and includes a sub-lessor" where "proprietor" is defined as "... the registered proprietor of land, or of any estate or interest therein".*
>
> *47. Ownership being defined in terms of title by registration is unique to the Land Transfer Act (which establishes the Torrens system of title by registration). The purpose of ALTA is not to simply import title by registration. In fact, it gives powers to the Agricultural Tribunal to declare tenancy against a registered proprietor. It even goes to the extent of allowing such a declaration to be made against an assignee of the registered proprietor.*
>
> *48. ALTA defines "landlord" as follows:-*
>
> *"landlord" means the Government, the Native Land Trust Board or any person for the time being entitled to receive the rents and profits of any agricultural land, and includes the personal representatives, executors, administrators* ***and assigns of a landlord*** *[The emphasis is mine]."*
>
> *49. The Second Respondent consented to an assignment of the instrument of tenancy from the predecessor in title to the First Respondent (page 26). The First Respondent effectively became an assignee of the landlord. He therefore fell within the category of "landlord".*
>
> *50. The CAT was of the view that once the land was transferred to the new registered proprietor any rights accrued to the Applicant against the Predecessor in Title was extinguished. This is absolutely incorrect because the definition of landlord includes "assigns of a landlord".*

51. *Such an interpretation would mean that any person could avoid an application under ALTA by simply assigning the lease to another person. This was clearly not the intention of ALTA and parliament defined landlord in that matter for the purposes of avoiding such a situation.*

52. *The jurisdiction of the Agricultural Tribunal and the CAT is by statute. The Applicant could not seek the relief against a predecessor in title. The instrument of tenancy is no longer in the name of Samuela Ibo Kautoga. If the proceedings were against him, a declaration would be meaningless. There would be no way to enforce a declaration that the predecessor in title had a tenancy that was unlawful. This is why the legislation provides an assignee of the landlord is included within the terms.*

53. *In holding that there was no cause as between the Applicant and the First Respondent, the CAT ignored and effectively changed the definition of "the landlord" as provided in the legislation. This was clearly outside its jurisdiction.*

(viii) I now turn to the respondents. Counsel for the respondents acknowledged the force of the criticism of Central Agricultural Tribunal's failure to regard first respondent as landlord. Indeed, they frankly conceded that the first respondent can be included in the definition of "landlord", however, they submitted that the first respondent had no dealings with the applicant. Their primary point was that the applicant was not occupying and cultivating on his own but instead on behalf of Mr. Kautoga (the predecessor in title) and therefore the applicant is not an occupier and cultivator under section 4(1) of ALTA.

(ix) Counsel for the third respondent elaborated on this point on page (8), (9), and (10) of the written submissions filed on 20.11.2018 as follows;

5.14 *However, we agree. The First Respondent may well be included in the definition of "landlord" however, the First Respondent had no dealings with the Applicant and it was therefore important for the CAT to consider the circumstances under which the Applicant had entered upon and cultivated the land.*

5.15 *It is evident that the Applicant's interest in the land under the instrument of tenancy stems from arrangements between the Applicant and Mr Kautoga. At page 194 of the Copy records at PT-02. Mr. Kautoga clearly indicated his reasons for bringing the Applicant on the land:*

"... After coming back from Lautoka and seeing the situation he was in, because of his vacation, I went up to his place and we discussed on his situation. When I came there, his house was already dismantled at that place where they were staying. We discussed and I told him that he will be staying at one piece of land which is an old farm, you will be staying there. The reason why I put him there was because of his request because he has been vacated from there and I thought about his daughters who were young and still in school because of their welfare. And I showed him the place on the same night and he brought his house and he stayed on that place I showed him..."

5.16 *Mr. Kautoga had brought the Applicant onto the land on humanitarian grounds.*

5.17 *Eventually the Applicant started cultivating on behalf of Mr. Kautoga. This the CAT viewed as cultivation not coming within the purview of section 4(1) of ALTA. CAT obviously found that, as admitted by the Applicant, there were no arrangements or dealings with the First Respondent. The Fiji Court of Appeal in* ***Gir v. Devi*** *[1989] FJLR 2echoed the view expressed in* ***Bijay Bhadur v. Ram Autar & Ors*** *[WD 48/78] where the following was stated:*

> *"Section 4(1) affords protection to bona-fide tenants whose landlords subsequently refused to recognize them as such. It is not a shortcut to acquiring of an interest in land by adverse possession."*

5.18 *In the present case, the Applicant would have appreciated that CAT had indeed dealt with the issue of alleged occupation and cultivation by the Applicant while the subject lease was under the name of Mr Kautoga. CAT's findings were that the Applicant was indeed not a cultivating and occupying on his own but instead on behalf of Mr Kautoga and therefore not an occupier and cultivator under Section 4(1) of ALTA (paragraphs 10, 11 and 12 of the Decision).*

5.19 *Therefore notwithstanding Mr Kautoga was not a party to the proceedings, CAT had already given consideration to whether or not the Applicant's alleged occupation and cultivation was in satisfaction of section 4(1) of ALTA. This was again answered in the negative and the reasons for why were given by the CAT.*

5.20 *Whether or not the First Respondent had accepted transfer of the knowledge of alleged occupation and cultivation by the Applicant was not necessary to rule on that point considering that CAT had in any event viewed such occupation and cultivation as not having satisfied section 4(1).*

5.21 *CAT even considered correctly that the occupation and cultivation did not automatically make the Applicant a tenant (paragraph 13 of the Decision). It only created a rebuttable presumption as the burden than shifted to the landlord to rebut the said presumption. This burden could not be shifted to Mr Kautoga as he was not a party to the proceedings.*

5.22 *These were the relevant considerations taken by CAT which loops into the argument of the Applicant under grounds/questions 4 & 5. The Applicant has not expressed in the Applicant's supporting affidavit what considerations taken by CAT were irrelevant or unreasonable or how the Decision was made in bad faith.*

5.23. *Again the merits of the decision are not in issue but the procedure; in any event we reiterate that due regards was given to the consideration of the alleged occupation and cultivation by the Applicant during the time before the assignment of the subject lease to the First Respondent.*

5.24 *The Applicants contend that the errors in law arose out of CAT's failure to consider this interpretation and application of the definition of "landlord". However this was never the framing of the issue on appeal as the CAT was required to determine whether or not the Agricultural Tribunal erred in law in not taking into account whether the First Respondent had purchased the subject land while having due notice of the Applicant's alleged occupation and cultivation. It is submitted with due respect that these are grounds are not referring to review of procedure or the way in which the decision had been made by the Respondents but are in relation to the merits of the decision.*

5.25 *In other words, it is presented before this Honourable Court as a way of an appeal to exercise an appellate jurisdiction as opposed to supervisory jurisdiction.*

5.26 *In* ***State v. Director of Town and Country Planning*** *[2008] FJHC 392; HBJ 7J.2006S. Justice Tiko stated:*

> *"An error in law amounts to illegality as recognized under the Wednesbury doctrine"*

5.27 *His Lordship further cited Lord Diplock in* ***Council of Civil Service Unions –v- Minister for the Civil Service*** *[1985] AC 374 at p.410:*

> *"By "Illegality" as a ground for judicial review I mean the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of the dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."*

5.28 *Therefore CAT was not in error in not having consider the definition of "landlord". Furthermore the Decision was not made based on irrelevant considerations, made unreasonably or made in bad faith as suggested by the Applicant.*

(x) To go back in time for a moment; on 11th August, 2009, the first respondent entered into an agreement with the predecessor in title for the sale and purchase of the agricultural land for a sum of $12,000.00. On 9th December, 2009, consent was granted by the second respondent to the assignment of land to the first respondent from the predecessor in title (page 26). The instrument of transfer was signed on the same day.

I must now turn to the statutory provision.

ALTA defines "**landlord**" as follows;

> *"landlord means the Government, the Native Land Trust Board or any person for the time being entitled to receive the rents and profits of any agricultural land, and includes the personal representatives, executors, administrators and* ***assigns of a landlord"****.*
>
> [Emphasis added]

It is plain from the wording of section (2) of ALTA that the statutory definition of "landlord" includes "**assigns of a landlord**". I do not, of course, for a moment presume to doubt the correctness of the view which I have formed. The court's duty is to give meaning to ALTA in the language in which it is expressed, to achieve its apparent purposes and to apply it to litigation in today's world. ALTA should be given its proper operation to allow many to come at justice. Why should a court prevent persons from coming at justice? I concur with counsel for the applicant that the first respondent comes within the definition of

"landlord", in section 02 of the Act. I accept the construction given to the word "landlord". The first respondent is entitled to be regarded as the landlord.

(xi) However, the failure of the Central Agricultural Tribunal to regard first respondent as landlord is not necessarily fatal.
The presumption created by section 4 (1) of ALTA arises from a cultivation for a period of not less than (03) years.

(xii) For the sake of completeness, section (4) and (5) of ALTA is reproduced below in full.

> *[ALT 4]* ***Presumptions with regard to tenancies***
>
> *4 (1) Where a person is in occupation of, and is cultivating, an agricultural holding and such occupation and cultivation has continued before or after 29 December 1967 for a period of not less than 3 years and the landlord has taken no steps to evict him or her the onus shall be on the landlord to prove that such occupation was without his or her consent and, if the landlord fails to satisfy such onus of proof, a tenancy shall be presumed to exist under the provisions of this Act, provided that any such steps taken between the 20 June 1966 and 29 December 1967, shall be no bar to the operation of this subsection.*
>
> *(2) Where payment in money or in kind to landlord by a person occupying any of the land of such landlord is proved, such payment shall, in the absence of proof to the contrary, be presumed to be rent.*
>
> *[ALT 5]* ***Application to declare existence of tenancy***
>
> *5 (1) A person who maintains that he or she is a tenant and whose landlord refuses to accept him or her as such may apply to a tribunal for a declaration that he or she is a tenant and, if the tribunal makes such a declaration, the tenancy shall be deemed to have commenced when the tenant first occupied the land, provided that rent shall only be recoverable where the tribunal is satisfied that it is just and reasonable so to order.*
>
> *(2) Where an agricultural holding is held by an iTaukei according to iTaukei custom, he or she or a person authorized in writing by the iTaukei Land Trust Board may apply to a tribunal for a declaration that a tenancy under the provisions of this Act exists and from a date specified in such declaration, which shall not have retrospective effect, the provisions of this Act shall apply to such holding and*

such rent as may be assessed and fixed by the tribunal in respect thereof shall be paid to the iTaukei Land Trust Board.

(xiii) Under ALTA, occupation and cultivation of agricultural land for not less than three years if without objection from the landlord could raise a rebuttable presumption of tenancy. The landlord has the onus of proof that such a person was there without his consent failing which a tenancy is to be presumed.

(xiv) It appears that the applicant relied for his claim for a *'presumptive tenancy'* on the ground of occupation and cultivation of the land. At the costs of some repetition, I state that on 11th August 2009, the first respondent entered into an agreement with the predecessor in title for the sale and purchase of the agricultural land for a sum of $12,000.00. On 9th December, 2009, consent was granted by the second respondent to the assignment of the land to the first respondent from the predecessor in title (page 26). The instrument of transfer was signed on the same day. On 09-09-2010 the applicant instituted proceedings against the first respondent in the agricultural tribunal established under ALTA for the assertion of his rights under section 4(1) of ALTA. **The applicant has to prove that he had been occupying and cultivating the land with the knowledge of the first respondent for more than three years to invoke the tribunal's jurisdiction under section 4 and 5 of ALTA. Even assuming for a moment that the first respondent has consented to the occupation and cultivation of the land by the applicant, the period of occupation with the knowledge of the first respondent is less than three years. The first respondent became interested in the agricultural land on 11.08.2009. Of course, the first respondent could not have consented to the applicant's occupation and cultivation of the land before 11.08.2009. The applicant's application to the tribunal claiming a 'presumptive tenancy' was lodged thirteen (13) months after the first respondent became interested in the agricultural land. The applicant can only succeed if he surmounts the formidable hurdle of proving that he had been occupying and cultivating the land with the knowledge of the first respondent for more than three years. Here the period of occupation and cultivation with the knowledge of the first respondent is less than three years. Thus, the applicant falls at the hurdle. Section 4 of ALTA did not, in the circumstances, create a presumption of tenancy in favour of the applicant**. Hence, the application by the applicant to the Tribunal claiming a 'presumptive tenancy' based on occupation and cultivation of the land is bound to fail. Therefore, the Central Agricultural

Tribunal's failure to consider a relationship of landlord and tenant between the applicant and the first respondent is not necessarily fatal.

(xv) **Moreover, the applicant's tenancy is void due to lack of consent of Native Land Trust Board. No consent was ever obtained from the Native Land Trust Board in respect of the alleged tenancy. There was no legal tenancy and none that could be legalized subsequently. Therefore, the applicant does not qualify for declaration of tenancy even if he satisfies the requirements of section 4 and brings himself within the provisions of section 4(1). The consent required from the Native Land Trust Board or the Director of Crown Lands cannot be dispensed with by the Tribunal.**

(xvi) A tenancy presumed to exist under ALTA by virtue of section 4(1) of the Act may offend against the provisions of the Native Land Trust Act or the Crown Lands Act in that the consent of the Native Land Trust Board or (where required) the Director of Crown Lands respectively has not been obtained to a tenancy presumed to exist under ALTA. In such a case the tenancy is unlawful because it offends against one or other of the above statues. Section 45 of ALTA prohibits the subletting of the whole or part of an agricultural holding. Section 45 of ALTA is in these terms;

> *[ALT 45] Subletting*
>
> *45 (1) Subject to the provisions of subsection (2), the subletting of the whole or part of an agricultural holding after the commencement of this Act is prohibited.*
> *(2) Notwithstanding the provisions of subsection (1), the tribunal may, upon application being made to it by a tenant, permit the subletting of the whole or any part of an agricultural holding in a case where the tenant is, by reason of the state of his or her health or any other special circumstances, unable to carry out his or her obligations under the provisions of his or her contract of tenancy. Any such permission shall be subject to the prior written consent of the landlord, which shall not be unreasonably withheld, and shall remain in force until such time as the tenant is able to carry out his or her obligations under the provisions of his or her contract of tenancy.*

The definition of "**tenant**" was amended by Parliament in 1976 by the insertion of the words "a person lawfully holding"; the definition of which now reads:

*"'tenant' means a person **lawfully** holding land under a contract of tenancy and includes the personal representatives, executors, administrators, tenant or any other person deriving title from or through a tenant".*

(Emphasis added)

The definition of 'tenant', in my view includes a person who is by virtue of Section 4(1) of ALTA presumed to hold a contract of tenancy.

Every tenancy presupposes a tenant and if the last mentioned definition is applied to the definition of "contract of tenancy" it would mean that a tenant under a contract of tenancy as defined in ALTA would mean only **a lawful one.**

Section 59(3) reads;

"59(3) - Nothing in this Act shall be construed or interpreted on validating or permitting an application to the tribunal in respect of a contract of tenancy which was or is made in contravention of any law."

(xvii) Due to the reasons which I have endeavored to explain in the preceding paragraphs, I reject the first ground upon which the relief is sought as devoid of any merits. I find no ground for disturbing the decision of the Central Agricultural Tribunal.

(xviii) I now turn to the **second ground** upon which the relief is sought. The second ground is in these terms;

(8) That the Central Agricultural Tribunal had acted beyond its powers and/or exceeded its jurisdiction and/or erred in law in allowing the First Respondent to contract out of the provisions of ALTA when section 15 of ALTA clearly prohibited such actions.

(xix) Counsel for the applicant elaborated on this on page 12, 13 and 14 of the written submissions filed on 07/02/2019.

*56. **The unlawful act was the assignment of instrument of tenancy by the Predecessor in Title to the First Respondent. It was plainly obvious that under the legislation, the First Respondent was deemed to be a tenant. Therefore, he was entitled to a declaration of tenancy.***

57. *Regardless of this right, the First Respondent took transfer of the property with the knowledge that the Applicant was in occupation and cultivation of the property. The predecessor in title transferred with this knowledge too.*

58. *Effectively, the agreement for transfer became an attempt to circumvent the legislative rights of the Applicant. This contract of Transfer was clearly prohibited by Section 15 of ALTA which provides:-*

> *"A provision in any contract of tenancy whereby the tenant purports to contract himself out of the provisions of this Act or the effects of which would be to contract the tenant out of any of such provisions shall be against public policy and void." (The emphasis is mine)*

59. *The transfer by the predecessor in title clearly has the effect of contracting out of Section 4 and 23 of ALTA. The Applicant had made an application for a declaration of tenancy against the predecessor in title. The First Respondent in these proceedings is a neighbor and in the contract he signed he was made aware of the occupation of the Applicant.*

60. *Before the declaration of tenancy application by the Applicant and the predecessor in title could be determined, the predecessor in title entered into an agreement to transfer the agricultural land to the First Respondent. The effect of this transfer was to contract out of the provisions of ALTA.*

61. *The Instrument of Tenancy in the name of the First Respondent is unlawful for that reason and because the rightful tenant of the agricultural land was the Applicant.*

62. *One of the purposes for the enactment of Section 18 (2) was to deal with situations of this nature. In Re Azmat Ali 1986 32 FLR 30 (23 July 1986) the Court of Appeal said (see page 9 of attached):-*

> *"A statute does not, as a rule, duplicate powers. In ALTA power to declare a tenancy on grounds of occupation and cultivation already existed when subsections 18(2) and (3) were added to it. Their purpose must, therefore, have been to deal with a situation for which no provision had been made in the Act as it then stood and the power conferred by them cannot be treated as aiming merely at declaring null and void what is already null and void by another statute.*

That would be a pure formality. Construction of these provisions as a whole indicate a contract capable of sustaining a claim unless declared invalid at the application of an interested party which may include the landlord, "tenant" under the contract, or "any tenant". Among the possible situations it certainly envisages one where more than one tenant may have a claim over the whole or part of the subject land, for instance where the whole land is claimed by "the tenant" under the agreement produced, whole or part of it is claimed by someone claiming tenancy under some other agreement or whole or part of it is claimed by a person claiming a declaration of tenancy under section 4. There may, of course, be situations where there is only one tenant alleging breaches of the provisions (such as section 11(1) of ALTA itself) or of some other law which, if established, may avoid the contract. The power to make a variety of orders is clearly intended to meet claims of different kinds."

63. *The transfer between the predecessor in title and the First Respondent was purposefully made in an attempt to defeat the rights of the applicant. This transfer was a contract which was unlawful under Section 15 of ALTA.*

Unlawful under other law

64. *Further, the transfer from the predecessor in title to First Respondent is, on the face of it, unlawful under the 'Taukei Land Trust Act. Any dealing in land must done with the consent of the iTLTB (Section 12 (1) of the Act.*

65. *It is unclear from the record whether the transfer was registered prior to this. The copy of the transfer on page 43 of the record shows the registered date is 12th February but the year is not legible. It appears to be 2012. It is submitted that the transfer was not registered before 8th March 2010 because subsequently, proceedings for eviction were taken by the predecessor in title who claimed to be the registered lessee.*

66. *The Agricultural Tribunal incorrectly noted that the transfer was registered on 19th December 2009 (see page 176). It is obvious from the words that the month of December is not mentioned in the registration box. It was signed on 9th December 2009 and in the registration box which is headed "for office use only" below the numbers 35893, the date "12 FEB" is clearly noted.*

67. *The predecessor in title also gave evidence (commences on page 192). In evidence in chief he confirmed that he owned the agricultural land "as at 18th February 2012" (page 193).*

68. *In his evidence in chief, the predecessor in title confirmed that the year of the transfer could not be read (page 199). It is submitted from the evidence that the transfer was registered on the 12th of February 2012.*

69. *An application was made for consent to assign this lease to the first respondent on 19th November 2009. Consent was granted on 9 December 2009 and this was valid "only for a period of THREE CALENDAR MONTHS". The conditions of the consent further provided that if the assignment was not registered either with the registrar of titles or the register of deeds by 8 March 2010, then "the consent here by granted will become VOID AND OF NO EFFECT." (page 26 of record). There is no credible evidence to show that the transfer was registered prior to that.*

70. *On the face of it, this clearly shows that the transfer was done without the consent of the Second Respondent and therefore is unlawful.*

(Emphasis added)

As I understand it, the crux of the argument of Mr. Ram is that the applicant acquired *'presumptive tenancy'* under section 4(1) of ALTA against the predecessor in title on the basis of occupation and cultivation of the land and therefore the assignment of land to the first respondent by the predecessor in title is an attempt to circumvent the legislative rights of the applicant.

I find this argument completely unconvincing.

On the question of power to decide a tenancy on the grounds of occupation and cultivation, the following passage of the Supreme Court of Fiji in '**Douglas James Gowing Garrich v. Lotan**' Civil Action No:- 1091 of 1982, 21.06.1984 is illuminating;

> *"It seems to me that, on a proper construction of Section 4(1), read together with Section 5, the intention of the legislature must be taken to be that if an applicant shows (i) that he has occupied and cultivated the land for a period of not less than three years immediately prior to making application under Section 5 for a declaration of tenancy and (ii) that the landlord has taken no steps to evict him prior to that application, the onus is then cost upon the landlord at the hearing of the application to prove that such occupation has been without his consent and*

that if (and only if) the landlord fails to discharge that onus a tenancy must be presumed to exist.

I do not think that an applicant can validly argue that the moment he has occupied and cultivated the land for three years, without the landlord having taken any steps to evict him during that period of three years, a presumption of tenancy arises. If, no steps to evict having been taken by the landlord, he fails to prove at the hearing of the application that the occupation has been without his consent, a tenancy must then (and not until then) be presumed to exist. Clearly, in my view, it is not until the landlord fails to discharge that onus at the hearing that the presumption matures."

(Emphasis Added)

Returning back to the case before me, it is important to remember that the predecessor in title did take steps to evict and terminate the tenancy of the applicant before he (the applicant) applied to the tribunal on 11.03.2010 for a declaration of 'presumptive tenancy' against the predecessor in title. The applicant's tenancy has been terminated by a written notice to quit dated 12th February, 2010, (page 52 of the brief) issued by the predecessor in title. **Therefore, a tenancy cannot be presumed under section 4(1) against the predecessor in title. The issue of written 'notice to quit' is necessarily fatal to the applicant's claim for a presumptive tenancy under section 4(1) of ALTA against the predecessor in title**. The presumption of tenancy does not arise automatically. I echo the view expressed by the Supreme Court of Fiji in '**Douglas James Gowing Garrich v. Lotan'** (supra);

> *I do not think that an applicant can validly argue that the moment he has occupied and cultivated the land for three years, without the landlord having taken any steps to evict him during that period of three years, a presumption of tenancy arises. If, no steps to evict having been taken by the landlord, he fails to prove at the hearing of the application that the occupation has been without his consent, a tenancy must then (and not until then) be presumed to exist. Clearly, in my view, it is not until the landlord fails to discharge that onus at the hearing that the presumption matures."*

I take cognizance of the fact that the applicant's application to the tribunal against the predecessor in title claiming a 'presumptive tenancy' under section 4(1) of ALTA on the ground of occupation and cultivation of the land was adjourned sine die and was not being actively pursued. The applicant does not

automatically become a tenant on the ground of occupation and cultivation of the land for more than three years. **The issue of written 'notice to quit' is necessarily fatal to the applicant's claim for a presumptive tenancy under section 4(1) of ALTA against the predecessor in title**. It is clearly a step taken to evict him. Therefore, the applicant's claim for presumptive tenancy against the predecessor in title is bound to fail. The applicant cannot satisfy the requirements of section 4(1). In the current climate, I find it a source of amazement that anyone would suggest;

(i) *The rightful tenant of the agricultural land was the applicant.*

(ii) *The agreement for transfer is an attempt to circumvent the legislative rights of the applicant.*

(iii) *The contract of transfer is clearly prohibited by Section 15 of ALTA.*

(iv) *The transfer by the predecessor in title clearly has the effect of contracting out of section 4 and 23 of ALTA.*

I find no ground for disturbing the decision of the Central Agricultural Tribunal.

(xx) I now turn to the **third ground** upon which the relief is sought. The third ground is in these terms.

> *(9) That the Central Agricultural Tribunal had acted beyond its powers and/or exceeded its jurisdiction and/or erred in law by not declaring the tenancy of the first respondent unlawful when the evidence clearly showed that the transfer from a predecessor in title (Samuela Iba Tautoga) to the First Respondent was done without the consent of the Second Respondent and was therefore unlawful under section 12(1) of the iTaukei Land Trust Act.*

This is flatly contradicted by the statement of defence filed by the second respondent. In paragraph (3) of the statement of defence of the second respondent filed before the Agricultural Tribunal, the second respondent pleaded that;

> *"Further to paragraph 2 above, the 2nd Respondent states that the land described by the Applicant in the application herein was previously leased to the 1st Respondent but has since been assigned by the 1st Respondent to a third party by the name of*

Narendra Chand on the 12th day of February, 2010 which assignment was duly consented to by the 2nd Respondent."

Therefore, I reject the third ground upon which the relief is sought, as devoid of any merits. With regard to the legality of the 'instrument of transfer', a number of challenges were ventured by counsel for the applicant. That matters not for present purposes. What matters is whether the applicant could bring himself within the provisions of section 4 (1) of ALTA.

(xxi) I propose to consider jointly the **fourth and fifth grounds** upon which the relief is sought. They are in these terms;

(9) That the CENTRAL AGRICULTURAL TRIBUNAL abused its discretion in that:

10.1. It took into consideration irrelevant matters;
10.2 It did not take into consideration relevant matters;
10.3 It acted unreasonably, arbitrarily or in bad faith and therefore exceeded its jurisdiction; and
10.4 It did not give regard to the Applicant's legitimate expectations.

(11) That the CENTRAL AGRICULTURAL TRIBUNAL acted in breach of the rules and principle of natural justice in that it did not give a proper hearing and/or due weight to the Applicant's Submissions.

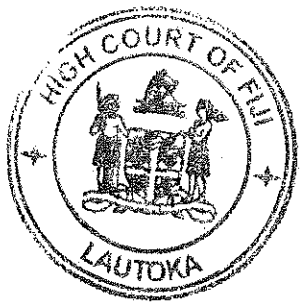
(10.1), (10.2) and (11) are expressed in general terms. They have not been particularized in the application for leave to apply for judicial review nor have they been specifically addressed in the written submissions. It is not only placing an unnecessary burden on the court to ask it to search through the written submissions and the transcript of hearing to find out what there may be to be complained of, but it is also unfair to the respondents, who are entitled to know what case they have to meet.

10.3 overlap and has been dealt with in ground (1).

(D) ORDERS

(i) The application for judicial review is dismissed.

(ii) In the light of the history of the litigation and the difficulties encountered by the applicant, there will be no order as to costs.



22/02/2019.

Jude Nanayakkara
Judge

At Lautoka,
Friday, 22nd February 2019