

IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION
WESTERN DIVISION
AT LAUTOKA

Constitutional Redress Application No. HBM 46 of 2017

IN THE MATTER of Section 25(b) of the Constitution
AND
IN THE MATTER of an application under Section 44(1)
of the Constitution and Rule 3(1) and (2) of the High
Court (Constitutional Redress) Rules 2015

BETWEEN : **LUSIANA RADUA** of Rabulu Village, Tavua, Domestic Duties. On
her own behalf as sole surviving member of Mataqali Natogo and
on behalf of Mataqali Natogo of Rabulu Village in the old Tikina of
Tavua in the Province of Ba.

APPLICANT

AND : **ITAUKEI LANDS AND FISHERIES COMMISSION** a
Commission constituted under the provisions of the iTaukei Lands
Act.

1st RESPONDENT

AND : **ITAUKEI LANDS TRUST BOARD** a corporate body constituted
under the iTaukei Lands Trust Act.

2ND RESPONDENT

AND : **MINISTER FOR LANDS** as empowered under the Decree No. 14
and 15 of 2000 Act to transfer State lands.

3RD RESPONDENT

AND : **LEPANI DRIU NO. 1** as representative of Yavusa Mali, Naseyani
Village, Ra.

4TH RESPONDENT

Counsel : Mr. Kitione Vuataki with Mr. Isoa Ratu Tikoca for the applicant
(Ms). Olivie Manuliza Faktaufon for the first and third
respondents
(Ms). Rogalu Elenoa Raitamata for the second respondent
No appearance for the fourth respondent

Date of hearing : Tuesday, 31st July, 2018
Date of ruling : Thursday, 31st January, 2019

RULING

(A) INTRODUCTION

- (1) The applicant applies for ‘**constitutional redress**’ pursuant to section 44(1) of the Constitution of the Republic of Fiji 2013 (the Constitution) by way of an amended “originating summons” and affidavit.
- (2) The applicant sought the following orders:

1. A DECLARATION that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is not extinct by the survival of Lusiana Radua as the last surviving member of such Mataqali.
2. AN ORDER that it is exceptional and just to correct false information from Roko Tui Ra quoted in Memorandum dated 11th April, 1972 written by L.V. Batiri for the Native Land Commissioner to 2nd Respondent that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is extinct.
3. AN ORDER annulling Memorandum dated 11th April, 1972 written by L.V. Batiri for the Native Land Commissioner to 2nd Respondent that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is extinct.
4. ALTERNATIVELY, an order by way of Injunction that the 1st Respondent write a Memorandum to the 2nd Respondent by the hand of its Chairman or an iTaukei Lands Commissioner withdrawing the Memorandum dated 11th April, 1972 written by L.V. Batiri for the Native Land Commissioner to 2nd Respondent that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is extinct and stating that such Mataqali is not extinct by the survival of one living member being Lusiana Radua the daughter of Wakesa Kurimai.
5. AN ORDER annulling Notice number 670 in Volume 99 of the Fiji Royal Gazette Number 21 of 19th day of April, 1972 and in the place thereof a Notice that such Mataqali is not extinct and its lands being NLC Lot 7 Sheet Reference H/54; H/10 2, J/3, J/6 1 RNL Number 151 in the Tikina of Tavua and NLC Lot 4 Sheet Reference H/5 4 are still registered in the Register of Native Lands as iTaukei lands in the name of said Mataqali.

6. ALTERNATIVELY, an order by way of Injunction that upon receipt of a Memorandum from the 1st Respondent revoking Memorandum dated 11th April, 1972 written by L.V. Batiri for the Native Land Commissioner that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is extinct, the 2nd Respondent do publish a Notice in the Fiji Gazette revoking its Notice number 670 in Volume 99 of the Fiji Royal Gazette Number 21 of 19th day of April, 1972 and in the place thereof a Notice that such Mataqali is not extinct and its lands being NLC Lot 8 Sheet Reference H/5 4; H/10 2, J/6 1 RNL Number 151 in the Tikina of Tavua and NLC Lot 4 Sheet Reference H/5 4 are still registered as native land in the name of said Mataqali.
7. AN ORDER annulling the inclusion of NLC Lot No. 8 RNL 151 from the list of Schedule A Lands of the Ba Province Transferred to Second Respondent under Notice number 1047 of Volume 1 of the Fiji Royal Gazette Number dated 1st December 2000.
8. THAT ALTERNATIVELY, an order by way of Injunction that the Third Respondent do cause to be published in the Fiji Gazette a Notice that NLC Lot 8 Sheet Reference H/5 4; H/10 2, J/3, J/6 1 RNL Number 151 in the Tikina of Tavua is removed from the listing of Crown Schedule A lands published in Notice number 1047 of Volume 1 of the Fiji Royal Gazette Number dated 1st December, 2000.

(3) The grounds on which the relief was sought;

- (a) The Applicant was registered in the Register of Landowners of Mataqali Natogo kept by 1st Respondent by virtue of her birth registration number 339062.
- (b) That the 1st Respondent keeps such Register by virtue of birth certificates and death certificates.
- (c) Unbeknown to Applicant one L.V. Batiri wrote a Memorandum dated 11th April, 1972 on behalf of a Native Land Commissioner of 1st Respondent stated that the Roko Tui Ra had reported and confirmed that Mataqali Natogo was extinct.
- (d) At that time the Applicant was residing with her husband in the husband's village in Wailevu, Cakaudrove and did not know of such Memorandum until 9th November, 2017 when the 2nd Respondent applied to adduce it as further evidence in the Court of Appeal.
- (e) Such Memorandum misled the 2nd Respondent to gazette a Notice in the

Fiji Royal Gazette of 28th April, 1972 that Mataqali Natogo was extinct.

- (f) *By virtue of such Gazette such false information became evidence of extinction of the Mataqali by virtue of law and misled the 3rd Respondent in listing the lands of Mataqali Natogo as Crown Schedule A lands when such lands were still registered as belonging to Mataqali Natogo on the Register of Native Lands kept by the 1st Respondent and the Registrar of Titles.*
 - (g) *That it is just to hear the application as such false and misleading information be corrected by Orders sought.*
 - (h) *1st Respondent had acted on other sources rather than Death Certificate in notifying the extinction of Mataqali Natogo when the Death Column for Lusiana Radua in the Register of Landowners was not filled with Death Certificate for Lusiana Radua.*
 - (i) *2nd Respondent had not corrected its Gazette Notice when notified by 1st Respondent and Applicant that Mataqali Natogo was not extinct.*
- (4) The application for constitutional redress is vigorously opposed by the respondents. An answering affidavit sworn on 16th May, 2018 by 'Mosese Ratubalavu', the 'Reserve Commissioner' at iTLTB was filed on behalf of the second respondent. An answering affidavit sworn on 24th May, 2018 by 'Vananalagi Vesikula', the Chairman of the iTaukei Lands and Fisheries Commission was filed on behalf of the first and third respondents. The fourth respondent did not file any material in relation to the application and played no part in the proceedings. An affidavit in reply was filed by the applicant.

(B) **THE FACTUAL BACKGROUND**

The applicant's supplementary affidavit in support which is as follows sets out sufficiently the facts surrounded this application from the applicant's point of view as well as the orders sought by the applicant.

1. **THAT** *I am the Applicant herein and depose this, my Affidavit from documents in my possession and matters well known to me which I believe to be true.*

Mother Wakesa Kurimai

2. **THAT** *I was born out of wedlock on the 02nd day of December, 1933 to Wakesa Kurumai when she was twenty years old. Attached marked 'LR1' is a true copy of my birth certificate.*
3. **THAT** *on my birth certificate my mother Wakesa Kurumai is recorded as a member of Mataqali Natogo of Yavusa Nadokana of Rabulu Village in the Tikina Rakiraki in the Province of Ra.*
4. **THAT** *the Register of Landowners/Vola ni Kawa Bula/Book of Living Descendants (VKB) kept by the 1st Respondent shows my mother being recorded as Wakesa Kurimai of Mataqali Natogo of Yavusa Nadokana Koro ko Naseyani (Narabulu). Attached marked "LR 2" is a true copy of such Register for Mataqali Natogo.*
5. **THAT** *at the time of my birth in 1933, my mother was working as a house girl for a European man at Mt Kasi Gold Mine which is located in the isolated area of Dawara, Cakaudrove, Vanua Levu.*
6. **THAT** *whilst she was still alive and unknown to her one L.V. Batiri purporting to write for the native Land Commissioner of the 1st Respondent reported to 2nd Respondent by Memorandum dated 11th April, 1972 that Roko Tui Ra had reported that Mataqali Natogo was extinct. Attached marked "LR 3" is a true copy of such Memorandum.*
7. **THAT** *I believe that it was unbeknown to her as she did not mention it ever to me throughout her lifetime till her death in July 1993.*
8. **THAT** *I am advised by my Lawyer that the 1st Respondent was under strict Executive instruction to only act in accordance with Register of births and Register of Deaths in maintaining the Register of Landowners kept by it.*
9. **THAT** *I therefore believe that the said L.V. Batiri and or the 1st Respondent was in error in acting on the report of the Roko Tui Ra that my said mother was deceased when she was alive and living in Vanua Levu.*
10. **THAT** *my said mother also had relatives like....and ...in Rabulu Village on the island of Viti Levu who knew that she was alive and in Vanua Levu.*
11. **THAT** *such report was false as my mother was still alive on 11th April, 1972 and such false report misled the 2nd Respondent who then prepared a*

Notice of Extinction of Mataqali Natogo dated 19th April, 1972 which was gazetted as Notice Number 670 in the Fiji Royal Gazette Number 21 of Volume 99 dated 28th April, 1972. Attached marked "LR 4" is a true copy of such Gazette.

12. **THAT** I am advised by my Lawyer and believe that the iTaukei Land Trust Act requires the 2nd Respondent to only act on a Report signed by the hand of the Chairman of the 1st Respondent or a Native Land Commissioner that a Mataqali is extinct before it can gazette such Mataqali as extinct.
13. **THAT** I therefore believe that the 2nd Respondent was wrong in gazetting Mataqali Natogo extinct on the report of L.V. Batiri purporting to sign on behalf of a Native Land Commissioner.
14. **THAT** I never saw my mother read any Fiji Royal Gazette or even the newspapers as we were living in a remote village in Cakaudrove on the island of Vanua Levu and it was not until 6th November, 1978 when she had shifted to Laqere which is 7 miles from the city of Suva that she registered me with the Registrar of Births, I refer to my birth certificate being Annexure "LR 1" as to the Informant of my birth.
15. **THAT** such Birth Certificate shows that my mother was still alive as at 6th November, 1978 and had not died to make Mataqali Natogo extinct.
16. **THAT** according to the records of the 1st Respondent, I was entered in the VKB in 1986 through my Birth Certificate as kept by the Register of Births, Deaths and Marriages. I refer to the Register of Landowners of Mataqali Natogo which shows that the 1st Respondent registered me through my birth registration number 339062 in the column headed "Vola ni Sucu" in the iTaukei dialect.
17. **THAT** the word "Vola ni Sucu" is Birth Certificate and beside it is a column headed "Vola ni Mate" or "Death Certificate" which is blank as I am still alive.
18. **THAT** my mother Wakesa Kurimai died in July 1993 and this is also recorded by 1st Respondent under the "Death Certificate" column of the Register of Landowners of Mataqali Natogo. I refer to such Register being Annexure "LR 2".

Allotment of Mataqali Natogo land Lot 8

19. **THAT** after I got married I moved to my husband's village in Laucala Village in Wailevu West on the island of Vanua Levu and this village was

about one and a half days walk from the nearest Government Road and no bus went there.

20. THAT I never obtained copies of newspapers or gazette to read and unbeknown to me the 3rd Respondent did by Notice number 1047 in Fiji Government Gazette Number 73 of Volume 1 dated 1st December, 2000 listed land belonging to Mataqali Natogo being Lot 8 on RNL 151 as Crown Schedule A. Attached marked "LR 5" is a true copy of such Gazette.
21. THAT whilst I was still living in my husband's said village the 2nd Respondent unbeknown to me allotted the said land to Yavusa Mali by Fiji Government Gazette dated 23rd April, 2004. Attached marked "LR 6" is a cutting of said gazette.
22. THAT whilst I was still living in said village I was approached by some people coming from the island of Viti Levu to go to Labasa regarding Mataqali Natogo lands which was sought to be used as an access road by a water bottling company.
23. THAT I was told and believe that the 1st Respondent had written a letter dated 20th August, 2014 to the Director Land Use Unit that the land sought to be leased as an access road being Lot 8 on Register of Native Lands folio 151 belonged to Mataqali Natogo. Attached marked "LR 7" is a true copy of such letter.
24. THAT on 26th August, 2014 the Reserve Commissioner of 2nd Respondent answering a query from the General Manager of 2nd Respondent said in a Memorandum that 2nd Respondent had received a letter from 1st Respondent in 1999 that Mataqali Natogo was not extinct as I was still alive and that 2nd Respondent was paying me lease monies from leasing of Lot 4 belong to Mataqali Natogo. Attached marked "LR 8" is a true copy of said Memorandum.
25. THAT I did therefore go to Labasa on the 27th day of October, 2014 and I was advised by one Mrs Miliakere Tamani from a law office in Labasa that my Mataqali Natogo had been gazette as extinct.
26. THAT I then did leave the island of Vanua Levu and go to the island of Viti Levu to my village in Rabulu in old Tikina Tavua to find out what had happened and there did meet my Lawyer, Mr Vuataki who then took instructions from me to ask 2nd Respondent to revoke the said allotment which he did by letter dated 31st October, 2014. Attached marked "LR 9" is a true copy of his letter to 2nd Respondent.

27. THAT I met my Lawyer Mr Vuataki who then took instructions from me to ask 2nd Respondent to revoke the said allotment which he did by letter dated 31st October, 2014. Attached marked "LR 9" is a true copy of his letter to 2nd Respondent.

28. THAT by letter dated 1st December, 2014 the 2nd Respondent replied to my legal counsel that the allotment of Lot 8 of Mataqali Natogo lands to Yavusa Mali remains. Attached marked "LR 10" is a true copy of said letter.

Exceptional Circumstances and Justice

29. THAT I believe that the information contained in the L.V. Batiri Memorandum that my mother Wakesa Kurimai was deceased in 1972 is false when she was still alive and such false information had misled the 2nd Defendant in gazetting Mataqali Natogo as extinct, which in turn misled 3rd Defendant to list Lot 8 RNL 151 land belonging to Mataqali Natogo to be Crown Schedule A land and in turn misled 3rd Respondent to allot said land to Yavusa Mali of Naseyani Village.

30. THAT I am further advised by my Counsel that though I am alive and though the 1st Respondent now maintains that Mataqali Natogo is not extinct and I am the sole surviving member of such Mataqali what is written by law in a gazette is evidence of that matter.

31. THAT I am further advised by my Counsel that I have a constitutional right to have false and misleading information corrected if there are exceptional circumstances and just to do so.

32. THAT neither I nor my mother knew of the L.V. Batiri Memorandum to 2nd Respondent when it was written as such memorandum was only between 1st Respondent and not 2nd Respondent.

33. THAT I only came to know of the existence of such Memorandum when the 2nd Respondent sought to adduce it as evidence in hearing of Civil Appeal ABU 0059 of 2015 on the 9th day of November, 2017.

34. THAT neither I nor my mother knew of the 2nd Respondent's Notice number 670 by way of Fiji Royal Gazette Volume 99 No. 21 of 28th April, 1972 that Mataqali Natogo was extinct until it was sought to be adduced as evidence in the Court of Appeal by 2nd Respondent on 9th November, 2017.

35. THAT I am informed by my said Lawyer and believe that on the 09th day of November, 2017 the 1st Respondent through its legal counsel produced to the Court of Appeal the gazette notice by the 3rd Respondent that listed lands belonging to Mataqali Natogo as being Crown Schedule A lands.
36. THAT I have never seen my mother read a Gazette nor do I receive nor read Gazette and I never read newspapers in the vernacular.
37. THAT on my Counsel's city agent searching titles kept by the 1st Respondent and the Registrar of Titles such lands were still registered under the Register of Native Lands as native land in the name of Mataqali Natogo. Attached marked "LR 10" and "LR 11" are true copies of said two titles of Mataqali Natogo.
38. THAT acting on the advice of the 1st Respondent the Land Use Unit has leased part of Lot 8 on RNL 151 on behalf of Mataqali Natogo after designation by the honourable Prime Minister to be administered under the Land Use Act.
39. THAT I am informed by my Counsel Mr Vuataki that one of the learned Justice of Appeal had said to my said Counsel that the documents sought to be adduced by the 2nd Respondent namely the L.V. Batiri Memorandum, the Gazette Notice of Extinction of Mataqali Natogo Land as Crown Schedule to be attacked in separate proceedings.
40. THAT because of that I make application in this separate proceedings for annulling the said three documents and the allotment of Lot 8 to Yavusa Mali because of the information upon which they are based are false and misleading.
41. THAT I am advised and believe that I have the right under section 24(2) of the Constitution to the correction or deletion of false and misleading information that affect me as a person.
42. THAT I believe that justice will be served in the correction of the false and misleading information that Mataqali Natogo was extinct in 1972 as 1st Respondent has already tried to correct it with 2nd Respondent by their 1995 letter that Mataqali nation was not extinct and also their letter to Land Use Unit that Lot 8 still belonged to Mataqali Natogo.
43. THAT I therefore ask for Orders in Terms of Application filed herewith.

(C) CONSIDERATION AND DETERMINATION

- (1) Counsel for the applicant and the respondents have tendered extensive 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. If I do not refer to any particular submission that has been made, it is not that I have not noted that submission or that 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 me.
- (2) I desire to say at the outset that during the hearing conducted on 31st July, 2018, the applicant's counsel stated that the memorandum written by one L.V. Batiri dated 11th April, 1972 ('**memorandum**') and addressed to the second respondent was the genesis for which all other events followed which affected the applicant including:
- (a) the notice of extinction of Mataqali Natogo gazetted on 28th April, 1972 ('**Notice of extinction**'); and
 - (b) the subsequent Fiji government gazette dated 1st December, 2000 along with schedule A ('**government gazette**') whereby the ownership, management and administration of NLC Lot No. 8 RNL 151 ('**subject land**') was transferred to the 2nd respondent.
- (3) As earlier indicated the orders sought in the amended originating summons filed on 28th March, 2018 are in the following terms:
1. **A DECLARATION** that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is not extinct by the survival of Lusiana Radua as the last surviving member of such Mataqali.
 2. **AN ORDER** that it is exceptional and just to correct false information from Roko Tui Ra quoted in Memorandum dated 11th April, 1972 written by L.V. Batiri for the Native Land Commissioner to 2nd Respondent that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is extinct.
 3. **AN ORDER** annulling Memorandum dated 11th April, 1972 written by L.V. Batiri for the Native Land Commissioner to 2nd Respondent that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is extinct.

4. ALTERNATIVELY, an order by way of Injunction that the 1st Respondent write a Memorandum to the 2nd Respondent by the hand of its Chairman or an iTaukei Lands Commissioner withdrawing the Memorandum dated 11th April, 1972 written by L.V. Batiri for the Native Land Commissioner to 2nd Respondent that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is extinct and stating that such Mataqali is not extinct by the survival of one living member being Lusiana Radua the daughter of Wakesa Kurimai.
5. AN ORDERB annulling Notice number 670 in Volume 99 of the Fiji Royal Gazette Number 21 of 19th day of April, 1972 and in the place thereof a Notice that such Mataqali is not extinct and its lands being NLC Lot 7 Sheet Reference H/54; H/10 2, J/3, J/6 1 RNL Number 151 in the Tikina of Tavua and NLC Lot 4 Sheet Reference H/5 4 are still registered in the Register of Native Lands as iTaukei lands in the name of said Mataqali.
6. ALTERNATIVELY, an order by way of Injunction that upon receipt of a Memorandum from the 1st Respondent revoking Memorandum dated 11th April, 1972 written by L.V. Batiri for the Native Land Commissioner that Mataqali Natogo of Yavusa Nadokana of old Tikina Tavua is extinct, the 2nd Respondent do public a Notice in the Gazette revoking its Notice number 670 in Volume 99 of the Fiji Royal Gazette Number 21 of 19th day of April, 1972 and in the place thereof a Notice that such Mataqali is not extinct and its lands being NLC Lot 8 Sheet Reference H/5 5; H/10 2, J/6 1 RNL Number 151 in the Tikina of Tavua and NLC Lot 5 Sheet Reference H/5 4 are still registered as native land in the name of said Mataqali.
7. AN ORDER annulling the inclusion of NLC Lot No. 8 RNL 151 from the list of Schedule A Lands of the Ba Province Transferred to Second Respondent under Notice number 1047 of Volume 1 of the Fiji Royal Gazette Number dated 1st December 2000.
8. THAT ALTERNATIVELY, an order by way of Injunction that the Third Respondent do cause to be published in the Fiji Gazette a Notice that NLC Lot 8 Sheet Reference H/5 4; H/10 2, J/3, J/6 1 RNL Number 151 in the Tikina of Tavua is removed from the listing of Crown Schedule A lands published in Notice number 1047 of Volume 1 of the Fiji Royal Gazette Number dated 1st December, 2000.

(4) As I understand the affidavit in response of the respondents, the respondents invited the Court to exercise its discretion in dismissing the application for constitutional redress on the following three main grounds; (Reference is made

to para (33) of the affidavit in response of the first and third respondents filed on 25th May 2018.)

- (a) *any challenge to the correctness of the 1st Respondent's records is within the jurisdiction of the 1st Respondent;*
 - (b) *an alternative remedy presents itself in the form of a challenge to the notice of extinction of Mataqali Natogo published in the Fiji Royal Gazette in 1972, the correspondence by L.V. Batiri dated 11th April, 1972 and the Government Gazette dated 1st December 2000 pertaining, be made in separate proceedings for judicial review, as stated by the Court of Appeal which the Applicant relies on in making this constitutional redress application;*
 - (c) *in any event, the VKB and the Register kept with the 1st Respondent reflects and maintains the existence of the Mataqali Natogo and their ownership of Lot 8.*
- (5) The first and third respondents elaborated on this in their written submissions filed on 14th August, 2018. The following paragraphs are pertinent.
- 7. *However, the effect of the Memorandum has no bearing on the official records kept by the 1st Respondent being the Register of iTaukei Lands and Register of iTaukei Land Owners.*
 - 8. *It does not affect the position held by the 1st Respondent in as early as 1995 and before the allotment of the subject land by the 2nd Respondent. The 1st Respondent had informed the 2nd Respondent that Mataqali Natogo was not extinct (annexure LR7 of the Applicant's supplementary affidavit filed on 27th March, 2018).*
 - 10. *It is the 2nd Respondent who has maintained the extinction notwithstanding acknowledgment that it has been made aware by the 1st Respondent of the existence of Mataqali Natogo. It follows that the 2nd Respondent cannot be said to have been misled by the Memorandum in proceeding with the allotment of the subject land.*
 - 11. *In actual fact, we would argue that any affect the Memorandum has on the Applicant was negated by the admission by the 1st Respondent that the Mataqali Natogo is not extinct and the communication of such admission to the 2nd Respondent. Therefore the correction or annulment of the Memorandum would be moot if it does not affect the 2nd Respondent who refuses in any event to accept Mataqali Natogo's existence.*

12. *Therefore the Memorandum has had no effect on the official records kept by the 1st Respondent being the Register of iTaukei Lands and the Register of iTaukei Land Owners and subsequently on the Applicant's membership of Mataqali Natogo. These records have always maintained the existence of the Mataqali Natogo. Also, the correction or annulment of the Memorandum is moot as the 1st Respondent has already communicated to the 2nd Respondent on the existence of Mataqali Natogo prior to allotment of the subject land.*

21. *It appears that the Applicant admits that her constitutional redress application is made on the opinion of His Lordship Justice Prematilaka JA in the Court of Appeal. If that is the case, than the challenge of the Memorandum, Notice of extinction and the Government Gazette should have been made in separate proceedings for judicial review. Yet she challenges the documents in this constitutional redress proceeding rather than judicial review.*

22. *When questioned about why the Applicant did not institute judicial review proceedings, the Applicant's main argument is, as indicated in paragraph 9(a) of her Affidavit in Reply sworn on 28th June, 2018 that a challenge by judicial review is not possible due to the fact that the challenge would be made out of time.*

23. *Yet in contradiction to this argument the Applicant's counsel proceeded to provide reasons for instituting this constitutional redress application out of time; the very same reason His Lordship commented that he believed the Applicant would not be too late in instituting judicial review proceedings, which is that the documents challenged were only discovered at the Court of Appeal stage.*

26. *It is obvious that in essence the Applicant challenges the procedures undertaken by the 1st and 2nd Respondent and this shows in the arguments presented by the Applicant's counsel. For instance, the Applicant contends that the 1st Respondent was required to make reference to the Register of Births and Deaths when declaring extinct a mataqali pursuant to an Order under reference MP 4089/26 "Instructions as to entries in the Register of Native Lands Owners". This is open to question as the Order applies to entries made to the Register of iTaukei Lands and not in declaration of extinct mataqalis. The Applicant also challenges the validity of the reliance by the 2nd Respondent on the Memorandum written under the hand of one L.V. Batiri and rather than the Commissioner of the 1st Respondent.*

27. *These are challenges that ought to be made appropriately through judicial review which, for the benefit of all parties, adequately and extensively deals with the procedures undertaken by the 1st and 2nd Respondent.*
31. *As such, we ask that this honourable court exercise its jurisdiction to dismiss this application for constitutional redress on the basis that there exists an alternative remedy being judicial review. This is clearly admitted to by the Applicant who states that she relies on Justice Prematilaka JA's remarks in the Court of Appeal decision. Other than the hesitations the Applicant has with instituting judicial review proceedings, the Applicant has not shown why that option is not adequate and available.*

(6) Counsel for the applicant argued against the objection. He contended that the court has the jurisdiction and that the applicant is entitled, as of right to bring an application under section 44(1) of the constitution for constitutional redress.

The following extracts are taken from the "reply submissions" filed by the applicant on 24th August, 2018.

8. *The Respondents' subheading is "Judicial Review as an Alternative Remedy". It is respectfully submitted that not only must there be alternative remedy, it must also be adequate. Therefore it is respectfully submitted that the approach adopted by Wilson J in State v Silatolu [2002] FJHC 69; HAC 001.2001 (22 August, 2002) case of considering whether the remedy was available must be considered as noted in our submission. His Lordship had gone further to examine the alternative remedy and stated that it was doomed to fail, Because it would fail, there would be no remedy even before one considers the adequacy of that remedy.*
10. *In Finau v Mani [2017] FJHC 522, HBM 14.2017 (14 July, 2017) an employee of Airport Terminal Services raised constitutional redress of not being allowed his right to Counsel. The Court found that he still had recourse to the Employment Relations Tribunal and Employment Relations Court. There was adequate remedy available to him under the Employment Relations Act 2007 and refused remedy.*
11. *In this case however, the time to object under Section 19(4) of the iTaukei Lands Trust Act is three months from date of publication of the notice of extinction in the Gazette. The Gazette published the extinction of Mataqali Natogo on the 28th April, 1972. Three months from that would be about 28th July, 1972. That time is far gone and is not available as a remedy to the Applicant.*

12. *The Respondents submit that judicial review would be an adequate remedy. That would be so if judicial review was available to the Applicant. But in this case it is not, because of the delay in lapse of time from when the decisions were made by the 1st, 2nd and 3rd Respondents.*
17. *Not so in this case. The dates of the decisions were;*
- a. *11th April, 1972 – L V Batiri Memorandum (Annexure LR 3)*
 - b. *28th April, 1972 Legal Notice number 670 (Annexure LR 4)*
 - c. *1st December, 2000 Legal Notice 1047 (annexure LR 5)*
 - d. *23rd April, 2004 Legal Notice 298 (Annexure LR 6)*
18. *Judicial Review remedy of certiorari to quash the decisions recorded in the above four documents would have been available from three months of the above dates. All are out of time for certiorari remedies.*
23. *Secondly, “judicial review is a wholly inappropriate mechanism for the examination of conflicting traditional claims” (para 6 at page 4 of judgment) between Yavusa Bau and Yavusa Tacilevu. In this case there is conflicting traditional claims between Mataqali Natogo as registered owner and Yavusa Bau as purported allotment owner as gazetted by 2nd Respondent.*
40. *It is respectfully submitted that section 44(4) is not an absolute bar especially when alternative remedy for judicial review is doomed to fail because of the length of delay.*

The preliminary point

- (7) The Attorney-General and iTLTB contended that an adequate alternative remedy was available, namely, judicial review to challenge the memorandum, notice of extinction and government gazette. They relied on the court’s discretionary power to refuse relief under section 44(4) of the constitution if an adequate alternative remedy was available. It was submitted that constitutional relief was therefore premature and inappropriate and that the application was an abuse of the process of the court.

Counsel for the applicant argued against that preliminary objection. He contended that;

- Section 44(4) of the constitution is not an absolute bar when alternative remedy for judicial review is doomed to fail because of the length of the delay.

- Judicial review is wholly inappropriate mechanism for the examination of conflicting traditional claims.

I now come to this preliminary point.

The decisions challenged are;

(a) L V Batiri Memorandum dated 11th April, 1972
(Annexure LR-3)

(b) Legal Notice number 670 dated 28th April, 1972
(Annexure LR-4)

(c) Legal Notice number 1047 dated 01st December, 2000
(Annexure LR-5)

(d) Legal Notice number 298 dated 23rd April, 2004
(Annexure LR-6)

(8) The **grounds** that the applicant is arguing in support of her application for the above decisions to be impugned are; (Reference is made to para (e), (f) and (h) of the applicant's amended originating summons dated 08.03.2018).

(e) *Such Memorandum misled the 2nd Respondent to gazette a Notice in the Fiji Royal Gazette of 28th April, 1972 that Mataqali Natogo was extinct.*

(f) *By virtue of such Gazette such false information became evidence of*

extinction of the Mataqali by virtue of law and misled the 3rd Respondent in listing the lands of Mataqali Natogo as Crown Schedule A lands when such lands were still registered as belonging to Mataqali Natogo on the Register of Native Lands kept by the 1st Respondent and the Registrar of Titles.

(h) *1st Respondent had acted on other sources rather than Death Certificate in notifying the extinction of Mataqali Natogo when the Death Column for Lusiana Radua in the Register of Landowners was not filled with Death Certificate for Lusiana Radua.*

(9) Moreover, the applicant says in her affidavit; (Reference is made to para (9), (12), (13), (32), (33) and (40) of the applicant's supporting affidavit sworn on 16th March 2018).

9. THAT I therefore believe that the said L.V. Batiri and or the 1st Respondent was in error in acting on the report of the Roko Tui Ra that my said mother was deceased when she was alive and living in Vanua Levu.

12. THAT I am advised by my Lawyer and believe that the iTaukei Land Trust Act requires the 2nd Respondent to only act on a Report signed by the hand of the Chairman of the 1st Respondent or a Native Land Commissioner that a Mataqali is extinct before it can gazette such Mataqali as extinct.

13. THAT I therefore believe that the 2nd Respondent was wrong in gazetting Mataqali Natogo extinct on the report of L.V. Batiri purporting to sign on behalf of a Native Land Commissioner.

32. THAT neither I nor my mother knew of the L.V. Batiri Memorandum to 2nd Respondent when it was written as such memorandum was only between 1st Respondent and not 2nd Respondent.

33. THAT I only came to know of the existence of such Memorandum when the 2nd Respondent sought to adduce it as evidence in hearing of Civil Appeal ABU 0059 of 2015 on the 9th day of November, 2017.

40. THAT because of that I make application in this separate proceedings for annulling the said three documents and the allotment of Lot 8 to Yavusa Mali because of the information upon which they are based are false and misleading.

(10) In my view, such grounds fall within the ambit of "abuse of discretion, error in law, breach of natural justice and failure to take relevant considerations into account" for which in the present case judicial review is the sole remedy and an appropriate remedy.

The allegation of 'error in law' arises out of;

9. THAT I therefore believe that the said L.V. Batiri and or the 1st Respondent was in error in acting on the report of the Roko Tui Ra that my said mother was deceased when she was alive and living in Vanua Levu.

12. ***THAT** I am advised by my Lawyer and believe that the iTaukei Land Trust Act requires the 2nd Respondent to only act on a Report signed by the hand of the Chairman of the 1st Respondent or a Native Land Commissioner that a Mataqali is extinct before it can gazette such Mataqali as extinct.*
40. ***THAT** because of that I make application in this separate proceedings for annulling the said three documents and the allotment of Lot 8 to Yavusa Mali because of the information upon which they are based are false and misleading.*

The allegation of '**breach of natural justice**' arises out of;

32. ***THAT** neither I nor my mother knew of the L.V. Batiri Memorandum to 2nd Respondent when it was written as such memorandum was only between 1st Respondent and not 2nd Respondent.*

The allegation of '**abuse of discretion**' arises out of;

- (h) *1st Respondent had acted on other sources rather than Death Certificate in notifying the extinction of Mataqali Natogo when the Death Column for Lusiana Radua in the Register of Landowners was not filled with Death Certificate for Lusiana Radua.*

The allegation of '**failure to take relevant considerations into account**' arises out of;

- (h) *1st Respondent had acted on other sources rather than Death Certificate in notifying the extinction of Mataqali Natogo when the Death Column for Lusiana Radua in the Register of Landowners was not filled with Death Certificate for Lusiana Radua.*

- (11) These would be matters for judicial review. It is open to the applicant to apply for judicial review by way of orders for '*certiarari*' and '*mandamus*' and a declaration in respect of the existence of '*Mataqali Natogo of Yavusa Nadokana*'. The applicant may seek judicial review of the decisions taken by the first, second and third respondents. The first, second and third respondents have their statutory powers and duties, the exercise of which can be challenged by the process of judicial review. 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 no reasonable public officer or authority could have reached or abuses its powers. I looked at the relief claimed by the applicant. Judicial review is now the procedure for obtaining relief by way of prerogative order, i.e. *mandamus*, prohibition or *certiarari*. But it is not

confined to such relief: an applicant may now obtain a declaration or injunction in any case where in the opinion of the court 'it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.' Further, on an application, the court may award damages, provided that the court is satisfied that damages could have been awarded, had the applicant proceeded by action. The rule also makes available at the court's discretion discovery, interrogatories, and cross-examination of deponents. And, where the relief sought is a declaration, an injunction, or damages but the court considers that it should not be granted on an application for judicial review, the court may order the proceedings to continue as if they had been begun by writ. In principle I see no reason why the applicant should not be entitled to apply for judicial review of the decisions taken by the first, second and third respondents.

A more fundamental difficulty for the applicant is that at the same time the applicant herself is guilty of not exercising the opportunity to correct the Notice of extinction available to her under section 19(4) of the iTaukei Lands Trust Act 1940 which states as follows:

"If any person desires to show that the mataqali has not ceased to exist by reason of the extinction of its members, he or she may, within 3 months of the date of publication of the notice in the Gazette and in a newspaper published in the iTaukei language and circulating in Fiji, give notice of objection in writing to the Board setting out particulars of any members of the mataqali alleged to be still surviving. Upon receipt of such notice of objection the Board shall cause such investigation to be made as it may consider necessary."

- (12) 'Constitutional redress' should not be granted where an 'alternative remedy' is available.

Section 44(4) of the constitution reads;

(4) *The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.*

Section 44 grants discretion to the court to reject an application for constitutional redress when there is an alternative remedy.

In Singh v Director of Public Prosecutions [2004] FJCA 37; AAU0037.2003S(16 July 2004) Fiji Court of Appeal while addressing the issue of availability of the alternate remedy stated;

"We note that the Privy Council is consistently laid down that where an adequate alternative remedy is available then constitutional redress will be refused. It has regarded an application for constitutional relief in these circumstances as an abuse of process and as being subversive of the Rule of Law which the Constitution is designed to uphold and protect."

In 'In re Application by Aiyaz Ali' (2005) FJHC 255, 29.08.2005, the court held;

"The Redress Rules do not provide a parallel process where other remedies are available. To use the constitutional redress process as a substitute for normal procedures is to devalue the utility of this constitutional remedy. The applications under the Redress Rules are not a short cut or a system to by-pass existing mechanisms in law. Section 41 of the Constitution is not an Alladin's cave which contains all the remedies for all the ills and the Redress Rules the magical words "open sesame" which are keys to those remedies.

Section 41(4) of the Constitution endorses my above remarks and provides that the court may refuse to grant relief if "adequate alternative remedy" is available to the person concerned.

More recently in 'Vatunitu v iTaukei Trust Board' (2016) FHC 785 at para (38), the court held;

"So the position in Fiji, as set out in the Fiji Court of Appeal, is that when there is an alternative remedy it should be exercised and if not the CR can be dismissed in the exercise of the discretion contained in the Section 44(4) of the Constitution."

(13) Let me now turn to the question of 'delay'

The impugned decisions were made on;

- | | | |
|-------------------------------------|---|--------------------------|
| (a) 11 th April, 1972 | - | L.V. Batiri Memorandum |
| (b) 28 th April, 1972 | - | Legal Notice Number 670 |
| (c) 01 st December, 2000 | - | Legal Notice Number 1047 |
| (d) 23 rd April, 2014 | - | Legal Notice Number 298 |

In her affidavit in support the applicant says that the above documents were discovered in 2017 at the Court of Appeal in Civil Appeal No:- ABU 0059 of 2015. The following paragraphs are pertinent.

- "33. THAT I only came to know of the existence of such Memorandum when the 2nd Respondent sought to adduce it as evidence in hearing of Civil Appeal ABU 0059 of 2015 on the 9th day of November, 2017.
35. THAT I am informed by my said Lawyer and believe that on the 09th day of November, 2017 the 1st Respondent through its legal counsel produced to the Court of Appeal the gazette notice by the 3rd Respondent that listed lands belonging to Mataqali Natogo as being Crown Schedule A lands.
39. THAT I am informed by my Counsel Mr Vuataki that one of the learned Justice of Appeal had said to my said Counsel that the documents sought to be adduced by the 2nd Respondent namely the L.V. Batiri Memorandum, the Gazette Notice of Extinction of Mataqali Natogo Land as Crown Schedule to be attacked in separate proceedings.

The applicant in her supporting affidavit establishes the reasons for delay as follows;

14. THAT I never saw my mother read any Fiji Royal Gazette or even the newspapers as we were living in a remote village in Cakaudrove on the island of Vanua Levu and it was not until 6th November, 1978 when she had shifted to Laqere which is 7 miles from the city of Suva that she registered me with the Registrar of Births, I refer to my birth certificate being Annexure "LR 1" as to the Informant of my birth.
19. THAT after I got married I moved to my husband's village in Laucala Village in Wailevu West on the island of Vanua Levu and this village was about one and a half days walk from the nearest Government Road and no bus went there.
20. THAT I never obtained copies of newspapers or gazette to read and unbeknown to me the 3rd Respondent did by Notice number 1047 in Fiji Government Gazette Number 73 of Volume 1 dated 1st December, 2000 listed land belonging to Mataqali Natogo being Lot 8 on RNL 151 as Crown Schedule A. Attached marked "LR 5" is a true copy of such Gazette.

21. THAT whilst I was still living in my husband's said village the 2nd Respondent unbeknown to me allotted the said land to Yavusa Mali by Fiji Government Gazette dated 23rd April, 2004. Attached marked "LR 6" is a cutting of said gazette.
22. THAT whilst I was still living in said village I was approached by some people coming from the island of Viti Levu to go to Labasa regarding Mataqali Natogo lands which was sought to be used as an access road by a water bottling company.
23. THAT I was told and believe that the 1st Respondent had written a letter dated 20th August, 2014 to the Director Land Use Unit that the land sought to be leased as an access road being Lot 8 on Register of Native Lands folio 151 belonged to Mataqali Natogo. Attached marked "LR 7" is a true copy of such letter.
24. THAT on 26th August, 2014 the Reserve Commissioner of 2nd Respondent answering a query from the General Manager of 2nd Respondent said in a Memorandum that 2nd Respondent had received a letter from 1st Respondent in 1999 that Mataqali Natogo was not extinct as I was still alive and that 2nd Respondent was paying me lease monies from leasing of Lot 4 belong to Mataqali Natogo. Attached marked "LR 8" is a true copy of said Memorandum.
25. THAT I did therefore go to Labasa on the 27th day of October, 2014 and I was advised by one Mrs Miliakere Tamani from a law office in Labasa that my Mataqali Natogo had been gazette as extinct.
26. THAT I then did leave the island of Vanua Levu and go to the island of Viti Levu to my village in Rabulu in old Tikina Tavua to find out what had happened and there did meet my Lawyer, Mr Vuataki who then took instructions from me to ask 2nd Respondent to revoke the said allotment which he did by letter dated 31st October, 2014. Attached marked "LR 9" is a true copy of his letter to 2nd Respondent.
32. THAT neither I nor my mother knew of the L.V. Batiri Memorandum to 2nd Respondent when it was written as such memorandum was only between 1st Respondent and not 2nd Respondent.
33. THAT I only came to know of the existence of such Memorandum when the 2nd Respondent sought to adduce it as evidence in hearing of Civil Appeal ABU 0059 of 2015 on the 9th day of November, 2017.

35. ***THAT** I am informed by my said Lawyer and believe that on the 09th day of November, 2017 the 1st Respondent through its legal counsel produced to the Court of Appeal the gazette notice by the 3rd Respondent that listed lands belonging to Mataqali Natogo as being Crown Schedule A lands.*
39. ***THAT** I am informed by my Counsel Mr Vuataki that one of the learned Justice of Appeal had said to my said Counsel that the documents sought to be adduced by the 2nd Respondent namely the L.V. Batiri Memorandum, the Gazette Notice of Extinction of Mataqali Natogo Land as Crown Schedule to be attacked in separate proceedings.*

Order 53, r. 4(2) of the Rules of High Court is applicable in calculating the time within which a judicial review application should be made. The High Court Rules state that a judicial review application should be made within 3 months from the date the impugned decision was made.

“in the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding”.

There is not the slightest doubt that the applicant is late and it is a matter of more than a year rather than months and days. Whenever there is a failure to act promptly or within three months there is “undue delay”.

As I mentioned earlier, an application “for leave to apply” for judicial review should be made within three (03) months of the events giving rise to the application. Failing such challenge within the applicable time limit, public policy expressed in the maxim “*Ominia praesumuntur rite esse acta*”, requires that after the expiry of the time limit it should be given all the effects in law for a valid decision.

In O’Reilly v Mackman [1983] 2 AC 237 at 280 Lord Diplock said:

“The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for

any longer period than is absolutely necessary in fairness to the person affected by the decision."

In Anuradha Charan v. Public Service Commission and Others, Civil Appeal No – 02 of 1992, decided on 19th November 1993, the Court observed:

"In a world of burgeoning bureaucracy and use of administrative powers by an increasing number of official bodies, judicial review is an essential means of redress. The special procedures are designed for a relatively straight forward and prompt determination of the case."

The time limit is narrow for application for judicial review because it is designed as a quick and cheap remedy. But the court has power for good reason to extend it. Order 53, r.4(1) of the Rules of High Court provides as follows:

"subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant

(a) Leave for making the application, or

(b) any relief sought on the application,

if in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration"

Accordingly, the Court has discretion to enlarge the time period if the granting of the relief sought would not likely to cause substantial hardship to, or substantially prejudice the rights of any person or would not be detrimental to good administration.

Even if there was, here, undue delay, in order to find detriment to good administration the court has to be satisfied that there is evidence of detriment. It must be borne in mind that 'detriment to good administration' cannot be inferred from mere passage of time. **The test for detriment to good administration is higher and the burden of proving such detriment to good administration lay squarely on the respondents. It must not be forgotten that the evidence is required to be on affidavit.** Therefore and with respect, counsel for the applicant could not be right when he said "alternative remedy of judicial

review is doomed to fail because of the length of the delay". I do not myself see the matter in that way. It would be premature now.

It would be premature at this stage to exercise constitutional remedy. Judicial review may still be an option and it should have been pursued. I believe there is room for an application under Order 53 for the reason that the documents had been discovered in 2017 at the Court of Appeal in Civil Appeal No- ABU 0059 of 2015. The general rule is that where an application for judicial review under Order 53 is available an applicant should apply to the court under Order 53. The time limit for applications under Order 53 may be enlarged in appropriate cases. It is a matter for the court's discretion whether to allow an alternative proceeding by way of writ, originating summons or constitutional redress to be used. Here in particular the applicant is in effect inviting the court to exercise a supervisory jurisdiction to control a public body carrying out public duties. There is a presumption that an applicant seeking relief in the field of public law ought to proceed by way of application for judicial review. Order 53 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review. It would in my view as a general rule be contrary to public policy , and as such an 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 'constitutional redress' and by this means to evade the provisions of Order 53.

I cannot refrain from referring to a few words of Hon. Justice Jiten Singh said in **'In re Application by Aiyaz Ali' (2005) FJHC 255, 29.08.2005.**

"The Redress Rules do not provide a parallel process where other remedies are available. To use the constitutional redress process as a substitute for normal procedures is to devalue the utility of this constitutional remedy. The applications under the Redress Rules are not a short cut or a system to by-pass existing mechanisms in law. Section 41 of the Constitution is not an Alladin's cave which contains all the remedies for all the ills and the Redress Rules the magical words "open sesame" which are keys to those remedies.

Section 41(4) of the Constitution endorses my above remarks and provides that the court may refuse to grant relief if "adequate alternative remedy" is available to the person concerned.

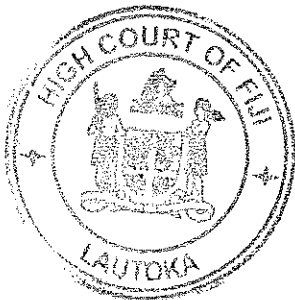
(Emphasis added)

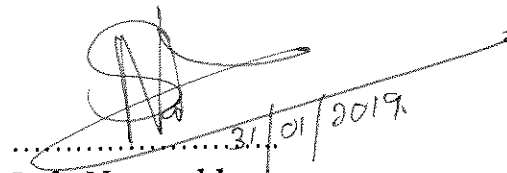
(D) CONCLUSION

Having done the best that I can with the papers before me, I have no hesitation in holding that the State has satisfied me that "an adequate alternative remedy" is available to the applicant in the sense of an 'adequate remedy alternative to constitutional redress'. Therefore, I uphold the preliminary objection raised by the State.

(E) ORDERS

- (i) The application for constitutional redress is refused.
- (ii) In the circumstances of the case, I make no order as to costs.




31/01/2019
Jude Nanayakkara
Judge

At Lautoka,
Thursday, 31st January 2019