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

JUDICIAL REVIEW NO. HBJ 7 OF 2018

IN THE MATTER of an application by Ratu Kaliova Dawai of Narewa Village, Nadi, Villager, for Judicial Review.

IN THE MATTER of the iTaukei Lands Act Cap 113 of the Laws of Fiji whereby the iTaukei Lands and Appeals Tribunal have endorsed **Ratu Vuniani Navuniuci** to be the holder of the title of Tui Nadi purporting to exercise powers under the iTaukei Lands Act

BETWEEN : **RATU KALIOVA DAWAI** a villager of Narewa Village, Nadi.

APPLICANT

A N D : **iTAUKEI LANDS AND APPEALS TRIBUNAL** a statutory body set up by law of 87 Queen Elizabeth Drive, Nasese, Suva.

FIRST RESPONDENT

A N D : **iTAUKEI LANDS AND FISHERIES COMMISSION** a statutory body set up by law of Carnavon Street, Suva.

SECOND RESPONDENT

A N D : **THE ATTORNEY GENERAL OF FIJI** of Level 7, Suvavou House, Victoria Parade, Suva.

THIRD RESPONDENT

A N D : **RATU VUNIANI NAVUNIUCI** of Narewa Village, Nadi.

FOURTH RESPONDENT

Appearances	: Mr I. Fa for the applicant
	: Ms M. Faktoufon for the 1st, 2nd and 3rd respondents
	: No appearance for the 4th respondents
Date of Hearing	: 21 August 2019
Date of Ruling	: 13 September 2019

RULING

[on leave to apply for judicial review]

Introduction

[01] This is an application for leave to apply for judicial review.

[02] By his notice of motion summons filed on 31 August 2018 (*'the application'*), Ratu Kaliova Dawai, the applicant seeks leave to apply for judicial review of the decisions of the iTaukei Lands and Appeals Tribunal (*'Tribunal'*), the respondent dated 1 June 2018 and of the iTaukei Lands and Fisheries Commission, the second respondent dated 5 December 2017 declaring Ratu Vuniani Navuniuci, the respondent to be the rightful Tui Nadi.

[03] The application is supported by an affidavit of the applicant sworn on 31 August 2018, which verifies the facts relied upon.

[04] The application is made in terms of 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 03 January 2019 in response.

[06] The application was initially heard before Mackie J who has left the bench before determination of the same. Therefore, the matter came before me for the limited purpose of hearing and determining the granting of leave to apply for judicial review.

[07] At the hearing before me, the parties made oral submissions, and filed their respective written submissions as well. I am grateful to both counsel and their team for their written submissions, by which I was greatly assisted.

Background

[08] The applicant has given fairly long background facts, but I do not intend to repeat it here. For the present purpose, I would only say that the applicant intends to challenge the first respondent's decision of 1 June 2018 and the second respondent's decision of 5 December 2017. Both decisions confirm that Ratu Vuniani Navuniuci, the fourth respondent to be the rightful Tui Nadi.

Relief sought

[09] The applicant seeks the following relief:

> *a) An order for Certiorari to remove into the High Court the said decision of the first respondent dated 1 June 2018, declaring the fourth respondent to be the rightful Tui Nadi and that the same be quashed;*
>
> *b) A declaration that the decision of the first respondent of 1 June 2018, is unlawful, void and of no effect.*
>
> *c) A declaration that the decision of the first respondent of 1 June 2018, declaring the fourth respondent to be the rightful Tui Nadi is unreasonable in the Wednesbury sense and as such the decision is unlawful.*
>
> *d) A declaration that the first respondent had acted in bad faith and in a manner which was unfair to the applicant by proceeding to hear the upholding the decision of the second respondent that the fourth respondent is the holder of the title of Tui Nadi when at the relevant time there was a lawful Order of this Court that was made on the 12 May 2005, that prevented the second respondent from undertaking an inquiry into the rightful holder of the title of the Tui Nadi and a further Order of this Court of the 27 January 2007, that clearly set out the composition of the Commission and also a required terms of reference;*
>
> *e) A declaration that the first respondent's declaration of the fourth respondent as the rightful holder of the title of Tui Nadi is irregular, void and of no effect.*
>
> *f) An order for damages and costs.*

g) Such further declaration and other relief as to the Court may seem just.

Grounds on which relief sought:

[10] The grounds on which the relief are sought include:

(a) That the decision by the first respondent to declare the sixth respondent to be the Tui Nadi pursuant to their ruling of 1 June 2018, was in breach of the rules of natural justice in that amongst other matters the applicant was denied a fair hearing in that the first respondent failed to address the illegality of the proceedings before the second respondent:-

1) That the second respondent failed to provide a terms of reference for the Commission of Inquiry into the Tui Nadi dispute pursuant to the Orders of the High Court of the 27 January 2007;
2) That the second respondent failed to appoint an independent Commission for the Commission of Inquiry of the 22 November 2011, to determine the Tui Nadi dispute in accordance with the orders of the High Court of the 27 January 2007.
3) That the second respondent was biased against the applicant in that the first to the third respondents failed to provide the applicant with a terms of reference that the Commission of Inquiry would base its inquiry into, and
4) That the second respondents had taken into account as evidence in the inquiry matters which were not placed before it.
5) That the first respondent being aware of the above proceeded to accept the second respondent's decision without addressing the same.

(b) That the decision by the first respondent was a decision that was made on evidence of the customs and traditions of the Vanua of Nadi and of section 17 of the Native Lands Act that was discredited and rejected by the High Court of Fiji in the case of ***Ratu Isireli Rokomatu Namulo v Josefa Saronicava Waqairatu & 5 Ors;*** *HBJ 0021 OF 1997L;*

(c) That the first and second respondents had made a predetermination in arriving at their decisions to declare the fourth respondent to be the Tui Nadi as it was aware that the procedures set out by the High Court in the consent orders of the 24 January 2007, to ensure fairness and compliance with the rules of natural justice was complied with yet refused to comply with these procedures.

(d) That the first respondent in arriving at their decisions had: -

(1) ***Taken into account irrelevant considerations and matters****, by failing to comply with the consent orders of the High Court of the 24 January 2007 which are set out below:*

"(i) That each party nominate a member for appointment as Commissioners;

(ii) The Minister is to appoint the Chairman of the Commission which is to be qualified for appointment as a Judge or otherwise suitable by qualification and experience;

(iii) The terms of reference for the Commission is to be determined in accordance with the custom of the vanua of Nadi as to who should be the holder of the title Tui Nadi;

(iv) Each party is to be given natural justice;

(v) Adjourned to 23/2/07 for resolution of the Commissioners."

*(2) **<u>Acted in breach of the rules of natural justice</u>** by failing to comply with the consent orders of the High Court on the 24 January 2007, which are set out below:*

"(i) That each party nominate a member for appointment as Commissioners;

(ii) The Minister is to appoint the Chairperson of the Commission who is to be qualified for appointment as a Judge or otherwise suitable by qualification and experience;

(iii) The terms of reference for the Commission is to be determined in accordance with the custom of the vanua of Nadi as to who should be the holder of the title Tui Nadi;

(iv) Each party is to be given natural justice;

(v) Adjourned to 23/2/07 for resolution of the Commissioners."

*(3) **<u>Acted illegally, unlawfully and in an unreasonable manner</u>** by failing to comply with the consent order of the High Court of the 24 January 2007, which are set out below:*

"(i) That each arty nominate a member for appointment as Commissioners;

(ii) The Minister is to appoint the Chairman of the Commission who is to be qualified for appointment as a Judge or otherwise suitable by qualification and experience;

(iii) *The terms of reference for the Commission is to be determined in accordance with the custom of the vanua of Nadi as to who should be the holder of the title Tui Nadi;*

(iv) *Each party is to be given natural justice;*

(v) *Adjourned to 23/2/07 for resolution of the Commissioners."*

Notice of Opposition

[11] The first, second and third respondents (collectively *'the respondents'*) oppose the application for leave to apply for judicial review on grounds that:

1. *The applicant has no sufficient interest or arguable case in that:*

    a) *there is no evidence in the affidavit of Ratu Kaliova Dawai sworn and filed on 31 August 2018, to support the reliefs sought;*
    b) *the affidavit evidence focuses on circumstances arising prior to and is not relevant to the present proceeding.*

2. *There is no breach of the rules of natural justice in that:*

    a) *there is no affidavit evidence supporting any breach of natural justice;*
    b) *the affidavit evidence focuses on arguments relating to merits of the lawful Tui Nadi and not on procedure adopted in the decision making process.*

3. *That this claim is res judicata as the consent orders of 27 January 2007, has been discussed in the following cases:*

    a) *contempt proceedings in Dawai v iTaukei Lands & Fisheries Commission [2011] FJHC 795' HBJ 4.2005L (8 December 2011) by Justice Inoke in refusing leave to apply for an order of committal;*
    b) *Dawai v Nasetava [2012] FJLaw Rp 120; HBJ 2 of 2012 (7 November 2012) whereby Justice Nawana dismissed the application for leave for judicial review challenging the appointment of Ratu Sailosi Dawai as Tui Nadi; and*
    c) *Dawai v Ratu Sailosi Dawai, HBJ 4 of 2013 whereby Justice Abeygunaratne dismissed the application for leave for judicial review challenging the appointment of Ratu Sailosi Dawai as Tui Nadi.*

4. *There was no appeal against the decision of Justice Inoke immediately after the decision nor had there been any Stay Orders sought against the respondents.*

5. *The applicant had filed an appeal for enlargement of time to appeal the decision of Justice Inoke dated 8 December 2011, in Dawai v Native Lands and Fisheries Commission [2014] FJCA 194; Misc.2.2012 (7 November 2014); which was eventually deemed abandoned.*

6. *The applicant again filed an application for extension of time in civil appeal no ABU 43 of 2018 which is pending before the Court of Appeal.*

The law

[12] 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

[13] 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

[14] The applicant has made this application to obtain leave to apply for judicial review of the tribunal's decision dated 1 June 2018 on the grounds of breach of rules of natural justice, illegality, unreasonableness and legitimate expectation.

[15] 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 writ of *certiorari* (quashing order) quashing the decision of the tribunal dated 1 June 2018.

[16] An application for leave to apply for judicial review may be determined on papers 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) (b). In this case, the application was heard *inter partes*.

[17] 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 in compliance with the HCR, O 53, R 3 (2). The formality of the application was not disputed. The application is in order.

[18] 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).

[19] Returning to the test for granting leave to apply for judicial review.

Sufficient interest

[20] 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.

[21] 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.

[22] 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.

[23] 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.'*

[24] The tribunal's decision affects the applicant's status in the village. The decision directly interferes with his personal right to hold the position as Tui Nadi. For the purpose of this application, I am provisionally satisfied that the applicant has sufficient interest in the matter to which the application relates.

The arguable case for review

[25] Another test for granting leave to apply for judicial review is that a claimant must demonstrate to the court upon *'a quick perusal of the papers'* that there is an

arguable case for granting relief (see: *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* (above)).

[26] 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.

[27] The tribunal's decision is challenged on the grounds that: (a) breach of the principles of natural justice and fairness, (b) illegality, (c) unreasonableness and (d) legitimate expectation.

[28] It was contended on behalf of the respondent that there is no arguable case for the court to consider granting leave to apply for judicial review.

[29] 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."*

[30] 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."*

[31] 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."

[32] In this matter, the second respondent decided that the forth respondent is entitled to hold the position of Tui Nadi (*'the position'*). The applicant appealed that decision to the tribunal. On 1 June 2018, the tribunal after hearing the appeal confirmed the fourth respondent'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 on the ground of illegality among other grounds.

[37] In his affidavit in support, the applicant [at paragraphs 3, 4, 47, 50 and 51] states:

"...

3. ***THAT*** *the decision of the 1st Respondent of the 1st June 2018 is a decision that is arrived at unlawfully and in breach of the orders of Connors J of the 12th of May 2005 and the consent orders of Connors J of the 24th of January 2007 in the case of* ***Ratu Kaliova Dawai v Native Lands and Fisheries Commission, Ratu Napolioni Dawai, Attorney General of Fiji****; Judicial Review No. 4 of 2005.*

4. ***THAT*** *in arriving at its decision of the 1st of June 2018, the 1st Respondent had accepted without reservation the decision of the 2nd Respondent of the 5th of December 2017 arrived at in breach of the process and procedures ordered by consent by Connors J in the case of* ***Ratu Kaliova Dawai v Native Lands & Fisheries Commission, Ratu Napolioni Dawai, Attorney General of Fiji****; Judicial*

Review No. 4 of 2005 to ensure fairness and compliance by the 2nd Respondent with the rules of natural justice.

47. ***THAT*** *the 1st and 2nd Respondents have all our evidence before them. That the evidence relied upon by the 2nd Respondent to declare Ratu Sailosi Dawai and Ratu Vuniani Navuniuci have already been discontinued by the High Court of Fiji in* ***Ratu Isireli Rokomatu Namulo v Josefa Saronicava Waqairatu & 5 Ors;*** *HBJ 0021 of 1997L.*

50. ***THAT*** *the High Court has recognised from the past conduct of the 2nd Respondent that it is bias in favour of the family of Ratu Napolioni Naulia Dawai, the close blood relative of Ratu Sailosi Dawai and Ratu Vuniuani Navunicui.*

51. ***THAT*** *this bias and unlawful conduct by the 2nd Respondent continues to this day.*

..."

[38] It appears that the first and the second respondents have failed to assess the evidence properly.

[39] 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 (see: *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736).

[40] Having had a look at the application, I am satisfied that the application demonstrates that there is an arguable case for granting relief.

Undue delay

[41] The applicant seeks relief by way of *writ of certiorari* (quashing order) to remove the decisions of the first and the second respondents. In that case, the relevant period is 3 months after the date of the proceeding (see: O 53, R 4 (2)).

[42] The decision to which this application relates was made on 1 June 2018. The applicant has made his leave application on 31 August 2018. The application has been filed within 3 months of the impugned decision. The question of undue delay does not arise.

Conclusion

[43] Having read the application, the supporting affidavit and the affidavit in opposition and having heard and read the submissions advanced by both counsel, I conclude that the applicant has demonstrated an arguable case for judicial review of the decisions of the first and the second respondents. I would accordingly grant leave to apply for judicial review of the decisions of the first and second respondents. The costs of this application shall be in the case.

Stay

[44] Mr Fa of counsel for the applicant submits that the granting of leave should immediately operate as a stay as the illegality created by the unlawfulness of the first and the second respondents' conduct should be stopped forthwith. If it is, he further submits, allowed to continue then when the decision is eventually reversed, considerable loss and damages will arise to innocent parties who have relied on the unlawful acts on the first and the second respondents will be left without a remedy.

[45] The HCR, O 53, R 3 (8) (a), states:

> *"(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;" (Emphasis supplied)*

[46] By way of relief, the applicant seeks an order of *certiorari to* remove the impugned decisions of the first and the second respondents on the ground of illegality among other grounds. I am of the view that it would be appropriate that there should be a stay of the proceedings. I accordingly, acting under R 3 (8) (a), direct the granting of leave must operate as a stay of the proceedings to which the application relates until the determination of the application for judicial review.

[47] The applicant now will make his application for judicial review either by originating motion or originating summons and enter it for hearing within 14 days (see: O 53, R 5 (4)).

The result

1. Leave to apply for judicial review is granted.
2. The grant of leave shall operate as a stay of the proceedings to which the application relates.
3. The applicant shall enter his application for judicial review for hearing within 14 days.
4. The costs shall be in the case.

13/9/19
....

M. H. Mohamed Ajmeer

JUDGE

At Lautoka

13 September 2019

Solicitors:
Fa & Company, Barristers & Solicitors for the applicant
Office of the Solicitor-General for the first to third respondents