

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**JUDICIAL REVIEW NO. 9 OF 2018**

**IN THE MATTER** of an application by Kaikuilau Holdings Company Limited, for Judicial Review.

**IN THE MATTER** of decision dated 29<sup>th</sup> August 2018, given by the Director of Lands to decline the application of Kaikuilau Holdings Company Limited for State Foreshore Lease for the area known as Denarau South, Denarau Island, Nadi

**BEWEEN:**

- 1. THE DIRECTOR OF LANDS**
- 2. THE DIRECTOR OF ENVIRONMENT**
- 3. ITAUKEI LANDS AND FISHERIES COMMISSION**
- 4. SGV PACIFIC PROPERTIES GROUP**

**RESPONDENTS**

**AND: KAIKUILAU HOLDINGS COMPANY LIMITED**

**APPLICANT**

**Counsel** : Applicant Matebalavu R  
: 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents Ms Motofaga

**Date of Hearing** : 11.12.2020

**Date of Judgment** : 29.1.2021

**JUDGMENT**

**INTRODUCTION**

1. This is an application seeking stay of execution of orders made in this action for Judicial Review. Applicant entity having obtained necessary waivers of fishing rights from traditional owners had submitted its application for a state foreshore lease for a project. This project required Environmental Impact Assessment (EIA) as a precondition due to

its nature. These were obtained and submitted. Applicant had sought lease of state foreshore and area known as Denarau South and for this prerequisites were EIA and waiver of traditional fishing rights. Both requirements were fulfilled and some additional requirements requested such as site plan, investment and funding requirements were fulfilled, but first Defendant on **29.8. 2018** had informed the Applicant that its application for lease cannot be considered, since a subsequent withdrawal of waiver of fishing rights by owners. The waiver of fishing rights was endorsed by third Respondent on **31.3.2015** in favour of Applicant was purportedly withdrawn by the owners on 22.3. 2017 and also endorsed by third Defendant without any indication to Applicant whose application for lease was processing. The Applicant's request for lease was made on 13.2.2014. He had legitimate expectation of commencing with the project subject to EIA and other conditions as he had already submitted waiver of fishing rights in the area endorsed by third Respondent. So the issue was whether proper procedure followed by first, second and or third Respondents, in allowing withdrawal of waiver granted in favour of Applicant which denied, legitimate expectation of Applicant. It is to be noted waiver of fishing rights was pursuant to a cabinet decision which required procedural fairness in the process through proper Guide Lines and procedures. There was no evidence of any guide lines and procedures being adopted and or used but waiver given in favour of Applicant was allowed to be withdrawn by third Respondent which had resulted first respondent's letter of 29.8.2018. This withdrawal and subsequent grant of the same to forth Respondent was never intimated to Applicant who was proceeding with EIA and other requirements. This Court had granted Mandamus directing first Defendant to consider its application in terms of law and had also held cancellation of waiver in favour without any hearing of Applicant and subsequent granting in favour of waiver for forth Respondent, was null and void. In this application first second and third Respondents are seeking stay of the execution of Mandamus.

## ANALYSIS

2. Applicant sought lease of state foreshore, which required waiver of fishing rights and also EIA. These were submitted to first Defendant. But later on 29.8.2018 Applicant was informed that waiver of rights in favour of him was withdrawn hence his application cannot be considered.
3. After obtaining leave from this court Applicant filed judicial review against decision of first Defendant not to consider its application for state foreshore lease, any further.
4. After hearing all necessary parties following orders were made.
5. The court made following orders
  - a. "Cancellation or withdrawal of waiver of fishing rights is unlawful and null and void.

- b. Subsequent grant of the same waiver of the same fishing rights is unlawful and null and void.
  - c. The decision of 29.8.2018 of first Respondent not to consider further the application for state foreshore lease dated 3.2.2014 is quashed.
  - d. An order of Mandamus is issued to first Respondent to further consider the application for state foreshore lease dated 3.2.2014.
  - e. No order as to costs.”
6. Application for stay of execution was filed by first second and third Defendants.
7. The factors that is needed for consideration of a stay is stated in the Court of Appeal in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* Civil Appeal ABU0011.04S, 18th March 2005. These are applied in Fiji Supreme Court in *Ward v Chandra* [2011] FJSC 8; CBV0010 (decided 20 April 2011) (Per Gates CJ). These principles were;
- "(a) If no stay is granted, the applicant's right of appeal will be rendered nugatory (**this is not determinative**). See *Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd* [1977] 2 NZLR 41 (CA).
- (b) Whether the successful party will be injuriously affected by the stay.
  - (c) The bona fides of the applicants as to the prosecution of the appeal.
  - (d) The effect on third parties.
  - (e) The novelty and importance of questions involved.
  - (f) The public interest in the proceeding.
  - (g) The overall balance of convenience and the status quo."
8. The above factors are considered below
- a. Whether if no stay is granted right of appeal will be rendered nugatory- This is not determinative but considered as a vital factor which carries a considerable weight. In this case *Mandamus* does not compel first Defendant to grant fore shore lease, but only directed to consider the Applicant’s application which submitted waiver of fishing rights and EIA. The only reason given by first Defendant not to consider Plaintiff’s application was held not valid. Whether rest of qualifications for a lease were fulfilled by Applicant was not clear at this moment, but if satisfied first Defendant may grant foreshore lease. The area under prospective lease is for more than 135 acres and due to indefeasibility of title it will not be able to reverse. So, even

if the appeal is successful, it would be made nugatory if land was already leased to Applicant. This is a factor that will affect all the Respondents. If the appeal is successful there is a risk that land being developed substantially from present status with substantial investment. This can adversely affect investor confidence which is vital for large foreign investments.

- b. Whether successful party will be injuriously affected by the stay- Applicant had waited for more than 5 years and even after decision more than one year no major investment was done in this project. In the circumstances there is no evidence of injuriously affecting Applicant if stay is granted.
- c. Bona fides of the applicants to the prosecution.  
First, second and third Respondents are all government organs and or persons. They are keen on the appeal of the decision. So there is no issue as to bona fides in this appeal.
- d. The effect of third parties- if stay is not granted first Respondent will start processing Applicant's application for the lease of the land for the project. Forth Respondent is an investor who is also interested in developing same area, whose waiver the court found null and void. At hearing Respondents did not mention about any third party being essential.
- e. Novelty and importance of questions involved- This is a matter where court held that Applicant's legitimate expectations were violated. This is a novel concept. The violation of legitimate expectation was due to not following any rule or guide lines by one or all the respondents as required by the same cabinet direction that recommended waiver from traditional fishing right owners. As to the cancellation of waiver and granting the same to forth Respondent was arbitrary. This is a novel issue. The waiver of fishing rights to Applicant and subsequent withdrawal was not done in procedurally fair manner. Applicant is an entity that desired to invest in the development of 135 acres in highly commercial area of South Denarau. There are important questions involved.
- f. There is no known public interest in the project other than obvious impact to the are in such a project of that magnitude.
- g. The balance of convenience heavily favours granting of stay of execution. If stay is not granted and appeal is successful it would be difficult to restore the *status quo* and there will also be further investment by Applicant.

## CONCLUSION

9. Application for stay of execution is granted till final determination of appeal in Court of Appeal. No cost ordered.

## FINAL ORDERS

- a. Execution of orders granted on 23.9.2019 is stayed till final determination of appeal in Court of Appeal.
- b. No costs.

Dated at Suva this 29<sup>th</sup> day of January, 2021.



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Justice Deepthi Amaratunga  
High Court, Suva