

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

JUDICIAL REVIEW HBJ NO. 01 OF 2018

IN THE MATTER of an Application for
leave to apply for Judicial Review by

EPI BUACIVO LISALA (Applicant)

AND

IN THE MATTER of the decision dated 7
November 2017 by the iTaukei Lands
Appeals Tribunal – upholding the decision
of the iTaukei Lands Commission.

BETWEEN : **THE STATE**

EX-PARTE : **EPI BUACIVO LISALA** of Lomawai Village, Nadroga, Farmer.

APPLICANT

AND : **ITAUKEI LANDS APPEALS TRIBUNAL**, a body duly constituted
under the iTaukei Lands Act.

RESPONDENT

AND : **KINIJOJI VOSAILAGI** of Lomawai Village, Nadroga.

INTERESTED PARTY

Appearances : Mr T. Duanasali for the applicant
: Mr J. Mainavolau for the respondent
: No appearance for the interested party

Date of Hearing : 07 May 2019

Date of Ruling : 31 May 2019

R U L I N G

[on leave to apply for judicial review]

Introduction

[01] This is an application for leave to apply for judicial review. It seeks to judicially review the decision of the iTaukei Lands Appeals Tribunal (*'Tribunal'*), the respondent given on 7 November 2017, at Lomawai Village in Nadroga confirming Kinijoji Vosailagi, the interested party as Turaga ni Mataqali Nalolo, Turaga ni Yavusa Nalolo and also as Tui Nalolo .

[02] By his *inter partes* summons dated and filed 7 February 2018 (*'the Application'*), Epi Buacivo Lisala, the applicant seeks the following orders:

- i. *A declaration that the decision of the respondent given on 7 November 2017, was unfair.*
- ii. *A declaration that the respondent did not consider the relevant consideration to give rights of natural justice to the applicant.*
- iii. *Costs on indemnity basis.*

[03] The application is supported by an affidavit of the applicant sworn on 6 February 2018, which verifies the facts relied upon.

[04] The application is made under Order 53, Rule 3 (2) of the High Court Rules 1988, as amended (*'HCR'*).

[05] The respondent has filed an affidavit of Anasa Tawake, the secretary to the tribunal sworn on 15 March 2018 in reply.

[06] Tribunal's proceedings were all in iTaukei language. The applicant did not file the English translation of the proceedings. The respondent was only able to finalise and serve the English version of the proceedings on the applicant in April this year.

[07] At the hearing, the parties made oral submissions, and had also filed their respective written submissions.

Background

[08] The background facts are taken from the applicant's affidavit in support. The applicant, on the affidavit, deposes, among other things, that:

1. *That I had challenged the traditional positions of Turaga ni Mataqali Nalolo, Turaga ni Yavusa Nalolo and Tui Nalolo of Lomawai village, Nadroga being held by the interested party with the iTaukei Lands Commission (hereto referred as the "NLC").*
2. *That the NLC by its decision made on 17 March 2017 confirmed the said three traditional positions to the Interested Party.*
3. *That being aggrieved of the decision of the NLC, I appealed the decision to the respondent.*
4. *That the respondent by its decision on 7 November 2017, dismissed my appeal and reconfirmed the decision of the NLC.*
5. *That the decision of the respondent was unfair in that the respondent refused to hear pertinent witnesses of mine in the appeal.*
6. *That the respondent failed to consider as a relevant consideration references to family tree of mine and the Interested Party gleaned from historical written records produced and exhibited in the appeal hearing.*

The relief sought

[09] The applicant seeks the following relief:

- i. *A declaration that the decision of the respondent made on 7 November 2017 was unfair.*
- ii. *A declaration that the respondent did not consider the relevant consideration to give rights of natural justice to the applicant.*
- iii. *Other declarations as the Honourable Court may decide.*
- iv. *Costs on an indemnity basis.*

The grounds upon which relief is sought

[10] The grounds which the relief is sought upon are as follows:

- a. *The iTaukei Lands Commission had on 17 March 2017, confirmed the Interested Party to the position of Turaga ni Mataqali Nalolo, Turaga ni Yavusa Nalolo and Tui Nalolo.*
- b. *The applicant had appealed the decision of the iTaukei Lands Commission to the respondent.*
- c. *The respondent by its decision made on 7 November 2017, dismiss the appeal.*
- d. *The decision of the respondent was unfair and failed to consider matters of relevant consideration and took account of matters of irrelevant consideration.*

The law

[11] The relevant law applicable to leave to apply for judicial review is the HCR, O 53, R 3 (2), which provides:

'Application for leave to apply for judicial review (O 53, R 3)

3 (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this Rule.

(2) An application for leave must be made upon filing in the Registry-

(a) a notice in Form 32 in Appendix 1 hereunder containing statement of-

- (i) the particulars of the judgment order, decision or other proceeding in respect of which judicial review is being sought;*
- (ii) the relief sought and the grounds upon which it is sought;*
- (iii) the name and description of the applicant;*
- (iv) the name and address of the applicant's solicitors (if any); and*
- (v) the applicant's address for service;*

(b) an affidavit which verifies the facts relied on.

(3) (a) Copies of the application for leave and the affidavit in support must be served on all persons directly affected by the application.

(b) *The Court may determine the application without a hearing and where a hearing is considered necessary the Court shall hear and determine the application inter partes.*

(c) *Notice of hearing of the application shall be notified in writing to the parties by the Registrar.*

(d) *Where the Court determines the application without a hearing, the Registrar shall serve a copy of the order of the Court on the applicant.*

(4) *Without prejudice to its powers under Order 20, Rule 8, the Court hearing an application for leave may allow the relief sought and the grounds thereof to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit.*

(5) *The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*

(6) *Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*

(7) *If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.*

(8) *Where leave to apply for judicial review is granted, then-*

(a) *if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;*

(b) *if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.*

(9) *Upon granting leave the Court may, if satisfied that such a course is justified, direct that the grant shall operate either forthwith or conditionally as an entry of motion under rule 5 (4) and may then proceed to judgment on the application for judicial review or may give such further directions as may be warranted in the circumstances.'*

Test for granting leave

- [12] To grant leave to apply for judicial review, the court has to be satisfied that:
- (a) There is an arguable case for review;
 - (b) The claimant has a 'sufficient interest'; and
 - (c) There has not been 'undue delay'.

Discussion and decision

- [13] The applicant applies for leave to apply for judicial review of the tribunal's decision dated 7 November 2017 on the ground that decision is unfair in that the tribunal failed to consider matters of relevant consideration and took account of matters of irrelevant consideration.
- [14] As required in R 3 (2) (i), the applicant has attached a statement of the particulars of the decision in respect of which judicial review is sought. The applicant seeks declaration that the decision of the tribunal made on 7 November 2017 was unfair and that the respondent did not consider the relevant consideration to give rights of natural justice to the applicant.
- [15] The application for leave to apply for judicial review may be determined without a hearing and where a hearing is considered necessary, the Court will hear and determine the application *inter partes* (see O 53, R 3 (3) (ii)). In this case, the application was heard *inter partes*.
- [16] The application provides name, description and address of the applicant, and provides the particulars of the decision in respect of which judicial review is being sought. This complies with the HCR, O 53, R 3 (2). The application is in order. There was no dispute in regard to the formality of the application.
- [17] The applicant has filed an affidavit, which verifies the facts relied upon. This complies with the requirement of the HCR, O 53, R 3 (2) (b).
- [18] I now turn to apply the test for granting leave to apply for judicial review.

Sufficient interest

- [19] The court will not grant leave unless it considers that the applicant has a sufficient interest (standing) in the matter to which the application relates (see O 53, R 3 (5)). The requirement of standing indicates that the primary concern of administrative law is not simply to control the performance of public functions but rather to exercise control in the interests of persons affected in particular ways. In administrative law, rules of standing are seen as rules about entitlement to complain of a wrong rather than as part of definition of the wrong.
- [20] The question of sufficient interest is to be decided:
1. In the light of the circumstances of the case before the court (it cannot be decided in advance of litigation).
 2. It has to be judged in the light of relevant statutory provisions-who is to be allowed to challenge decisions made under the statute?
 3. It has to be judged in the light of substance of the complainant's complaint. (In *R v Somerset CC, ex p Dixon* [1998] Env LR 111, Sedley J said that *provided the claimant had an arguable substantive case, leave should not be refused on the basis of lack of standing unless the claimant was a 'busybody' or a 'troublemaker'*.).
 4. Whether the claimant's interest is sufficient depends to some extent on the seriousness of the alleged breach of administrative law. Whatever the claimant's interest, the more serious the breach, the more likely that interest is to be sufficient.
- [21] The purpose of the standing rules under O 53 appears to be a mechanism for weeding out hopeless or frivolous cases at an early stage and protecting public functionaries from harassment.
- [22] The test for deciding whether a claimant has sufficient interest was considered by the House of Lords in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617, where it was held:

'That not only was standing a ground in itself upon which permission could be granted, it should also be considered at the substantive hearing after the relevant law and facts were examined in full.'

[23] The decision sought to be judicially reviewed affects the applicant's status in the village. The decision directly interferes with his personal right to hold those positions. At this stage, the respondent did not dispute the applicant's interest in the matter. For the purpose of this application, I am satisfied that the applicant has sufficient interest in the matter to which the application relates.

The arguable case for review

[24] Another test for granting permission (leave) has been that a claimant must demonstrate to the court upon '*a quick perusal of the papers*' that there is an arguable case for granting relief (*R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* (above)).

[25] When considering whether there is an arguable case for granting the relief sought, the court will not go into the matter in depth. The court will only see, upon perusal of the papers, whether there is an arguable *prima facie* case for granting the relief.

[26] The applicant challenges the impugned decision on the grounds that: (a) breach of the principles of natural justice and fairness and (b) consideration of irrelevant matters and not considering the relevant matters.

[27] Mr Mainavolau of counsel appearing for the respondent contends that there is no arguable case for the court to consider granting leave to apply for judicial review. He cites: *Fiji Airline Pilots Associations v Permanent Secretary for Labour and Industrial Relations* [1998] FJCA 14, *State v Connors, ex parte Shah* [2008] FJHC 64, *Ramasi v Native Lands Commission* [2015] FJCA 83; ABU 00562012 and *O'Reilly v Mackman & Others* [1982] 3 All ER 1124.

[28] In *Fiji Airline Pilots Associations v. Permanent Secretary for Labour and Industrial Relations* [1998] FJCA 14, the Court of Appeal said:

"That the basic principle is that the judge is only required to be satisfied that on the material available and disclosed is what might, on further consideration, turn out to be an arguable cause in favour of granting relief."

[29] Scutt J in *State v Connors, ex parte Shah* [2008] FJHC 64 stated:

"...as was said in Sitiveni Ligamamada Rabuka and Commission of Inquiry into the Deed of Settlement Dated 17 September 1993; In re Anthony Stephens v. Attorney-General of Fiji (JR No. 26 of 1993, 4 May 1995):

"This Court is not concerned with a review of the decision which the commission reached at the Inquiry but simply with a review of the manner or process in which the decision was reached. It is the decision-making process employed by the Commission of Inquiry in reaching its decision which is the primary concern of this Court."

[30] Hon. Justice Callanchini in *Ramasi v Native Lands Commission* [2015] FJCA 83; ABU 00562012, concluded at paragraph 11 that:

"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."

[31] Lord Diplock made an obiter statement in *O'Reilly v Mackman & Others* [1982] 3 All ER 1124 at 1129 in the following manner:

*"It was this provision that provided the occasion for the landmark decision of this House in *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147, and particularly the leading speech of Lord Reid, which has liberated English public law from the fetters that the courts had theretofore imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within*

their jurisdiction. The breakthrough that Anismic made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e, one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination, not being a determination within the meaning of the empowering legislation, was accordingly a nullity."

[32] Turning to the case at hand, the applicant challenged the decision of the iTaukei Lands Commission (*'the Commission'*) that, Kinijoji Vosailagi (the interested party) is entitled to hold the three traditional positions of Turaga ni Mataqali Nalolo, Turaga ni Yavusa Nalolo and Tui Nalolo of Lomawai village, Nadroga (*'the positions'*). The Commission made its decision on 17 March. Being aggrieved with this decision, the applicant appealed to the tribunal. On 7 November 2017, the tribunal after hearing the appeal confirmed the Commission's decision and dismissed his appeal.

[33] Section 7 (5) of the Act makes the tribunal's decision final and conclusive and cannot be challenged in a court of law. In view of the ouster clause in that section, the tribunal's decision may be judicially reviewed on the ground of illegality.

[34] Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 said that:

'Illegality arises where a decision-maker who must understand correctly the law that regulates his or her decision-making power and must give effect to it fails to do so.'

[35] Illegality also includes ultra vires and errors of law. An error in relation to a precedent (jurisdictional) fact is also often placed under the illegality heading.

[36] The applicant seeks leave to apply for judicial review of the tribunal's decision, which is final and conclusive and cannot be challenged in a court of law on the two grounds:

1. The decision of the respondent was unfair in that the respondent refused to hear pertinent witnesses of mine in the appeal.

2. The respondent failed to consider as a relevant consideration references to family tree of mine and the Interested Party gleaned from historical written records produced and exhibited in the appeal hearing.
- [37] Under the ground 1, the applicant complains that the tribunal refused to hear his pertinent witnesses in the appeal, and therefore the decision is unfair.
- [38] It is true that under section 7 (3) of the Act the tribunal had power to hear further evidence when hearing an appeal. That section provides:

'(3) For the purpose of determining an appeal the Appeals Tribunal shall have power to hear further evidence but only if all of the 3 following conditions are satisfied-

(a) if it is shown that the evidence could not have been obtained with reasonable diligence for use at the inquiry before the Commission or commissioner;

(b) if the further evidence is such that, if given, it would have probably have an important influence on the decision; or

(c) if the evidence is such as is presumably to be believed'.

- [39] The affidavit evidence filed by the applicant does not show that such an application was before the tribunal and the tribunal refused to exercise such power. A refusal to exercise the power given by the Act would amount to illegality. However, if the tribunal had decided an application made before it according to law, it cannot be said that it had acted illegally.
- [40] There is no complaint that he tribunal had refused its power under section 7 (3) of the Act or it had acted illegally in relation to its power under that section.
- [41] Under the ground 2, the applicant states that the tribunal failed to consider as a relevant consideration references to his family tree and the interested party gleaned from historical written records produced and exhibited in the appeal hearing.

[42] A failure to assess the evidence properly, resulting in a decision which appears to be unsupported by the evidence, can also be characterised as failure to take account of relevant considerations. This may arise where the court is unable to identify the evidence to support a decision, in which event the decision will be flawed in law (*AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736).

[43] Again, the applicant's affidavit does not sufficiently disclose the relevant factors that the tribunal had failed to take account of and the irrelevant factors that were considered by the tribunal. In the absence of sufficient information, I cannot assess the actual or potential importance of the fact that was overlooked and of the fact that was irrelevant.

[44] In my view, a cursory consideration of the application fails to demonstrate that there is an arguable case for granting relief despite the ouster clause that the tribunal's decision is final and conclusive and cannot be challenged in a court of law. The grounds relied upon to challenge the tribunal's decision attempts to attack the merits of its decision.

Undue delay

[45] The applicant does not seek relief by way of writ of certiorari (quashing order). Therefore, the question of delay does not arise. It was not an issue in dispute.

Conclusion

[46] For the reasons set out above, I conclude that the applicant fails to demonstrate an arguable case for judicial review of the tribunal. I would accordingly refuse to grant leave to apply for judicial review of the tribunal's decision delivered on 07 November 2017.

[47] The respondent had made a few appearances, filed affidavit in response and written submission. I take all these into my account and assess costs at \$600.00, which the respondent is entitled to recover from the applicant.

The Result

1. Leave to apply for judicial review refused.

2. Applicant must pay costs of \$600.00, which is summarily assessed to the respondent.

M. H. Mohamed Ajmeer
31/5/19

M. H. Mohamed Ajmeer

JUDGE



At Lautoka
31 May 2019

Solicitors:

For the applicant: M/s Kevueli Tunidau Lawyers, Barristers & Solicitors

For the respondent: Office of the Attorney General, Lautoka