IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBJ. 05 of 2014

BETWEEN : **THE STATE**

AND : **THE ITAUKEI LAND TRUST BOARD**

1st RESPONDENT

AND : **THE ATTORNEY GENERAL OF FIJI**

2nd RESPONDENT

AND : **MATAQALI KETENATUKANI, NADAKUVATU, NANUKU, NOIBATIRI, NAKURAKURA, TOKATOKAS NABAOLI AND NADALI**

INTERESTED PARTIES

AND : **VILIAME NABIAU**

APPLICANT

Appearances

For the Applicant	:	Mr Saimoni Nacolawa
For the Respondent	:	Mrs M. Lee
For the Interested Parties	:	Mr Kemueli Qoro
Date of Hearing	:	12th August 2016
Date of Ruling	:	1st May 2019

RULING

INTRODUCTION

1. Viliame Nabiau is a member of *tokatoka* Navitua, *mataqali* Vidilo, *yavusa* Vidilo of the *vanua* of Vidilo (***Schedule 1*** is a diagram of how the *vanua* of

Vidilo is structured into its component socio-economic and proprietary units). Nabiau claims that his *tokatoka* is the only **"hereditary landowning unit"** in the *vanua* of Vidilo. Accordingly, he asserts that lands which were once beneficially used by some extinct *i-tokatoka*, should revert to *i-tokatoka* Navitua. His judicial review application which is now before me is based on his grievance at a decision of the *i-Taukei* Lands Appeal Tribunal (**"*i*-TLAT"**) to revert such land to some "dependent" *mataqali* within the *vanua* Vidilo. The applicant seeks the following orders:

a) *AN ORDER FOR CERTIORARI to quash the decision of the 1st Respondent dated 12 September 2014 for reverting the extinct dependant tokatoka lands to their various dependant mataqali of the interested parties.*
b) *A DECLARATION that the decision of the 1st Respondent given on 12 September 2014 is unlawful, void and of no effect.*
c) *A DECLARATION that the decision of the 1st Respondent given on 12 September 2014 in reverting the extinct dependent tokatoka lands to their respective mataqali of the interested parties is unreasonable in the Wednesbury sense and as such the decision is unlawful.*
d) *A DECLARATION that the 1st Respondent's decision to revert the extinct dependent tokatoka lands to their respective dependent mataqali of the interested parties is irregular, void and of no effect.*
e) *A DECALARATION that tokatoka Navitua, Mataqali Vidilo is the only recognized hereditary i-taukei owners entitled for reversion of all the extinct dependant lands herein.*
f) *A DECALARATION that the reversion of dependent tokatoka Nubu land from all the tokatoka under Mataqali Vidilo namely Navitua, Nabaoli and Nadala to Mataqali Nakurakura of Yavusa Navatulevu is null and void as it is not the subject of this Judicial Review.*

THE DECISION - BACKGROUND

2. Vide a memorandum dated 13 July 2010, the Chairman of the *i*-Taukei Lands & Fisheries Commission (**"*i*-TLFC"**) wrote to the Registrar of Titles to amend the Register of Native Lands (**"RNL"**) or the *Vola Ni Kawa Bula*. The

amendments entailed the deletion of various named *i-tokatoka* from the RNL on account of the fact that they (i.e. the *i-tokatoka*) had become extinct.

3. The amendments also entailed the reversion of *i-taukei* land that used to be beneficially occupied and used by these extinct *i-tokatoka,* to other "surviving" *i-tokatoka* units that were part of the same *mataqali* as the extinct *i-tokatoka.*

4. That decision, and action, by the *i*-TLFC Chairman, was not well received by the members of *i-tokatoka* Navitua, *mataqali* Vidilo. The applicant is a member of the said *i-tokatoka.* He was of the view that these lands should revert to *i-tokatoka* Navitua. The reasons why they hold this view I discuss below.

5. Because the applicant and his *i-tokatoka* were adamant about their belief in their entitlement to the lands, and their belief as to where their interests lay, they made representations to the *i*-TLFC and to the Roko Tui Ba. Various meetings ensued, and letters were written to and fro.

6. On 30 September 2013, the *i*-TLFC wrote a letter to the applicant's solicitors, Mr. Saimoni Nacolawa, to confirm the 13 July 2010 decision of the Chairman. On 25 October 2013, the applicant lodged an appeal to the *i*- TLAT.

7. Vide its decision dated 12 September 2014, the *i*-TLAT conceded that the *i*-TLFC was wrong in agreeing with the Chairman's directions to the Registrar of Titles to revert the land allotments that were once beneficially occupied and used by the various extinct *i-tokatoka,* to other surviving *i-tokatoka* of the same *mataqali.*

8. However, the *i*-TLAT did not agree with the applicant's position either, that is, that the said lands be reverted to the applicant's *i-tokatoka*. Rather, the *i*-TLAT decided, after a formal hearing, that the various land allotments in question should revert to the wider *mataqali* unit of which the various extinct *i-tokatoka* were a part of.

9. Below is a summary of the reversions and re-allotments.

Extinct Tokatoka (No.)	**Land Originally Reverted by i-TLFC in 2010 to:**	**Decision by i-TLAT in 2013**
Tokatoka Nawaqatabu (510)	Tokatoka Navitua (507) & Tokatoka Nabaoli (508)	Revert to Mataqali Vidilo
Tokatoka Matalaqere (512) & Tokatoka Naduanitu (514)	Tokatoka Korotu	Revert to Mataqali Ketenatukani
Tokatoka Nagarutia (515B)	Tokatoka Vunamoli (515) Namaralevu (515C) Natubawai (515D)	Revert to Mataqali Nadakuvatu
Tokatoka Korovou (516) Vunivedugu (516B)	Tokatoka Naqevoli (516A)	Mataqali Nanuku
Tokatoka Nayavunibogi (517A)		Mataqali Noibatiri
Tokatoka Nubu (518)	Tokatoka Navitua (507) Nabaoli (508) Nadala (511)	Mataqali Nakurakura

10. The *i*-TLFC said *inter alia* as follows:

> *....we agree with the Disputant, and we also do not agree with the reversion of extinct tokatoka Lands by a Taukei Lands Commission decision in 2010. This is because the extinct Tokatoka Lands were given to other Tokatoka members within their respective Mataqali Social Units. These Tokatoka Social Units have already been allotted Tokatoka Lands and this decision violates Taukei Lands Act Cap 133 Section 18 92)(3).*
> .....

....we were told that Tavanavanua had two sons in Lubi and Nayasalalevu which we can confirm from TLC Records. Lubi's descendants are identified by the Customary name of Ketenatukani and the descendants of Nayasalalevu are the Mataqali Vidilo.

11. It is the above decision which is at the heart of this judicial review application.

APPLICANT'S GRIEVANCE

12. As I have said above, the applicant asserts that the various *i-tokatoka* in question, were all "dependent" units in terms of section 3 of the *i-Taukei* Lands Act (Cap 133). This is contentious. The applicant further argues that larger *mataqali* units of which the extinct "dependent" *i-tokatoka* were a part, were also all "dependent" units.

13. The applicant then argues that, land formerly allotted to an extinct dependent *i-tokatoka* cannot lawfully be reverted to another surviving dependent unit, whether the surviving unit be another *i-tokatoka* or a *mataqali* in terms of section 18 of the *i-Taukei* Lands Act (Cap 133).

14. The applicant argues that the law of reversion under section 18(2) stipulates that the land should revert to the **"true Fijian owners"**. In this case, it is the *mataqali* Navitua which is the "true Fijian owner" because it is the hereditary owner of all the lands in question. The applicant contends that the *i*-TLAT's decision was irregular, unlawful, void and of no effect and was unreasonable in the Wednesbury sense and in breach of the principles of natural justice.

SECTION 18

15. Section 18 provides as follows:

Power to allot land to dependents

18.-(1) *Not withstanding anything contained in this Act it shall be lawful for the Commission with the consent of the Fijian owners to allot at its discretion to any dependants either individually or collectively a sufficient portion of land for their use and occupation:*

Provided that any dependant to whom such portion of land has been allotted and who thereafter ceases to reside with the mataqali from whose lands the said portion was allotted shall thereupon lose his interest in the said portion.

Land to revert to Fijian owners on cesser of occupation

(2) *Whenever through any cause such portion of land ceases to be used and occupied by the dependant or dependants to whom it was allotted it shall revert to the Fijian owners from whose lands the allotment was made.*

GENERAL COMMENTS

16. All *i-taukei* land in Fiji is owned communally. In the Western Division, generally, the *i-tokatoka* is recognised by custom and tradition to be the basic proprietary unit of *i-taukei* land. In other parts of Fiji, it is the *mataqali* which is the customary proprietary unit. These customary systems of communal proprietorship are formally registered in the Register of Native Lands which is kept and controlled by the *i-T* LFC.

17. Hence, in the Western Division, it is the *i-tokatoka* which is registered in the RNL as the proprietary unit of *i*-taukei lands, even though the *i-tokatoka* is part of the larger social unit of *mataqali,* which is part of a *yavusa,* which in turn is part of a *vanua.*

18. The *i-tokatoka* is a small extended family unit. It is the most basic communal social unit in any given *i*-taukei village. Above the *i-tokatoka,* is the *mataqali.* The *mataqali* is a clan comprised of two or more *i-tokatoka,* or sometimes, even

just a one surviving *i-tokatoka*. Above the *mataqali*, is the *yavusa*. The *yavusa* is a tribal unit, often described as a socio-political unit made up of various *mataqali*. Above the *yavusa*, is the *vanua*. The *vanua* is the unit comprising several *yavusa* which occupy a certain land mass and often described as a socio-political federation (of yavusa that is). Every registered[1] native (*i*-taukei) Fijian is a member of an *i-tokatoka*, a *mataqali*, a *yavusa*, and ultimately, a *vanua*.

19. As I have said, in most parts of Fiji, culture and tradition recognise the *mataqali* as the basic proprietary unit of ownership of demarcated parcels of *i*-taukei land in any *vanua*. In other parts, especially in the Western Division, it is the *i-tokatoka*. The applicant's case rests ultimately on this point, that is, that his *i-tokatoka* Navitabua, being the only hereditary proprietary unit in the *vanua*, holds the ultimate "reversionary" interest in the lands, in terms of custom and tradition, and in terms of section 18(2).

"DEPENDANTS"

20. In pre-colonial times, well before Fiji was ceded to Great Britain in 1874, for one reason or another, some sections of *i-taukei* people would leave their customary land and re-settle elsewhere in Fiji on lands belonging to other *i-taukei* "tribes". This pre-colonial internal migration saw many *i-taukei* people being separated from their own "tribes" and re-settle in lands belonging to other "tribes". It was often the case that the *i-taukei* "migrants" were allotted land by the host "tribes". These lands were allotted purely for the "migrants" beneficial use and occupation, but not to own.

[1] Registered into the Vola Ni Kawa Bula (Register of Native People) pursuant to the Native Lands Act (Cap 133).

21. The "migrants" themselves would band as a kinship group and form their own *i-tokatoka* or *mataqali* or even *yavusa* as the case maybe, which would one way or another, be grafted onto and be entwined with, the existing socio-political structure of the host "tribes".

22. However, although "migrants" were absorbed into and entwined with the socio-political structure of their host tribes, and were disassociated from their ancestral "tribes", they and their descendants were still called "dependents" and were considered to live in a state of "dependency" on the host tribe. The *i-taukei* term for the word "dependent" which is *"tu vakararavi"* or *"ravi"* is still used today in relation to an *i-tokatoka*, or *mataqali*, or *yavusa* whose ancestors were "migrants" in the sense that I have used above.

23. The term "dependent" is defined in section 3 of the *i-Taukei* Lands Act (Cap 133) as follows:

> *"**dependents** " mean native (i-taukei) Fijians who at the time of the erection of the Fiji Islands into a British Colony had become separated from the tribes to which they respectively belonged by descent and had by native custom lost their rights in tribal lands and were living in a state of dependence with other tribes, and includes their legitimate issue ...."*

24. In **Native Lands Trust Board v Nagata** [1993] FJCA 4; Abu0075e.91s (11 February 1993), the Fiji Court of Appeal discussed the origin of section 3 as follows:

> *This section appears to have its origin in the Native Lands (Dependants) Amendment Ordinance 1919. The recital to that Ordinance reads:*
>
> > *"WHEREAS it has been ascertained that at the time of the erection of the Fiji Islands into a British Colony certain native Fijians in various parts of the Colony had become separated from the tribes to which they respectively belonged by descent and had by*

native custom lost their rights in the tribal lands and were living in a state of dependence with other tribes:

And whereas it is desirable to make provision whereby sufficient land may be allotted for the use and support of such natives and their legitimate issue hereinafter referred to as "dependants" as well as for natives of illegitimate birth born after the year one thousand eight hundred and seventy-four."

25. Section 18 of the *i-Taukei* Lands Act (supra) recognises that ownership of the lands allotted to dependants remained with the host "tribes". Whilst section 18(1) gives power to the *i*-TLC to allot at its discretion land for the use and occupation of any dependant, the proviso is that if the dependant ceases to reside with the ***mataqali*** from whose lands the said portion was allotted, the dependant will thereupon loose its interest in the said land. As I have said above, under section 18(2), the said land shall thereupon revert to its *i-taukei* owners.

RESPONDENTS' POSITION

26. An affidavit sworn by Peni Waqa on 12 June 2015 deposes as follows at paragraphs 5 to 39 as follows:

5) *I do not agree ..... that the Tokatoka Navitua is the only hereditary land owning units. The "native owners" who are members of the Mataqali as listed by the Applicant are also hereditary land owning units, and have customary rights to use and occupy any native lands. The Annexure VN2 has new additions on the right which should not be considered as it was never submitted to the Tribunal.*

6) *..... I totally disagree that the Mataqali and Tokatoka in paragraph 5 above were granted the right of occupation and usage. They are also the hereditary land owning units because most of the iTaukei Lands in Fiji are owned by the Mataqalis except a few places in Nadroga, Ba, Lomaiviti where the Tokatoka owns the land. The Yavusa (2-4) and their Mataqali in 5 above are given ownerships of their land so that they can perform their customary duties and responsibilities to the Head of the Vanua of Namoli. The members of the Tokatoka Navitua who are the Applicants in this case, cannot perform the customary duties and responsibilities of the other Yavusas and*

Mataqalis as the "Matanivanu" (Spokesman) of the Head of Vanua Namoli and other duties as "Bati" (Warrior), Gonedau (Fisherman), Bete, etc. When the Tokatoka becomes extinct, the land is reverted to the Mataqali who are owners of the land the allotment was first made.

7) *.....I totally disagree with the contents of paragraph 8 of the Affidavit, for the simple reason that the members of the Navitua Tokatoka (Applicants) are trying to disown the other three Tokatoka members who happen to be the descendants of the same Ancestral God (Vu) who was "Tavanavanu", they therefore cannot be dependent Tokatoka status only as alleged herein.*

8) *..... The members of the Ketenatukani Mataqali are descendants of LUBI, the elder son of TAVANAVANUA their Ancestral God (Vu). They also cannot be categorized as dependent Mataqali status only.*

9) *..... These people who the Applicants alleged to be members of the dependent units, were originally from Namoli and according to Wiliame Nava's sworn evidence to Mr GV Maxwell, the land marked out for Namoli and the land for the Vanua of Vidilo which includes the Yavusa Saru, Noimarou and Navatulevu. Refer to Annexure marked "PW 1". They cannot be classified as dependent units because they had been living in their land well before the cession in 1874.*

10) *.....I do not agree to paragraph 11 of the Affidavit, because the land from an extinct iTokatoka automatically reverts to the Mataqali concerned.*

11) *..... Mataqali Ketenatukani and its three iTokatoka members are also the hereditary land owners because LUBI is the elder son of TAVANAVANUA and the Applicant cannot just count him out.*

12) *..... I must say that the family tree marked "VN 4" was never disclosed to the Tribunal, it is completely a new disclosure and should be disregarded. But I agree the two sons had made two hereditary Mataqalis. The Mataqalis Ketenatukani and Vidilo were there when Wiliame Nava gave evidence to Mr. GV Maxwell. I refer to Annexure Marked "PW 2".*

13) *..... I agree LUBI LINEAGE had three sons, DUAVANUA, RAVOUVOU and NAKURUKILAGI. But the recording of units was done by Mr GV Maxwell in 1914, where he recorded the names of each member of all iTokatokas. LUBI was the head of Ketenatukani, therefore his three sons here were head of the iTokatokas. I agree that only Ravouvou was the surviving lineage up to and beyond the time of recording the units.*

14) *..... I cannot say whether or not the same RAVOUVOU from LUBI's lineage was present with VILIAME NABIAU when they took oath during David Wilkingson inquiry in 1895 for their land. I confirm the Annexures "VN 5" as recorded and kept at TLFC office.*

15) *..... I agree, Maxwell in 1914, subdivided the land into Mataqali and iTokatoka and he also recorded names of each member of the iTokatoka. LUBI was the head of the Mataqali Ketenatukani and his three sons were the head to the three iTokatokas. I also*

agree that KESAIA TAWA was head of the iTokatoka Matalaqere which had become extinct. The iTokatoka Korotu was headed by Setareki Nasoki who was Turaga ni Mataqali Ketenatukani which still exists. After Mr Maxwell recorded the first eight names in this iTokatoka Korotu 05/08/1914, and areas for the Mataqali which Kesaia Tawa and Setareki agree. (Refer to Annexure Marked "PW 1". Mr Maxwell also recorded the four names for the iTokatoka Naduanitu which is also now extinct. No one objected to it during the 60 days objection period.

NAYASALEVU

16) *.....both Viliame Nabiau the lineage from the Nayasalevu Clan and Vilive Ravouvou from the Lubi clan signed on the document. It therefore proves that the land area marked belongs to both the Vidilo and Kerenatukani Mataqalis.*

17) *..... in the same sworn evidence alluded to in paragraph 18 of the Affidavit, Wiliame Nava said Korotu belonged to Duavanua and Matalaqere to Ravouvou, both were the sons of Lubi and both Korotu and Matalaqere are the iTokatokas under Ketenatukani Mataqali.*

18) *..... Lubi is the elder son of Tavanavanua. He had been allotted land belonging to Ketenatukani Mataqali and the three iTokatokas, namely Matalaqere (No. 512), Korotu (No. 513) and Naduanitu (No. 514).*

19) *THAT I agree with paragraph 20 of the Affidavit.*

ALLOTMENT OF LAND BY THE COMMISSION

20) *THAT I also agree, and it states that "the lands of Native Fijians are for the most part held by Mataqali or family communities as the proprietary unit according to ancient customs".*

21) *THAT I in regards to paragraph 22 of the Affidavit, the Applicant should be specific as to which page of the evidence states this.*

22) *THAT paragraph 23 of the Affidavit is completely false. The Mataqali Vidilo are the owners of the land belonging to the Mataqai Vidilo. For example, the Yavusa Saru had already been occupied by them when the people of Namoli Village the seat of Vidilo Mataqali, due to some differences went to Saru for their protection. They then went back to Namoli later. This is also in the sworn evidence of Wiliame Nava.*

REVERSION OF EXTINCT LANDS

23) *THAT paragraph 24 of the Affidavit is true. The Applicant, a member of the iTokatoka Navitua which had been allocated land, cannot claim to own the extinct land belonging to iTokatoka Nawaqatabu which by law should be reverted to the Mataqali Vidilo.*

24) *THAT in regards to paragraph 25 of the Affidavit, even the Chairman of the Commission, Ratu Viliame Tagivetaua incorrectly reverted all the extinct iTokatoka lands to the other iTokatoka when he should revert them to the Mataqalis because all lands in Fiji are owned by Mataqali. (Refer to Applicant Annexure Marked VN 7 and page 96 – paragraph XIII).*

25) *THAT I agree with paragraph 26 of the Affidavit that those are the extinct land belonging to their respective Mataqalis and iTokatokas.*

26) *THAT I am not aware of the various meetings mentioned in paragraph 27 of the Affidavit and cannot comment on it. This Annexure marked VN 10 was not disclosed and the Applicant was never cross-examined on it and it should not be considered by this Court.*

27) *Commission office to the Solicitor for the Applicant and NOT another new decision.*

28) *THAT in regards to paragraph 29 of the Affidavit, I confirm receiving a copy of the same.*

29) *THAT I do not agree with paragraph 30 of the Affidavit and I leave it to this Court for the correct interpretation of that Section of the Act.*

30) *THAT the respective iTokatokas that the former Chairman Viliame Tagivetaua reverted the land to have not become extinct and had been allocated land. To revert the land from the extinct iTokatokas would be contrary to Section 18 (2) and (3) of the iTaukei Lands Act Cap 133. They should be reverted to their respective Mataqalis to be in line with Legislative Council Pages No: 67 on procedures to be followed by the Native Land Commission on paragraph 4. Refer to Annexure Marked "PN 3" and to the preamble on the Applicant's Annexure Marked VN7.*

31) *THAT this is not only customary but also as stated in paragraph 31 above.*

32) *THAT in regards to paragraph 33 of the Affidavit, the Applicant and his members are claiming that they are the only hereditary owners, they have forgotten the descendants of LUBI the elder son of TAVANAVANUA are also the hereditary owners and other Yavusas that own the land that only the single iTokatoka Navitua of which this Applicant is a member claiming to be theirs.*

33) *THAT in regards to paragraph 34 of the Affidavit, the Applicant should have read through the whole paragraph 4 mentioned. It stated that we had known this when we read through the evidence of Wiliame Nava that he gave Mr. Maxwell in 1914.*

34) *THAT I do not agree with paragraph 35 of the Affidavit as this Applicant wants to completely erase from the records the existence of LUBI, his children and their descendants as being the hereditary owners of the land belonging to Mataqali Ketenatukani. Refer to Annexure Marked "PW3".*

35) *THAT in regards to paragraph 36 of the Affidavit, the iTokatoka Navitua are hungry for the lease money because they had been allocated their land and they were asking the Tribunal to revert all the lands belonging to ALL extinct land (refer paragraph 26 of its Affidavit) to the iTokatoka Navitua and not to their respective Mataqalis.*

<u>EXTINCT TOKATOKA NUBU</u>

36) *THAT in regards to paragraph 37 of the Affidavit, the Applicant and his members who presented sworn evidence to the Tribunal marked ALL lands from ALL extinct iTokatoka to be reverted to them. That was the reason why we corrected all the lands that were wrongly reverted to go to the rightfully land owning Mataqalis.*

37) *THAT as mentioned elsewhere above, all lands belong to the Mataqalis and that was the reason it was reverted to Mataqali Vidilo and NOT to the iTokatoka Navitua only.*

38) *THAT the Annexure Marked VN 15 only shows the areas of each Tokatoka and Mataqali that had been surveyed. In TABLE 7 – CLASSIFICATION OF COMMUNAL UNITS – PROVINCE OF BA and the Vola ni Kawa Bula (VKB), both show there is a iTokatoka Nadala and consisting of 92 members (refer VKB) under the Mataqali Nakurakura. (Classification Marked "PW 4" and VKB "PW 5".*

39) *THAT the Tribunal as mentioned in paragraph 37 above, answered to the Applicants evidence that they want all lands from all the extinct iTokatokas.*

27. A supplementary affidavit sworn by Peni Waqa on 28 July 2015 deposes as follows:

1. ***THAT** the Affidavit in Response of Peni Waqa filed on 12.06.2015 (**"main affidavit"**) contained some missing pages due to computer error and oversight by the Respondents. I attach herein a copy of the relevant pages from paragraphs 18 - 39.*
2. ***THAT** further the annexures are all marked as PW1 whereas they should be marked PW1, PW2, PW3, PW4 and PW5 respectively in their order in the main affidavit.*
3. ***THAT** the Office of the iTaukei Lands Appeal Tribunal has been asked to provide an English translation of the annexure that are in the vernacular language. Annexure PW1 which has annexure PN1 written on the top right hand corner of the document are the sworn statements during the 1st commission sitting for classification of ownership of land. Attached herein and marked as annexures **'PW1A'** is a copy of the English translation of annexure PW1 in the main affidavit.*
4. ***THAT** Annexure PW2 has annexure PN2 written on the top right hand corner of the document. Attached herein and marked as **'PW2A'** is a copy of the English translation of the relevant parts of annexure PW2 in the main affidavit.*
5. ***THAT** Annexure PW3 has annexures PN3 on the top right hand corner of the document. Attached herein and marked as annexure **'PW3A'** is a copy of the English translation of the relevant paragraph of annexure PW3 in the main affidavit.*
6. ***THAT** Annexure PW4 has annexure PN4 written on the top right hand corner of the document. Attached herein and marked as annexure **'PW4A'** is a copy of the English translation of annexure PW4 in the main affidavit.*

18. ***THAT** in regard to paragraph 19 of the Affidavit, this is completely false, because Lubi is the elder son of Tavanavanua. He had been allotted land belonging to*

Ketenatukani Mataqali and the three iTokatokas, namely Matalaqere (no. 512) Korotu (no. 513) and Naduanitu (no. 514).

19. ***THAT** I agree with paragraph 20 of the Affidavit.*

ALLOTMENT OF LAND BY THE COMMISSION

20. ***THAT** I also agree, and it states that "The lands of Native Fijians are for the most part held by the Mataqali or family communities as the proprietary unit according to ancient customs".*
21. ***THAT** in regards to paragraph 22 of the Affidavit, the Applicant should be specific as to which page of the evidence states this.*
22. ***THAT** paragraph 23 of the Affidavit is completely false. The Mataqali Vidilo are the owners of the land belonging to the Mataqali Vidilo. For example, the Yavusa Saru had already been occupied by them when the people of Namoli Village the seat of Vidilo Mataqali, due to some differences went to Saru for their protection. They then went back to Namoli later. This is also in the sworn evidence of William Nava.*

REVERSION OF EXTINCT LANDS

23. ***THAT** paragraph 24 of the Affidavit is true. The Applicant, a member of the iTokatoka Navitua which had been allocated land, cannot claim to own the extinct land belonging to iTokatoka Nawaqatabu which was by law should be reverted to the Mataqali Vidilo.*
24. ***THAT** in regards to paragraph 25 of the Affidavit, even the Chairman of the Commission, Ratu Viliame Tagivetaua incorrectly reverted all the extinct iTokatoka lands to the other iTokatoka when he should revert them to the Mataqalis because all lands in Fiji are owned by Mataqali. (Refer to Applicant Annexure Marked VN 7 and page 96 – paragraph XIII).*
25. ***THAT** I agree with paragraph 26 of the Affidavit that those are the extinct land belonging to their respective Mataqalis and iTokatokas.*
26. ***THAT** I am not aware of the various meetings mentioned in paragraph 27 of the Affidavit and cannot comment on it. This Annexure marked VN 10 was not disclosed and the Applicant was never cross examined on it and it should not be considered by this Court.*
27. ***THAT** in regards to paragraph 28 of the Affidavit, this was only a letter from the Commission office to the Solicitor for the Applicant and NOT another new decision.*
28. ***THAT** in regards to paragraph 29 of the Affidavit, I confirm receiving a copy of the same.*
29. ***THAT** I do not agree with paragraph 30 of the Affidavit and I leave it to the Court for the correct interpretation of that Section of the Act.*
30. ***THAT** the respective iTokatokas that the former Chairman Viliame Tagivetaua reverted the land to have not become extinct and had been allocated land. To revert the land from the extinct iTokatokas would be contrary to Section 18 (2) and (3) of the iTaukei Lands Act Cap 133. They should be reverted to their respective*

Mataqalis to be in line with Legislative Council Pages No. 67 on procedures to be followed by the Native Land Commission on paragraph 4. Refer to the Annexure Marked "PN3" and to the preamble on the Applicant's Annexure Marked VN 7.

31. ***THAT** this is not only customary but also as stated in paragraph 31 above.*
32. ***THAT** in regards to paragraph 33 of the Affidavit, the Applicant and his members are claiming that they are the only hereditary owners, they have forgotten the descendants of LUBI the elder son of TAVNAVANUA are also the hereditary owners and other Yavusas that own the land that only the single iTokatoka Navitua of which this Applicant is a member claiming to be theirs.*
33. ***THAT** in regard to paragraph 34 of the Affidavit, the Applicant should have read through the whole paragraph 4 mentioned. It stated that we had known this when we read through the evidence of Wiliame Nava that he gave Mr Maxwell in 1914.*
34. ***THAT** I do not agree with paragraph 35 of the Affidavit as this Applicant wants to completely erase from the records the existence of LUBI, his children and their descendants as being the hereditary owners of the land belonging to Mataqali Ketenatukani. Refer to Annexure Marked 'PW 3'.*
35. ***THAT** in regards to paragraph 36 of the Affidavit, the iTokatoka Navitua are hungry for the lease money because they had been allocated their land and they were asking the Tribunal to revert all the lands belonging to ALL extinct land (refer paragraph 26 of its Affidavit) to the iTokatoka Navitua and not to their respective Mataqalis.*

EXTINCT TOKATOKA NUBU

36. ***THAT** in regards to paragraph 37 of the Affidavit, the Applicant and his members who presented sworn evidence to the Tribunal marked ALL lands from ALL extinct iTokatoka to be reverted to them. That was the reason why we corrected all the lands that were wrongly reverted to go to the rightfully land owning Mataqalis.*
37. ***THAT** as mentioned elsewhere above, all lands belong to the Mataqali and that was the reason it was reverted to Mataqali and NOT to the iTokatoka Navitua only.*
38. ***THAT** the Annexure Marked VN 15 is only shows the areas of each Tokatoka and Mataqali that has been surveyed. In TABLE 7 – CLASSIFICATION OF COMMUNAL UNITS – PROVINCE OF BA and the Vola ni Kawa Bula (VKB), both show there is a iTokatoka Nadala and consisting of 92 members (refer VKB) under the Mataqali Nakurakura. (Classification Marked "PW4" and VKB "PW5".*
39. ***THAT** the Tribunal as mentioned in paragraph 37 above, answered to the Applicants evidence that they want all lands from all the extinct iTokatokas.*

DECISIONS OF *i*-TLAT ARE FINAL & CONCLUSIVE

28. Section 7(5) of the *i*-Taukei Lands Act (Cap 133) as amended by the Act No. 44 of 1998 provides:

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

29. The Respondents refer to the Fiji Court of Appeal decision in **Ramasi v Native Lands Commission** [2015] FJCA 83; BU0056.2012 which is authority that section 7(5) only forbids the court from reviewing any *i*-TLAT decision on the merits. However, it does not preclude the Court from examining (i) whether the *i*-TLAT had jurisdiction and/or (ii) whether or not *i*-TLAT accorded natural justice to the applicant.

> *[3] ..... section 7(5) of the Act provides that decisions of the Tribunal are to be final and conclusive and cannot be challenged in a court of law. This clause is of a class that is known as an ouster clause and in the past referred to as a "privative clause."*
>
> *[4] The learned High Court Judge acknowledged that the effect of section 7(5) is that a decision of the Tribunal is final and cannot be challenged in court. However, as the learned Judge observed, an examination of the decision-making process is not prohibited by section 7(5) of the Act.*
>
> *[5] The learned Judge concluded that it remains open to the court to examine the decision-making process by way of an application for judicial review. Of the accepted grounds upon which an application for judicial review may be made, the issues of jurisdiction and natural justice are more relevant to the decision-making process than to the merits of the decision and therefore can be reviewed by a court.*
>
> *[6] What this means is that it is open to an aggrieved person to apply for judicial review of a decision of the Tribunal alleging either lack of jurisdiction or a denial of natural justice. A denial of natural justice may mean either the existence of bias on the part of the Tribunal or procedural impropriety. These issues are not directly concerned with the merits of the decision.*

[7] *These observations are consistent with previous decisions of this Court. In* ***Natauniyalo –v- The Native Land Commission and Koroimata*** *[1998] FJCA 41 (1998) 44 FLR 280 the Court was required to consider the effect of section 100 (4) of the 1990 Constitution which stated:*

> *"For the purpose of this Constitution the opinion or decision of the Native Lands Commission on*
>
> *a) matters relating to and concerning Fijian customs, traditions and usages or the existence, extent, or application of customary laws; and*
>
> *b) disputes as to the headship of any division or sub-division of the Fijian people having the customary right to occupy and use any native land, shall be final and conclusive and shall not be challenged in a court of law."*

[8] *The Court held that the section did not exclude an examination by the High Court to determine whether the principles of natural justice had been breached in reaching the decision impugned.*

[9] *Under the present legislative scheme the ouster clause now applies to decisions of the Tribunal under section 7(5) of the Act and not decisions of the Commission.*

[10] *In* ***Kubou –v- The State, The Appeals Tribunal and Another*** *[2008] FJCA 60 (unreported ABU 10 of 2006, 29 October 2008) this Court revisited the question and following its decision in the* ***Natauniyalo*** *decision (supra) applied the same principle when considering section 7(5) of the Act. At paragraph 15 the Court stated:*

> *"The Courts have held that the effect of [section 7(5)] is that decisions of the Tribunal are unimpeachable provided that they are valid decisions, reached in accordance with the principles of natural justice."*

[11] *Therefore, in my judgment, whenever a challenge to a decision of the Tribunal is based on a lack of jurisdiction or a denial of natural justice, the High Court has the necessary jurisdiction to consider an application for judicial review under Order 53 of the High Court Rules notwithstanding section 7(5) of the Act. However in this case the challenge by the Appellant went to the merits of the Tribunal's decision and for that reason there was no right to apply for judicial review.*

COMMENTS

30. There is nothing before me to suggest that the *i*-TLAT did not accord procedural fairness to the applicants. The applicants were heard and their submissions were taken into account.

31. The *i*-TLAT however based its decision on its records of the 1914 Maxwell Commission. Although the applicant alleges that there was a breach of natural justice, this allegation appears to be based on the submission that the *i*-TLAT had failed to take cognizance of some documentary evidence provided by the applicant. It appears that some of these documents were provided after the hearing as noted in the affidavit of Peni Waqa. In any event, if the documents were provided during the hearing, clearly, the *i*-TLAT preferred what is already in its records and in particular from the Maxwell Commission. It is hard to see how this is a breach of natural justice. Different if the interested parties had tendered documents not already in the *i*-TLAT records, and which influenced the *i*-TLAT decision. In this case, as the applicants themselves had noted, the other parties did not actively participate in the proceedings as much as the applicants did.

32. It is particularly noteworthy also that the *i*-TLAT refutes the applicant's allegation that the *i-tokatoka* Navitua is the only hereditary landowning unit in the socio-economic and political structure of the *yavusa* and *vanua* Vidilo. Again, this conclusion is based on evidence in the *i*-TLAT records. The records, as well as any conclusion that the *i*-TLAT might have formed from that, are beyond question in this Court in this instance.

33. The applicant argues that the *i*-TLAT did not have jurisdiction to order reversal of the lands to the mataqalis. The submissions is that to do so is

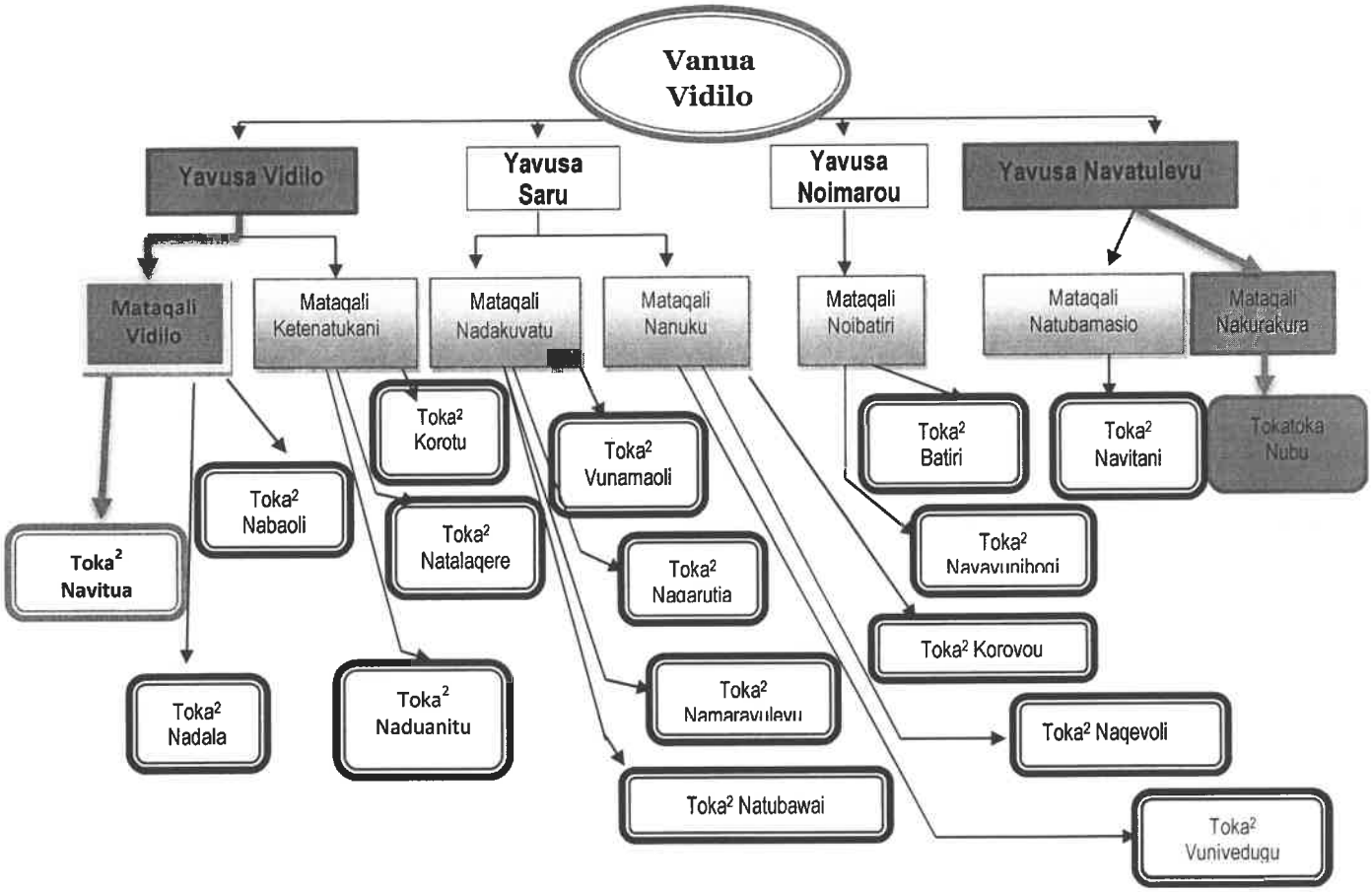
contrary to custom and practice of the *i*-taukei and of section 18 of the *i*-Taukei Lands Act. Again, as I have said, the *i*-TLAT has formed the view that the other proprietary units in question are also hereditary units. In forming this view, it was relying on recorded evidence from the Maxwell Commission of 1914. This Court hardly has the jurisdiction to second-guess the records.

CONCLUSION

34. I dismiss the application for Judicial Review. The parties are to bear their own costs.

Anare Tuilevuka
JUDGE
Lautoka

Schedule 1


Vanua Vidilo
Yavusa Vidilo
Yavusa Saru
Yavusa Noimarou
Yavusa Navatulevu
Mataqali Vidilo
Mataqali Ketenatukani
Mataqali Nadakuvatu
Mataqali Nanuku
Mataqali Noibatiri
Mataqali Natubamasio
Mataqali Nakurakura
Toka² Navitua
Toka² Nabaoli
Toka² Nadala
Toka² Naduanitu
Toka² Korotu
Toka² Natalaqere
Toka² Vunamaoli
Toka² Nagarutia
Toka² Namaravulevu
Toka² Natubawai
Toka² Batiri
Toka² Navavunibogi
Toka² Korovou
Toka² Naqevoli
Toka² Vunivedugu
Toka² Navitani
Tokatoka Nubu