

- (i) **A DECLARATION** that the Plaintiff has at all relevant times (including on 21 July 2021 and thereafter) had the right to be nominated as a candidate for election to Parliament and to remain a Member of Parliament.
- (ii) **A DECLARATION** that in purporting to remove the Plaintiff's name from the National Register of Voters purportedly pursuant to section 12(1)(j) of the Electoral (Registration of Voters) Act 2012 ("**ERVA**"), the Supervisor of Elections ("**Supervisor**") acted wrongfully, unlawfully and in breach of, among other things:-
- (a) The Plaintiff's right to be registered as a voter under section 23(3)(a) of the Constitution of the Republic of Fiji ("**the Constitution**") and sections 3(1), 4 and 7 of the ERVA.
 - (b) The Plaintiff's right to hold office under section 23(3)(d) of the Constitution; and
 - (c) The Plaintiff's right under s.16(1)(a) of the Constitution to administrative action that is lawful, rational and proportionate; and/or
 - (d) The Plaintiff's right under section 26 of the Constitution to equality before the law, the right to equal protection, treatment and benefit of the law and freedom from unfair discrimination, and
 - (e) Sections 12 and 13 of the ERVA.
- (iii) **A DECLARATION** that the Supervisor's action in purporting to remove the Plaintiff's name from the National Register of Voters was null and void and had no legal effect.
- (iv) **AN ORDER** that the Supervisor forthwith reinstate the Plaintiff's name to the National Register of Voters with backdated effect from 21 July 2021.

- (v) Further or alternatively, AN ORDER that the Plaintiff be reinstated as a Member of the Fiji Parliament with full recognition, remuneration and benefits backdated to 21 July 2021.
2. The Originating Summons was called on 30 July 2021, when parties were directed to file Affidavits and Submissions.
 3. The following Affidavits were filed by the parties

For the Plaintiff

- (i) Affidavit in Support of the Originating Summons by the Plaintiff sworn and filed on 27 July 2021;
- (ii) Plaintiff's Affidavit in Reply to the Affidavit of Mohammed Saneem sworn and filed on 5 August 2021; and
- (iii) Plaintiff's Affidavit in Reply to 2nd Defendant's Affidavit, sworn and filed on 5 August 2021.

For the Defendants

- (i) Affidavit in Response of Mohammed Saneem sworn on 3 August 2021 and filed on 4 August 2021; and
 - (ii) Affidavit in Response by Jeanette Emberson, Acting Secretary General of the Parliament of the Republic of Fiji sworn on 3rd August 2021 and filed on 4 August 2021.
4. The Parties filed and served Submissions as directed by this Court.

Background Facts

5. The Plaintiff was born on 16 August 1960, and his name is registered as “Nikolau Tuiqamea” with the Births, Deaths and Marriages Registry (“**BDM Registry**”).
6. On 31 March 2014, the Plaintiff first applied for registration as a voter with the name “Niko Nawaikula”. The Plaintiff provided the registration official of the Fijian Elections Office (“**FEO**”) his Drivers Licence as confirmation of his identification.
7. On 22 June 2017, the Plaintiff made an application to the FEO for the replacement of his Electronic Voter Registration Card (“**Voter Card**”) under the name ‘Niko Nawaikula’.
8. On 12 February 2020, the Supervisor issued a media release that was widely published which stated that the FEO will only accept names as printed on a person’s Birth Certificate for the purpose of voter registration.
9. On 7 June 2021, the Plaintiff in Parliament whilst debating on a Bill for an Act to amend the ERVA informed Parliament that the name registered on the Plaintiff’s Voter Card and the name registered on his Birth Certificate is not the same.
10. On 29 June 2021, the Supervisor enquired with the Registrar-General at the BDM Registry on whether there was any registered record of the name “Niko Nawaikula” and with the date of birth being 16 August 1960. The BDM Registry subsequently confirmed that there was no record of a person with that name and date of birth.
11. On 1 July 2021, the Plaintiff was issued a Notice by the Supervisor of his intention to remove the Plaintiff’s name from the Register of Voters on the ground that the Plaintiff provided the FEO with an incorrect name.

12. On 13 July 2021, the Plaintiff responded in writing to the Supervisor and stated that Niko Nawaikula is his common name which he uses and prefers because people know him by that name.
13. On 20 July 2021, the Supervisor informed the Plaintiff in writing of his dissatisfaction of the Plaintiff's response in his 13 July 2021 letter to the Supervisor, and consequently removed the name "Niko Nawaikula" from the Register of Voters.
14. On the same day, the Supervisor informed the Speaker about his decision to remove the Plaintiff's name from the Register of Voters.
15. On 21 July 2021, the Plaintiff wrote to the Supervisor reiterating the reasons why he continued to use the name "Niko Nawaikula" and attached a Deed Poll dated 21 July 2021, renouncing the name registered on his Birth Certificate (Nikolau Tuiqamea) in favour of Niko Nawaikula.
16. On 23 July 2021, the Supervisor responded to the Plaintiff's 21 July 2021 letter, informing the Plaintiff that given the removal of his name from the Register of Voters, the Plaintiff could re-register as a voter in accordance with the ERVA.
17. On 23 July 2021, the Speaker wrote to the Plaintiff advising the Plaintiff that his seat as a member of Parliament was made vacant in accordance with section 63(1) (d) of the Constitution.
18. On 26 July 2021, the Speaker subsequently informed Parliament that as a result of the removal of his name from the Register of Voters, the Plaintiff's seat in Parliament has become vacant.

Issues

19. The issues before the Court are:-

- 1. Whether the Supervisor erred in determining that the Plaintiff had provided an incorrect name when registering as a Voter;**
- 2. Alternatively whether the Supervisor's act of removing the Plaintiff from the Register of Voters is disproportionate thus breaching the Plaintiff's right under s. 16 (1) (a) of the Constitution, and his right to be registered as a voter and to uphold office upon being elected under s. 23 of the Constitution and ss. 3(1), 4 and 7 of the ERVA.**

20. In dealing with these issues, the Court will examine the various provisions of the ERVA and the Constitution.

21. Counsel for the parties made extensive submissions on each issue. It is not possible and necessary to incorporate the same in the judgment in the extended format. We will, where necessary, reflect the crux of their argument. There may be instances where it may not be necessary to indicate the position taken by each party. This should not mean that the court has not given regard to the submissions. We have, despite the time constraint, heard both counsel at length, read the papers including their submissions filed by them and taken into account the arguments presented before us. Now to the issues:

Whether the Supervisor erred in determining that the Plaintiff had provided an incorrect name when he registered as a Voter.

22. Section 4(2) of the EVRA provides as follows:-

(1).....

(2) *An application for registration as a voter shall be made to a registration officer and the application shall have recorded the applicant's –*

- (a) *full name;*
- (b) *residential address;*
- (c) *occupation;*
- (d) *date of birth;*
- (e) *gender;*
- (f) *form of identification acceptable to the registration officer;*
- (g) *thumbprints;*
- (h) *facial photographs; and*

(i) *such other particulars as a registration officer may require.*

23. The Plaintiff's name was removed from the Register of Voters on the basis of s. 4 (2) of the ERVA. The Supervisor interprets the term "**full name**" to be only the name on the birth certificate and no other. He says that if any other name is to be used it has to be changed by a deed poll.

24. The Plaintiff's position is that he has acquired and established the name "Niko Nawaikula" by usage and reputation and that is his common name and he regards it as his legal name. He therefore did not provide any incorrect details to the FEO. He also says that he need not have a deed poll to change his name as that this is one way to evidence the change in name which cannot be imposed on him under the law.

25. It is pertinent to note that the term "**full name**" is neither defined by the ERVA nor by the Births, Deaths and Marriages Registration Act 1975 ("**BDMRA**"). In absence of the definition in any one of the Acts, the Court will rely on the common law to determine whether a person's full name is only the name that is on his or her birth certificate.

26. Section 7 of the Constitution states that :

7 (2). This Chapter does not deny, or prevent the recognition of any other right or freedom recognized or conferred by common law or written law, except to the extent that it is inconsistent with this Chapter.

(4). When deciding any matter according to common law, a court must apply and, where necessary, develop common law in a manner that respects the rights and freedoms recognized in this Chapter.

(5). In considering the application of this Chapter to any particular law, a court must interpret this Chapter contextually, having regard to the content and consequences of the law, including its impact upon individuals or group of individuals.

27. In **Electoral Commission v. Supervisor of Elections** [2014] FJHC 627; HBC 240 of 2014 (12 August 2014) the Court stated as follows:-

.....where legislation fails to define any provision then common law should be looked at for guidance. Having said that, I am of the view Court should not readily accept common law definitions if doing so will defeat or frustrate the purpose of the particular legislation.

28. In Halsbury's Laws of England, Fourth Edition (Reissued) Vol. 35 at paragraph 1272 it is stated as follows:

An individual acquires his original name when his name is registered at birth. Subject to certain requirements of notification imposed in the case of aliens, the law prescribes no rules limiting a person's liberty to change his name, he may assume any name he pleases in addition to, or in substitution for, his original name; and, in adopting even the name or combination of names by which another person is already known, he does not commit a legal wrong against that person. The law concerns itself only with the question whether he has in fact assumed and has come to be known by a name different from that by which he was originally known.

29. **Kushner, J. S** in her article "**The Right to Control One's name**". 57 UCLA Law Review 313 (2009) cited with approval the following statement from **Smith v U. S Casualty Co.**, **90 N. E. 947 – 50 (N.Y. 1910)**:

The elementary writers are uniform in laying down the rule that at common law a man may change his name at will. Mr. Throckmorton, in his article on Names in the Cyclopedia of Law and Procedure says: "It is a custom for persons to bear the surnames of their parents, but it is not obligatory. A man may lawfully change his name without resort to legal proceedings, and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth". 29 Cyc. 271. So a writer in the American & English Encyclopedia of Law says: "At common law a man may lawfully change his name, or by general usage or habit acquire another name than that originally borne by him, and this without the intervention of either the sovereign, the courts, or Parliament; and the common law, unless by statute, of course obtains in the United States." 21 Am. & Eng. Encyc. of Law (2d Ed.) 311. "One may legally name himself or change his name or acquire a name by reputation, general usage, and habit." 2 Fiero Sp. Pro. (2d Ed.) 847 Id. At 950.

30. Pursuant to the common law, this Court is of the view that the term “full name” cannot be restricted to a person’s original name in the birth certificate. It could be a name a person has assumed and has come to be known by.
31. The specific questions that needs to be determined are:-
- (i) Whether the Plaintiff complied with the requirement of s.4 of ERVA when he applied to be registered as a voter under the “Family Name” (surname) of “Nawaikula” and “Given Name(s)”of “Niko”;
 - (ii) Whether, the Plaintiff had to change his registered name being “Nikolau Tuiqamea” to “Niko Nawaikula” pursuant to s.15 of the BDMRA before he made an application to be registered as a voter under that name.

Use of Family Name (surname) - “Nawaikula”

32. It is undisputed that the Plaintiff’s name was registered with the BDM Registry as “Nikolau Tuiqamea” upon his birth.
33. It is the Plaintiff’s evidence that from his early childhood days, he adopted the surname “Nawaikula” which was his grandfather’s surname as appears in his father’s Certificate of Registration in the Vola Ni Kawa Bula.
34. The question then is, can the Plaintiff use the surname he adopted even though it is not registered with the BDM Registry?
35. At paragraph 1274 of Halsburys Laws of England Fourth Edition (Reissued) Volume 35, it is provided as follows:-

Surname: A surname in common law is simply the name by which a person is known. Because in the first instance surnames were arbitrarily assumed, there was never any doubt that they could be changed at pleasure. An Act of Parliament, royal licence or other such formality is not required for the purpose.

36. In ***D v. B*** (otherwise D) (child: surname) 1979 1 All ER 92 Lord Justice Ormrod stated as follows:-

It is common ground that a surname in common law is simply the name by which a person is generally known, and the effect of a deed poll is merely evidential; it has no more effect than that.

37. **In re: T (Orse. H.) (An Infant)** [1963] 1 Ch. 238 his Lordship Justice Buckley stated as follows:-

It is, of course, well known that a person's surname is a conventional name and forms no part of his true legal name. An adult can change his or her surname at any time by assuming a new name by any means as a result of which he or she becomes customarily addressed by the new name. There is no magic in a deed poll. The effect of a deed poll when changing a name is merely to record the change in solemn form which will tend to perpetuate the evidence of the change of name. But a change of name on the part of an adult must, in my judgment, involve a conscious decision on the part of the adult that he wishes to change his name and be generally known by his new name.

38. The Plaintiff has given affidavit evidence that he has used and is known by the surname “Nawaikula” from his childhood through to primary school, secondary school, university and his election to Parliament in 2014 and 2018.

39. The Plaintiff provided copies of the following documents as evidence:-

- (i) University of Tasmania, Bachelor of Law Certificate (1985) – Nikolau Tuiqamea Nawaikula;
- (ii) Practising Certificate for the period 1 March 2018 to 28 February 2019 – Nikolau Tuiqamea Nawaikula;
- (iii) Practising Certificate for the period 1 March 2019 to 29 February 2020 – Nikolau Tuiqamea Nawaikula;
- (iv) Practising Certificate for the period 1 March 2021 to 28 February 2022 – Niko Tuiqamea Nawaikula;
- (v) Drivers licence No: 398825 – Niko Nawaikula;
- (vi) Tax Identification letter dated 9 February 2012 – Nikolau T Nawaikula

40. In addition, it is undisputed that the Plaintiff was registered as a voter for 2014 and 2018 elections, nominated to contest 2014 and 2018 elections and was allocated seat in Parliament under his surname “Nawaikula”.
41. This Court finds that the Plaintiff’s adoption of surname “Nawaikula” was out of repute and custom and that surname has been used by Plaintiff for most of his life, which he can use as his legal name.
42. This Court takes note that the Plaintiff has taken steps to change his name registered at BDM Registry to “Niko Nawaikula”
43. This Court holds that where a surname is adopted by any person with no intention to defraud or deceit any person or organization, then that person has the legal right to use that surname irrespective of whether that surname is registered with the BDM Registry.
44. What is stated at preceding paragraph is of course is subject to any legislative provisions that require surname to be registered, or for provisions for name appearing on a persons’ birth certificate. Also institutions and organizations (including Government and State entities) may also require persons to provide name on their birth certificates.

Other Names of Plaintiff

45. As stated earlier, the Plaintiff’s name registered with BDM Registry is Nikolau Tuiqamea.
46. After certain period of time the Plaintiff adopted the name Niko Nawaikula which appears to be the short version of his first registered name.
47. The question then is whether “Niko Nawaikula” is the Plaintiff’s legal name when he has not changed his registered name with the BDM Registry.

48. In **Avery v Registrar of Birth, Deaths and Marriages; Avery v State of New South Wales (Attorney General's Department) [2010] NSWCA 72**. His Honour Campbell JA at paragraph 54 and 55 is stated as follows:

In the ordinary usage of the term, it is not uncommon for the one person to have more than one name. William Shakespeare is sometimes called The Bard, but that does not mean that his name is not still William Shakespeare. Vladimir Ilyich Ulyanov is better known as Vladimir Lenin – but they are both his names.

In particular, there is nothing unusual about one person having two names at the one time. It is quite common for a woman who is known by a particular name in her business or profession, and who subsequently marries, to retain the name she has always had for business or professional purposes, even (as frequently happens, particularly if she has children) she is also known by her husband's surname in connection with family matters. The use of pen-names and stage names is widely understood – there can be no real doubt that if someone in nineteenth century England had left a legacy to Lewis Carroll, or to George Eliot, then Charles Dodgson and Mary Anne Evans respectively would have been entitled to receive those legacies, or that Boy George is better known by that name than by the name of George Alan O'Dowd. The use of nicknames or shortened names, at the same time as someone also uses their full name for certain business or formal purposes, is common. The differences in the names that a person can have at the one time can range from the comparatively small differences involved in a person being known as both Jim Smith and James Smith, to the large differences that occurs when one of a person's names has not linguistic element in common with the other. (Nor is having more than one name at the one time confined to humans).

49. Further at paragraph 58 His Honour stated as follows:

That the name of a person is often a question of fact and not dependent on any legal authority has been recognized in this Court in Director General, Department of Community Services v Adoptive Parents [2005] NSWCA 385; (2005) 64 NSWLR 268.

50. Sections 3, 8 and 15 of the BDMRA obliges the Registrar to maintain a register of births, deaths, marriage and change of name which are “registrable events.”

51. In **Avery's case** the Court in dealing with similar provisions in New South Wales legislations noted that “every registrable event” must not be registered.

52. At paragraph 89 His Honour Campbell JA stated as follows:-

The Tribunal found that “to be a former name a person must use an alternative name consistently, not merely on a few occasions.” The word “consistently” there clearly was not intended to mean “exclusively”. The point that the Tribunal was making was that use of a name on a few occasions would not suffice. How much use of a name is needed for it to become the name of a person is a matter of fact and degree.

53. This Court is of the same view as what is stated by His Honour Campbell JA which is as follows:

The word “name” is an awkward one. The leading textbook on the subject, Anthony Line II, the Law of Names: Public Private & Corporate, (Butterworths, London 1938) notes the problem in the first sentence on page 1:

“The first and possibly a fundamental difficulty in treating of the law of personal names is that there never has been and never can be a definition of a name that is at once exact and applicable in every case.

It will be seen that the focus of the regulations is on change of name. Furthermore, it is clear that “change” does not include variation or modification or addition or subtraction or a name unless it can be said that there has been such a variation as to amount to a person having a new name and being in the position that the last previous name can truly now be said to be a former name, ie it has been abandoned (Vide In re Neeld [1962] Ch 643, 679).

Unless she continues to use her maiden name and to be known by that name in some aspect of her life, a woman abandons her maiden name on marriage as if she had never borne it, Allen v Wood (1834) 1 Bing NC 8; 131 ER 1020, where it was held that a widow who published banns on her remarriage in her maiden name without having reacquired it by reputation was not validity married. However, as Linell points out at p.24, abandonment is never total as many statutory obligations require a person to state all former names.

When that reputation is established is a question of fact. The mere fact that person registers a deed poll (under the former law) in which he or she states that a former name is abandoned and a new name adopted may well be insufficient. The new name is (apart from what I say below) obtained by reputation, not registration (Line II, p.37). However, short period, perhaps only a matter of days, may suffice.

Whilst a person may, unless acting for a fraudulent purpose, adopt any name he or she wishes (Cowley (Earl) v Cowley (Countess) [1901] AC 450, 460), there is no right to compel other people at once to recognize it, though it may be a person has

some non-justiciable right to be called by the name he or she usually receives from friends and acquaintances (Linell, pp 27-8).

Thus, the mere fact that some government agency addresses a person by a name is only a peripheral piece of evidence as to whether the reputation has been established (Linell, p 37).

54. In **The King (Walsh) v Casey** [1914] II KB 248, the Deputy Registrar rejected a candidate's nomination to contest Council election on the ground that the candidate did not state fully his Christian name.

55. The Court stated as follows:-

On the evidence we hold that the relator is known in the district as Michael B. Walsh. Even if his full name is Michael Barry Walsh, he is entitled to call himself Michael B. Walsh, and has done so for many years; and that description has been such as was commonly understood to designate the relator. The name in the nomination paper is given exactly as it appears in the list of voters, and, under the circumstances, we are satisfied that it is properly stated in accordance with Rule 4, sub-rule 2, of the Local Government Election Order of February 16th, 1899.

56. On the evidence this Court is satisfied that the Plaintiff has assumed the name "Niko Nawaikula" and has come to be known by that name. He is hardly known by his original name. He has held almost two terms in Parliament by the name of Niko Nawaikula. He has been on the Register of Voters by that name. He is known amongst his peers by that name. He is addressed in Parliament by that name. He has even an identity card issued in that name. He has been elected by that name. In the legal fraternity he is known by that name. There is no evidence that anyone is confused with his identity when he uses the name "Niko Nawaikula".

57. Since he has been using that name and is known by that name for years now, he has effectively established a new name by usage and repute. He therefore was entitled to use the name of Niko Nawaikula when he was asked to make the application to register as a voter.

58. Apart from the common law position on what a person's name is, there are other reasons why we cannot agree with the Supervisor that the Plaintiff had to be registered as a voter with his name on the birth certificate.
59. This Court turns to s. 4 of the ERVA. Section 4 (1) (f) very clearly states that the form of identification that is required is one that is acceptable to the registration officer. The law does not require that the person must submit the birth certificate. If that was the stringent requirement, the legislature must say so. Even when the law was amended after the media release by the Supervisor, the amendment did not restrict the form of identification to a "*birth certificate*". If the legislature wanted only the birth certificate name to be used, it would have at least required that a birth certificate be provided as the identity card and stated full name to mean the name in the birth certificate or as in the birth certificate. In absence of such restriction, this Court cannot read in the legislation to mean that full name is confined to the name in the birth certificate.
60. Further, when the Plaintiff was registered as a voter, he was required to produce an identity card. He produced his driving licence which bears the name Niko Nawaikula. That was accepted by the registration officer as a good and valid ID. Since there was no requirement for the Plaintiff to bring a birth certificate and to use the name as in the birth certificate, he did not use the name in the birth certificate.
61. The Supervisor's media release clearly indicates that before the media release people have been using names which were not the names on their birth certificate and that it was allowed by the Supervisor as their approach was liberal. He also clarified that as a result of the birth certificate name not being registered, a lot of applications for correction of details was made.
62. If there are so many people in this country including the Plaintiff who believe that they could register as a voter with the name that they have been using and have been known by then from their perspective they did not do any wrong by giving the name not in their birth certificate. It was never made explicit or mandatory that a person's birth certificate name

be used. That requirement was only imposed last year when the Supervisor issued a media release. For the purposes of this judgment, this Court is not deciding the validity of the media release. That is for another day save to say that it is the duty of the Supervisor to implement the law and not to enact it. The law does not require use of birth certificate names, and allows use of names other than the birth certificate name. The policies of the FEO have to be in line with the law.

63. If the Plaintiff was registered with an acceptable identity card with the name he believes he has established by use and repute, his details cannot be said to be incorrect.
64. This Court wishes to go further into other aspects which indicates that the Supervisor could not conclusively hold that the law required only the name in the birth certificate to be provided. We come to the Forms that the voters are required to fill in order to register. The first Form is the Application Form which appears in the Supervisor's affidavit.
65. The Form states that all fields denoted by an asterisk must be completed. Two matters stand out in respect of the Form. The first is that it has a section which requires the "**Family Name**" to be provided. It is very common that not all family names or surnames are registered in the birth certificate of a person. The registration is merely evident of the fact but that does not mean that in absence of the registration, a person does not have a surname. The common law recognizes that.
66. If the Plaintiff is required to mandatorily give a surname which is not registered in the birth certificate, his application would be incomplete if he did not provide the surname. He therefore honestly provided his surname.
67. The second aspect in the Form is the place where it provides for "*Maiden Surname*". Although this section is not mandatory to be filled, it indicates that a married woman could also provide both her surname that she acquired after marriage and also the surname that she had before marriage. It is not necessary that married women have to change their surname by registration if she wishes to use her spouse's name. That has never been the position of the common law or an explicit requirement of the BDMRA in Fiji.

68. Given the nature in which the Form is drafted, this Court is fortified in its view that if the law only required the name on the birth certificate to be provided, it will not make the surname section in the Form mandatory to be filled or make a provision for a woman to provide her surname before marriage thus another basis on which this Court finds that the “*full name*” in the ERVA does not necessarily mean the only name in the birth certificate. It could include a name that a person has established by repute and usage and also include a surname which a person is commonly known by.
69. Having come to a finding that the Plaintiff could and has validly changed his name by use and repute, the next question is whether s. 15 of the BDMRA is the only way in which a person can change his or her name becomes superfluous. However, for the sake of completeness we will address that very shortly.

Change of Name: Section 15 of the BDMRA

70. It is the position of the Supervisor that a person can only change his or her name by s. 15 of the BDMRA. The BDMRA only prescribes one way in which a person can change his or her registered name. It also prescribes one way in which the change of name can be registered. Section 15(1) of the BDMRA says that an adult can change his name by a deed poll. Section 15 (3) of the BDMRA states that the change of name may be effected on application in the prescribed manner and by depositing the deed poll.
71. The written law in Fiji does not have a legal provision which states that the change of name can be established by repute and usage. In Australia, s. 32 of the Births, Deaths and Marriages Registration Act 1995 provides:

*“Change of name may still be established by repute or usage
This part does not prevent a change of name by repute or usage”.*

72. Notwithstanding the absence of an equivalent of s. 32 of the BDMR Act in Australia, the common law position has always been that “***an adult may change both his forename and his surname by use and reputation***”. *Standard Property Investment plc v. British Plastics*

Federation (1985) 53 P & CR 25 at 29 per Watson J reproduced in Halsbury's Laws of England Vol. 35 para. 1272.

73. This Court is of the view that the BDMRA does not in any way limit the way in which a person can change his or her name. Section 15 does not state the exclusive way in which a person can change his or her name. More specifically, it does not frustrate or limit the common law position that a person can establish change his or her name by usage and reputation. It is a right of a person to be known by the name that he or she has changed by usage and repute.
74. Before we leave the topic, for the purposes of clarity we must say that under s. 15(3) of the BDMRA, a person is not required to register a deed poll. He or she can simply deposit the same with the BDM Registry which will be sufficient for the BDM Registry to record a change in name. However if the deed poll is filed in the Registrar of Deeds, he or she must provide a certified copy of the deed with a certified copy of the entry as to his or her birth for the BDM Registry to act.
75. In this case, since the Plaintiff has lodged the deed poll with the Registrar of Deeds Office to change his registered name to "Niko Nawaikula", it will be in his interest to proceed to complete the process by providing a certified true copy of the deed poll and a certified true copy of the lodgment entry to the BDM Registry.

Alternative Issue: Whether the Supervisor's act of removing the plaintiff from the Register unlawful, improper, irrational, proportionately and procedurally unfair thus breaching the plaintiff's right under s. 16 (1) (a) of the Constitution, and his right to be registered as a voter and to uphold office upon being elected under s. 23 of the Constitution and ss. 3(1), 4 and 7 of the ERVA.

76. The Plaintiff's Senior Counsel submits that in view of the facts and circumstances of the case:
 - (i) The Supervisor's action in removing the Plaintiff's name from the Register of Voters was disproportionate; and
 - (ii) The Supervisor should have exercised his discretion under s.12 (1) (a) of ERVA.

77. Section 23 (3) (a), (d) and (4) (a) of the Constitution states that:

23 (3) Every citizen who has reached the age of 18 years has the right –

- (a) To be registered as a voter;*
- (b) ...*
- (c) ...*
- (d) If elected, to hold office.*

(4) A law may limit, or may authorize the limitation of, the rights mentioned in this section–

- (a) for the purpose of regulating the registration of voters, and prescribing persons who do not have or have ceased to have the right to be registered as a voter.*

78. The right enshrined in s. 23 is subject to limitations outlined in ss.4 (2) and 12 of the ERVA.

79. It is therefore perfectly proper that the ERVA has granted the Supervisor powers to register and deregister the voters. Whether the power in this case was exercised proportionately is what needs examination. To examine that we turn to the provisions under which the Supervisor exercised the powers.

80. The Plaintiff's name was removed under section 12 (1) (j) of the EVRA by following the procedures laid down in section 13. The relevant provisions read:

12 (1) The Supervisor may revise the National Register of Voters to –

- (a) correct any mistake or omission in the particulars of the registration of a person;*
- ...*
- (j) remove any registration obtained by fraudulent means or by providing incorrect details required by the Supervisor to successfully register an eligible voter.*

13. (1) If a person's name and other information are to be removed from the National Register of Voters, the Supervisor must first notify the person by sending a notice of the proposed removal to the person's last known residential address.

- (2) The person must, within 14 days from the date the notice is sent, provide a written response to the Supervisor, which must set out the reasons as to why the*

person's name and other information are to remain on the National Register of Voters.

- (3) *If the Supervisor is dissatisfied with the reasons provided under subsection (2) or if the person fails to provide a written response, the Supervisor may remove the person's name and other information from the National Register of voters.*
- (4) *The Supervisor must, for the purpose of notifying persons whose names and other information have been removed from the National register of voters, publish a notice listing the names of all such persons annually.*
- (5) *A notice published under subsection (4) must also list the voter number of each person whose name has been removed from the National Register of Voters.*

81. It is acknowledged and accepted by the Plaintiff that there was compliance with s. 13 requirements. It is submitted that in removing the Plaintiff's name the Supervisor acted in breach of 16(1) (a) of the Constitution which requires that “*every person has a right to an executive or administrative action that is lawful, rational, **proportionate**, procedurally fair, and reasonably prompt*”.

82. The Plaintiff's position is that if the Supervisor is correct in asking for the details in the birth certificate then the Plaintiff was genuinely mistaken that he can use his name other than that in the birth certificate and on that basis the Supervisor ought to have exercised his powers under s. 12 (1) (a) and not (12 (1) (j).

83. The position of the Supervisor is that s. 12 (1) (a) does not apply to the Plaintiff because he had intentionally provided that name which was not in his birth certificate.

84. The Plaintiff in his response to s. 13 Notice from the Supervisor had said:

“Since childhood I have been called Niko Nawaikula. My parents, siblings, family, friends, colleagues, school, university, work place and everywhere know me by that name. It is my common name that I use daily, for 60 years now, at home and everywhere else. And so, when asked anywhere by whoever for my name, I will always state Niko Nawaikula. DOB 16: 8: 1960, Parents Amosi Nawaikula & Mereani Nawaikula of Buca Village.

I hope you can see that Niko Nawaikula is my common name that I use and prefer because people know me only by that name. I consider it for that reason as my official name and I have many ID cards, including drivers licence under Niko Nawaikula...”

85. This Court finds that the Plaintiff, if anything, was genuinely mistaken that he could use his common name which is different from the birth certificate name. The Supervisor used the powers which is the most severe one when he could have used section 12(1) (a) and not have the Plaintiff's right to be registered as a voter taken away. That right could have been preserved being a fundamental right under the Constitution.

86. In **Prasad v Nacewa** [2002] FLR 35 which quoted the following cases with approval:

In Greidinger v Davis (1993) 988 F 2d 1344 (4th cir 1993) Hamilton J said.

It is axiomatic that no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

*In **Reynolds v. Sims** (1964) 377 US 533 at 1378 Warren CJ said:*

The right to vote freely, for the candidate of one's choice is of essence of a democratic society and any restriction on that right strikes at the heart of the representative government and the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

*The CJ referred to **Wesberry v Sanders** (1964) 376 US 1; [1964] USSC 3184 S ct 526 where the court had said:*

No right is more precious in a free country than that of having a voice in the selection of those who make the laws under which, as good citizens we must live.

87. The Court finds that in view of the circumstances of the case the Supervisor's decision to remove the Plaintiff's name from the Register of Voters was disproportionate.
88. Having held that the action of the Supervisor in removing the Plaintiff's name from Register of Voters was disproportionate, could this Court then have substituted the Supervisors decision if the first issue was determined otherwise.
89. Section 12 of the ERVA gives the Supervisor as an Administrator a discretion to take one of the actions stipulated therein.
90. It is well established that Courts will only interfere with the decision made by an administrator in exercise of his or her discretion in exceptional circumstances.
91. The Court will only interfere with the administrator's decision and replace it with its own decision if the Court is satisfied that the administrator's action is unlawful, irrational, disproportionate, and procedurally unfair or there has been unreasonable delay which adversely affects a person's rights.
92. In this instance, if this Court would have decided that removal of the Plaintiff from the Register of Voters was lawful, then under the circumstances of the case, this Court would not have hesitated to set aside the Supervisor's decision on the ground that it was disproportionate.

Did the Supervisor of Elections breach s. 66 of the Constitution?

93. The Plaintiff's argument under s. 66 of the Constitution is that the Plaintiff has been on the Register since 2014. He was nominated as a candidate and elected as a Member of Parliament. He says that under s. 66 of the Constitution, only those persons named in s. 66(3) can dispute the election result within 21 days. The Supervisor of Election does not have the right under s. 66 (3). His right is only limited to raising any disqualification when

processing the nomination. He cannot take any action to dispute the election of the Member of Parliament even on the ground relating to inclusion on the Register of Voters. If he is allowed to examine elected members qualifications, he is usurping the special jurisdiction which is vested exclusively in this Court. If he can do so well past the 21 day limit, this would undermine the early certainty which the constitutional fathers deemed necessary.

94. Mr. Apted further argued that the Supervisor's action in removing the Plaintiff's name from the Register of Voters whilst he is a Member of Parliament for a qualification that could and should have been raised by him prior to the plaintiff's election infringes the Court of Disputed Returns special and exclusive jurisdiction to hear election petition cases.
95. This Court finds Mr Apted's submission in respect s.66 of the Constitution to be totally misconceived and unwarranted for the reason stated below.
96. Under s. 63(1) (c) and (d) of the Constitution, a seat of the Member of Parliament can become vacant, amongst other matters, if he ceases to have the right to be a registered voter in an election to Parliament and ceases to have the right to be nominated as a candidate for election to Parliament under s. 56. A person can be removed from the Register of Voters anytime during his term in the Parliament. He can also cease to be nominated as a candidate at any time during his term. This means that even an elected member can get affected if he is properly removed from the Register of Voters if his nomination as a candidate has properly ceased. That is the Constitutional requirement as well and cannot be a provision subservient to s. 66 of the Constitution.
97. This case concerns vacancy of a seat from Parliament and such disputes concerning that can brought within 7 days of the members seat becoming vacant: s.63(5) of the Constitution. A different time frame also suggests that an elected member does not have an indefinite right to be in Parliament. His seat can become vacant for a number of reasons and in this case, albeit improperly, he was removed from the Register of Voters by the Supervisor.

98. The Supervisor does have powers to remove any voter including an elected member from the Register of Voters. Any suggestion to the contrary will be inconsistent with the powers bestowed to the Supervisor by the legislature under s. 12 (1) (j) of the ERVA.
99. The Court finds that this matter does not come within the purview of s. 66 of the Constitution. We shall now for the sake of completeness discuss the validity of the vacation of Plaintiff's seat in Parliament.

Vacation of Seat in Parliament

100. The Speaker was notified by the Supervisor that the Plaintiff's name has been removed from the Register of Voters. He then wrote to the Plaintiff on 23 July 2021, that his seat as the Member of the Parliament is consequentially vacated.
101. The Speaker only did what he was constitutionally required to do once a person ceases to be registered on the Register of Voters. Section 56 (2) (b) of the Constitution of Fiji provides that "*a person may be a candidate for election to Parliament only if the person... is registered on the Register of Voters*".
102. Section 63(1) (d) spells out the consequences if a person ceases to have the right to be nominated as a candidate for the election. It states that "*the seat of a member of Parliament becomes vacant if the member ... ceases to have the right to be nominated as a candidate for election to Parliament under section 56*".
103. The Speaker properly advised the Plaintiff the Constitutional provisions he was acting under. He also advised the Plaintiff of his right to be able to challenge the validity of his seat being made vacant. That is all that is required of the Speaker.
104. This Court finds that the Speaker acted in accordance with the Constitution and the law at all times.

Conclusion:

105. The court finds that:-

- (i) Niko Nawaikula was the Plaintiff's common name which he can use to register as a voter;
- (ii) The Supervisors actions in removing the Plaintiff's name from the Register of voters is unlawful and wrongful.
- (iii) If, this Court, would have found that the Plaintiff should have provided his birth certificate name then this court holds that the Supervisor in balancing the Plaintiff's constitutional right and the duty to provide name on birth certificate, should have exercised his powers under section 12(1)(a) instead.

Costs:

106. The Court takes into consideration the following:-

- (i) The issues involved interpretation s.4 of ERVA which is a question of general importance;
- (ii) Both parties filed comprehensive submissions and made oral submissions; and
- (iii) Hearing lasted for almost three hours.

Declarations and Orders:

107. This Court therefore grants the following declarations and orders:-

Declarations:

1. That the Plaintiff was not legally required to provide his name on his birth certificate to be registered as a voter;
2. That in removing the Plaintiff's name from the National Register of Voters pursuant to section 12(1) (j) of the EVRA, the Supervisor acted wrongfully and unlawfully and that the Supervisor's action is null and void and of no legal effect; and

3. That the Plaintiff has at all relevant times, including on 23 July 2021 had the right to remain a Member of Parliament.

Orders:

4. That the Supervisor forthwith reinstate the Plaintiff's name to the National Register of Voters with backdated effect from 20 July 2021 and inform the Speaker of Parliament forthwith; and
5. That the Plaintiff be reinstated as a Member of Parliament with full recognition, remuneration and benefits backdated to 23 July 2021.
6. Each party to bear their own costs of the proceedings.



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Hon. Chief Justice Mr. Justice Kamal Kumar

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Hon. Madam Justice Anjala Wati

Solicitors:

Valenitabua & Associates for the Plaintiff.
Attorney – General's Chambers for the Defendants.

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Hon. Chief Justice Mr. Justice Kamal Kumar

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Hon. Madam Justice Anjala Wati

Solicitors:

Valenitabua & Associates for the Plaintiff.

Attorney – General’s Chambers for the Defendants.