IN THE HIGH COURT AT SUVA

CENTRAL DIVISION

CIVIL JURISDICTION

HBJ: 12 OF 2021

BETWEEN:

TOMU TEAHANA VATEAI

FIRST APPLICANT

TOMASI MAWI

SECOND APPLICANT

JOSATEKI GUNAIVALU

THIRD APPLICANT

AND:

WAILOKU LAND BOARD OF TRUSTEE

FIRST RESPONDENT

ITAUKEI LAND TRUST BOARD

SECOND RESPONDENT

ATTORNEY GENERAL

THIRD RESPONDENT

Date of Hearing :	**26 June 2023**
For the Applicants:	**Mr. Suveinakama J.**
For the Second Respondent:	**Mr. Tuicolo V.**
For the Third Respondent:	**Ms. Faktaufon M.**
Date of Decision:	**24 October 2023**
Before:	**Levaci SLTTW, Acting Puisne Judge**

J U D G M E N T

(*APPLICATION FOR LEAVE FOR JUDICIAL REVIEW)*

(APPLICATION FOR STRIKING OUT)

Application and background

1. The Applicant is a member of the Wailoku Land Board of Trustee set up to administer the land granted to the Melanesian descendants who came work and settle in Fiji under the indentured labourers system. In 1940 the Anglican Church under the Diocese of Polynesia, relocated the settlers from Flagstaff to Wailoku, a 99 year itaukei leased land held under Trust with the Anglican Church under the Diocese of Polynesia, until it was transferred to the Wailoku Land Board Trust.

2. The Wailoku Land Board of Trustees (referred to as the WLBT) held the lands under a Deed of Trust the Anglican Church of England, the Diocese of Polynesia and transferred to WLBT. The lease required re-assessment of rentals in 1966, 1991 and 2001 not exceeding 6 (six) per cent per annum of the unimproved value of the land. The registered males (over 18 years of age) who were resident on the leased land and were required to pay a land rental annually.

3. At a bi-annual meeting of the members of the WLBT on 10 April 2021, the First Applicant requested for the review of rental payments and the procedure. The Motion was not considered at the meeting of WLBT.

4. The Applicants thereafter filed two applications:

   (i) Application for Judicial Review (by way of Notice of Motion) on 20 December 2021 together with their Affidavit in Support;
   (ii) Application for Leave for Judicial Review (by way of Summons) filed on 1 November 2022 together with their Affidavit in Support.

Application for Leave for Judicial Review

5. In the Applicants application for **Leave for Judicial Review**, the Applicant seeks the following interlocutory orders:

   1. That the Applicants do have Leave;

   (i) To apply for judicial review as per the Notice of Motion for Judicial Review and Affidavit in Support of TOMU VATEAI TEAHANA, both filed on 20th December 2021 and Affidavit in Reply of TOMU VATEAI TEAHANA filed on 19th August 2022 in response to the First Respondent's Notice of Intention to Defend and the Affidavit in

Support of JOSEFA LAUVANUA both filed on 2nd February 2022; and the Third Respondent's Notice of Opposition filed on 1st February 2022.

(ii) To grant a stay on a decision by the Wailoku Land Board of Trustees on 10th April 2021 to refuse the motion from Tomu Vateai Teahana on behalf of Marata Village for equal distribution of land rentals for all villages of the Wailoku Melanesian Settlement;

(iii) Such further order or other reliefs as this Court may deem just and equitable; and

(iv) The costs shall be in the case.

6. In their Application for **Judicial Review**, the Applicants have sort the following orders:

(1) That this application for judicial review is filed within the limitation period, alternatively, if the application is beyond the limitation period, that an extension of time be granted for this application for judicial review in regard to the decision of the Wailoku Land Board of Trustees made on 10th April 2021;

(2) An order for Certiorari to remove the decision of the Wailoku Land Board of Trustees made on 10th of April 2021 to be quashed;

(3) A Declaration that the Wailoku Land Board of Trustees decision on 10th April 2021 in regard to rental for the Villages upon which it administers is unfair, unreasonable, unlawful, void and of no effect;

(4) A Declaration that the Wailoku Land Board of Trustees Decision on 10th April 2021 to refuse the requested for equal payment of land rentals was a constitutional breach of its members legitimate expectation of being treated fairly and being accorded natural justice;

(5) A Declaration that all the above-mentioned Respondents work together for a just and equitable solution of land tenure for the Applicants on behalf of the descendants of the Solomon Islanders brought to Fiji under the colonial indentured system;

(6) A Stay of Wailoku Board of Trustees decision on 10th April 2022 pending final determination of the judicial review;

(7) Such further order or other relief as this Court may deem just and equitable; and

(8) That the costs in this application be costs in the cause.

7. The First and Third Respondents filed their **Notice of Opposition** to the Application for Judicial Review opposing the Orders sort.

8. The **First Respondent** stated in his Notice as follows –

    1. That this application for Judicial Review be struck off on the ground that a decision disallowing the applicants motion during the 4th Wailoku Settlement Biennial General Council was never made by the Wailoku Land Board of Trustees on the 10th of April 2021 for reason that the Applicants withdrawal their motion during the course of the deliberation of the Council hence was struck out and do not warrant a vote.

    2. That an Order for Certiorari is irrelevant as there is no decision made by the Wailoku Settlement BGC nor the Wailoku Land Board of Trustees on the Applicants motion due to their withdrawal of the motion during the deliberation of the Council on the 4th of April 2021.

    3. That a Declaration for Items 3,4,5,6 and 7 be denied as the BGC representing the other four villages of Wailoku Melanesian Settlement have accepted the current practice of lease payments distribution since the establishment of the Trust in 2002.

    4. That considering 1-3 above, the application is an abuse of the Court Process by the Applicants.

    5. That the cost in this application be awarded against the Applicants to the First Respondent.'

9. The **Third Respondent** had filed their Notice of Opposition on the grounds that -

    1. The Applicants are purporting to seek leave to apply for judicial review of a decision made by the WLBT which decision has nothing to do with the Third Respondent.

    2. Pursuant to Order 53 Rule 3 of the High Court Rules 1988, it is a mandatory requirement that an application for leave to apply for judicial review must show, inter alia, the particulars of the judgment, order, decision or other proceeding in respect of which judicial review is being sought, the relief sought and the grounds upon which it is sought.

    3. The Third Respondent does not have any authority over the First Respondent's decision making process. Also, the Second Respondent is an independent statutory

body administered by the iTaukei Land Trust Act 1940 and civil proceedings against statutory bodies does not fall within the ambit of State Proceedings Act 1951. As such, there is no cause to adjoin the third Respondent as a party to the application.

4. Given that there is no decision made by the Third Respondent subject to review, the Application is defective in law and ought to be dismissed against the Third Respondent.

5. In addition, the Applicants seek a Declaration that all Respondents work together for a just and equitable solution of land tenure for the Applicant on behalf of the Descendants of the Solomon Islanders brought to Fiji under the Colonial Indentured System. Such declaration does not come under the review of Order 53 Rule 3 of the High Court rules 1988 and ought to be dismissed by this Honorable Court.''

Law on Leave to seek Judicial Review

10. In an application for Leave to seek judicial review under Order 53 rule (5) of the Fiji High Court Rules states:

'(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'.

11. The onus is on the Applicant to satisfy the Court the Applicant has sufficient interest in order for the Court to exercise its discretion.

12. In Commissioner of Inland Revenue Commissioners -v- National Federation of Self-Employed and Small Businesses Limited (1982) AC 617 pg 6-7 Wilberforce L.J stated as follows -

> 'R.S.C. 0.53 was, it is well known, introduced to simplify the procedure of applying for the relief formerly given by prerogative writ or order — so the old technical rules no longer apply. So far as the substantive law is concerned, this remained unchanged: the Administration of Justice (Miscellaneous Provisions) Act 1938 preserved the jurisdiction existing before the Act, and the same preservation is contemplated by legislation now pending. The Order, furthermore, did not remove the requirement to show *locus standi.* On the contrary, in r.3, it stated this in the form of a threshold requirement to be found by the court. For all cases the test is expressed as one of sufficient interest in the matter to which the application relates.'

13. Diplock LJ in Commissioner of Inland Revenue -v- National Federation of Self-Employed and Small Businesses Ltd (Supra) pg 10-11 stated –

> 'The procedure under the new Order 53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or "threshold", stage is regulated by rule 3. The application for leave to apply for judicial review is made initially *ex parte,* but may be adjourned for the persons or bodies against whom relief is sought to be represented. This did not happen in the instant case. Rule 3(5) specifically requires the court to consider at this stage whether "it considers that "the applicant has a sufficient interest in the matter to which the application "relates." So this is a "threshold" question in the sense that the court must direct its mind to it and form *a prima facie* view about it upon the material that is available at the first stage. The *prima facie* view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.
>
> The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.
>
> "The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the Applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.'

14. In Wades and Forsyth on 'Administrative Law' (7th Edition, Clarence Press, Oxford, 1994) page 667 states –

> 'The requirement for leave, which formerly applied only to the prerogative remedies, has thus been extended to declarations and injunctions when sought for the purpose of judicial review, its justification being that it enables many unmeritorious cases to be disposed of summarily if an arguable case cannot be shown.''

What is Sufficient Interest in law?

15. Thus in R -v- Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd [1980] 2 ALLER 378-399, at 389 Lord Denning explained about sufficient interest stating:

'This leaves open the question, of course, what is sufficient interest? To that I answer, as many statutes have done in similar situations, any 'person aggrieved' by the failure of a public authority to do its duty, has sufficient interest. He can come to the court and apply for a mandamus to compel it. At one time those words 'a person aggrieved' were given a restrictive interpretation, confining it to a person who had a specific legal grievance: see Re Sidebotham (1880) 14 Ch D 458, [1874-80] All ER Rep 588. But the interpretation was overthrown in Attorney General of the Gambia –v- N'Jie [1961] 2 ALL ER 504 at 511 [1961] AC 617 at 634:

'The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because [something has been done or omitted to be done contrary to what the law requires'.

16. Thus in Wades Forsyth et al in pages 678 and in 700 -701 stated –

''Order 53, as remade in 1977, empowered the court to refuse preliminary leave, and also to refuse any remedy where there had been undue delay in making the application –but only if, in the courts opinion, granting the remedy would be likely to cause substantial hardship to, or substantial prejudice to the rights of any person or would be detrimental to good administration of justice, and in the case of certiorari three months was equivalent to undue delay.

…..The testing of the applicant's standing is thus made a two-stage process.

……On the application for leave (stage one) the test is designed to turn away hopeless and meddlesome applications only. But when the matter comes to be argued (stage two), the test is whether the applicant can show a strong enough case on the merits, judged in relation to his own concern with it. As Lord Scarman put it in R-v- Inland Revenue Commissioner National Federation of Self-Employed and Small Businesses Limited (Supra)

''The federation having failed to show any grounds for believing that the revenue has failed to do its statutory duty, have not, in my view, shown an interest sufficient in law to justify any further proceedings by the court on its application'. He added that had reasonable grounds for supposing an abuse been shown, he would have agreed that the federation had shown a sufficient interest to proceed further'.

17. Proline Boating Company Ltd -v- Director of Lands [2014] (Supra) Guneratne JA, Mutunayagam JA and Kotigalage JA when describing the meaning of the term '*sufficient interest'* held that –

> [29] The English decisions reveal a vast range of situations in which an applicant has been held to have a sufficient interest in applying for leave to seek judicial review. Of these it is what I would like to call the direct consequences test that would be applicable in the instant case, for example, if the decision sought to be reviewed interferes directly with the applicant's personal rights then the applicant would have "sufficient interest".
>
> [30] It is to be noted that, the instant case is not one where like in the House of Lords decision in Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd [1981] UKHL 2; [1981] 2 All ER 93, the applicant went to Court in the public interest or as in R v. Legal Aid Board, ex parte Bateman [1992] 1 WLR 711 where the applicant's attempt to move court had been quixotic. Likewise the present case is not where a representative body or a pressure group comes to court such as in the celebrated decisions of R v. Panel on Takeovers and Mergers, ex parte Datafin plc [1986] EWCA Civ 8; [1987] QB 815; R v. Secretary for the Environment, ex parte Rose Theatre (1990) 1 QB 504; R v. Secretary of State for Employment, ex parte Equal Opportunities Commission [1994] UKHL 2; [1995] 1 AC 1; R v. HM Inspectorate of Pollution, ex parte Greenpeace Limited (No. 2) [1994] 2 All ER and R v. Secretary of State for Foreign Affairs, ex parte World Development Movement Limited [1994] EWHC Admin 1; [1995] 1 WLR 386.
>
> …..
>
> [38] The Appellant had an existing right to the three leases in question being granted the same. When they were cancelled (for whatever reasons, whether it be on account of a mistake or not on the part of the 1st Respondent) the Appellant as a person directly affected by the 1st Respondent's impugned decision acquired "a sufficient interest" to apply for Judicial review. Whether or not the Appellant would be entitled to the final reliefs is a matter for the final hearing.' (under-lining my emphasis)

Other Requisite matters at Leave stage

18. In Proline Boating Company Ltd –v- Director of Lands [2014] FJCA159; ABU0020.13 (25 September 2014) Guneratne JA, Mutunayagam JA and Kotigalage JA, the Court of Appeal not only considered the threshold test of *Sufficient Interest* but also included additional requisites to consider at leave stage:

> [42] This is necessary in order "to eliminate frivolous vexatious or hopeless applications" that would prima facie appear to be so. (vide: **Harikissun Ltd v. Dip Singh & Ors**. [FCA Rep. 96/365].

[43] These requisites in developed jurisdictions may be noted as follows:

> '(1) Was there an inordinate delay in seeking Judicial review against the decisions that is complained of by an applicant?
>
> (2) Does that decision/emanate from the exercise of statutory power by a public body even if disputes involving private parties are involved?
>
> (3) What reliefs have been sought by an applicant in his/her application for leave to apply for Judicial review and against whom?'

Analysis

19. The crux of the dispute arises from the Biennial General Council meeting at Wailoku Settlement. According to the Affidavit of the Applicant, a motion was raised as follows –

> *'that the annual lease of $60,000 be shared equally ($12K) by each of the five villages of Wailoku Settlement. If unable then to be allocated a certain amount to pay as similar to the church and school'.*

20. The Applicant alleges that this motion was raised and not voted on because as stated in paragraph 11 of the Applicants Affidavit –

> *'11. That when the Council Meeting reached the Agenda of Part 2 of item 9 – 'other matters' I raised a Motion for Equal Annual Lease to paid equally by each of the five villages of Wailoku Settlement. My motion on behalf of the Marata Village was refused by the Chair, without a 'show of hands' or other methods to confirm a vote on the issue. The Chair of the Council stated that, it would be unfair on Balibuka Village. As a result, the status quo of the land rentals prevailed at $250 per year for all registered male members of the settlement that are over 18 years of age.*
>
> *13. That I verily believed that the member of WLBT who chaired the decision in regards to our motion for a fairer payment of rental failed to take into consideration real and practical issues in regards to the issue raised by Marata Villagers. The Chair did not provide our motion a fair go by allowing the meeting to discuss and allow a raise of hands to make a determination on the motion. Instead, the Chair was dismissive of the motion, and did not accord the seriousness that was required of the motion. This was unfair and unreasonable.'*

21. The First Respondent in their Affidavit stated as follows –

> *'23. That the first applicant herein was asked to speak on the intention of his motion to which there was a lengthful discussion by the Council, interjections and reflections on the sincerity and justification by the motion considering that the present practice is more fair in the sense that all males are charged the same amount i.e. $250 per*

annum or $5 per week per male. An example was put forward by the Chair that for the said motion, Balibuka village will be unjust and penalized with more payments because it has less male numbers.

24. That the Chairman during the deliberation simply expressed his thoughts regarding the credibility of the motion without making any decision to abort or disregard the motion.

25. That the motion was never put to vote because the First Applicant together with the Second Applicant herein as Village Headman, sensing the enormous interjections, withdrew the motion from the floor before it was even put to vote hence the motion was deemed withdrawn and cancelled.'

(I) WAS THERE SUFFICIENT INTEREST?

22. The Biennial Council meeting held every 2 years was conducted at the village where the motion of the Applicant was considered.

23. The Applicants contest that their ancestors, Solomon islanders who arrived and worked as indentured labourers re-settled from Flagstaff by the Anglican Church of England in the 1950's to Wailoku on church land. These lands were later transferred to the trusteeship of Wailoku Land Board of Trustees under a Deed of Trust.

24. The Wailoku Land Board of Trustees meet biennially to make decisions regarding the Wailoku Lands and to appoint or revoke Trustees.

25. The Applicant, is a registered male of his settlement which is part of 5 settlements who jointly own the Wailoku Land Board of Trustees.

26. The Applicant argued that the Chairman of the Council refused to consider his motion on the basis that it was discriminatory to other male settlers, thereby removing his ability to raise his issue and take it to a vote.

27. The Defendants argue that there was no decision of the Biennial Council as at the time in which the motion was discussed, the Chair had merely raised his concerns and the Applicants had eventually withdrawn their motion.

28. In the case of Kaur -v- Prasad [2016] FJHC 891; JR 7.2015 (5 October 2016) the Secretary to the Agricultural Tribunal had informed the Applicant to amend his application to Appeal the Interlocutory Ruling of the Tribunal who had determined to recuse himself. The Court held that what the Secretary had told the Applicant was not a decision on itself for which judicial review can be sort and that the Applicant had failed to seek alternative remedy of amending and filing the Appeal as an aggrieved.

29. The Court finds that in order to arrive at an impugned decision, the members of the Council must have put the decision to a vote.

30. The Court found that the discussion and concerns by the Chairman were not of itself a decision of the Council. There was no decision emanating from the votes of the members of the Council.

31. Given that the Applicants opted to withdraw their motion which had not reached a decision, the Court finds there is no impugned decision for which this Court should to consider.

32. So although the Applicant has an interest, there is no impugned decision to seek orders against.

(2) INORDINATE DELAY

33. According to Order 53 Rule 4 (2) an application for Certiorari to remove a judgment or order is required to be filed within 3 months from the date of the proceeding.

34. The meeting was held on 10 April 2021. The Applicants filed their application for Judicial Review on 20 December 2022 and their Summons seeking Leave for Judicial Review on 1 November 2022.

35. The Application for leave is 20 months delay. This delay is inordinate and there is no reasonable excuse why there was delay in seeking reliefs after the meeting concluded.

36. **In State v Public Service Disciplinary Tribunal, ex parte Solicitor General [2015] FJHC 579; HBJ11.2015 (7 August 2015)** the Court held that the application was filed on 1 May 2015 after the decision of the Respondent on 3 February 2015.

(3) DOES THE DECISION EMANATE FROM A PUBLIC BODY EXERCISING A STATUTORY POWER EVEN IF THE DISPUTE INVOVLES PRIVATE PARTIES INVOVLED?

37. The matter before this court is an alleged 'decision' arising from a meeting of the Wailoku Land Trust Board Council.

38. In the case of Proline Boating Company Ltd -v- Director of Lands [2014] (Supra) the Court of Appeal held that –

> '[53] It would, in my view, amount to drawing a red herring if it were to be argued that merely because the Appellant, the 3rd and 4th Respondents are private parties, the impugned decision of the 1st Respondent and the consequential steps taken by the 2nd Respondent fell into the realm of private law.
>
> [54] The private law – public law divide stands bridged when decisions of public functionaries who exercise statutory power vested in them affect private parties inter se such as in the instant case.

[55] The issuance and cancellation by the 1st Respondents of the said leases are intrinsically connected to the mortgages consented to by the 1st Respondent involving the 3rd and 4th Respondents.'

39. The Trust Board Council is established under Memorandum of Trust in accordance with the Trustees Act.

40. The exercise of the powers of the Trustees who are the Board members arises from their fiduciary duties and are determined under the Deed of Trust as well as the Trust Act.

41. None of those powers are statutory in nature although they emanate from the required powers under the Trustee Act under section 89 and section 90.

42. The Court therefore finds that the powers exercised by the Board is not a public statutory power. It is merely in accordance with their duties as Trustees – a private right.

43. Thus on that basis, the disputed facts requires proper evidence that can only be dealt with by way of an application of Writ on the functions and duties of the Trustees.

(4) WHAT RELIEFS ARE SOUGHT BY AN APPLICANT IN HIS OR HER APPLICATION FOR LEAVE FOR JUDICIAL REVIEW?

44. Reliefs sort include Certiorari and Injunctions and Declaratory reliefs. These remedies are only available for contention where the Court finds that statutory powers have been wrongfully exercised.

45. In this instance the powers of the Chairman in the Wailoku Council was not a statutory power. Hence the Court is now empowered under Judicial Review to consider the application.

(5) STRIKE OUT

46. The Court therefore finds the application for Leave for Judicial Review as frivolous and vexatious and without any reasonable cause of action against the Defendants and thus will strike out this matter.

COSTS

47. The Court will rightfully award the Defendants costs for the manner in which this matter was applied for.

ORDERS OF COURT

48. The Court will order as follows:

(i) That Leave for Judicial Review is not granted;
(ii) That the application for Leave and for Judicial Review is struck out as frivolous, vexatious and without reasonable action;
(iii) That the Defendants be awarded $700 each as costs.