STATE v NATIVE RESERVES COMMISSION and 3 Ors; Ex parte MANOA RATINAISIWA (HBJ0005 of 2003)

HIGH COURT — REVISIONAL JURISDICTION

SINGH J

2 April 2004

Administrative law — judicial review — Native Reserves Commission — breach of natural justice — ultra vires.

Real property — Crown land — customary ownership of land — "ultimus haeres" — native reserve — usage rights — Native Lands Act s 3 — Native Land Trust Act ss 18, 19, 19(1).

This was an application for judicial review of the decision of the first Respondent on 20 November 2002 giving the ownership of 368 acres of land in Dawara, Vanualevu to Yavusa Yanawai.

The Register of Native Lands showed that the Mataqali Navisoi of the Yavusa Yanawaii is the proprietary unit owning the subject land. Later on the Mataqali Navisoi became extinct so the land reverted to the State pursuant to s 19 of the Native Land Trust Act (the Act). Thereafter, customary dealings with the subject land were made by the chiefs in that area. In 1962, the Native Lands Commission recommended that the land be reserved for Yavusa Naisamuwaqa and the President acting under the powers conferred upon him by s 18 of the Act set aside the land for the use, maintenance and support of Yavusa Naisamuwaqa by virtue of a proclamation on 4 May 1992.

On 10 November 2002, it appeared in the Fiji Times that a formal inquiry into claims for allotment of the extinct Mataqali lands will be conducted. Thereafter, the first Respondent assigned the customary ownership of the land to Yavusa Yanawai.

The Applicant in seeking a judicial review of the decision of the first Respondent argued that: (1) the decision was unreasonable because the Applicant's views were not heard; and (2) whether s 18 of the Act vested customary ownership to Yavusa Naisamuwaqa.

Held — (1) The evidence established that the Applicant knew that there was a meeting on 20 November 2002 but did not attend. Thus, the Applicant should have been present during the meeting for him to present his views but failed to do so although his counsel told the court that the Applicant wanted a postponement.

(2) When s 18 of the Act was proclaimed, it conferred upon the President to issue the land for use to the Applicant. Moreover, the "land" mentioned under s 18 pertains to a native reserve and is deemed to be one as of the date of the proclamation by the president. After the proclamation, a Mataqali and its members can already use the land and treat the land as theirs. The effect of the proclamation was the passing of ownership rights to the land. Thus, the first Respondent was in error of law in concluding that the Proclamation of 1992 only granted usage rights to the Applicant. Accordingly, the decision of the first and second Respondents to assign the customary ownership of the land to Yavusa Yanawai is quashed.

Application granted.

Case referred to

Mesulame Narawa v Native Land Trust Board (unreported, FCA 12/1999), cited.

N. Nawaikula for the Plaintiff

D. Dalituicama for the first and second Defendants

S. Banuve and *M. Lord* for the third and fourth Defendants

Singh J. This is an application for judicial review of decision of the first Respondent (R1) made on 20 November 2002 to give ownership of 368 acres of land NLC Lot 13, Map Ref E/5, 4 and F/1, 3 to Yavusa Yanawai. The land is in Dawara, Vanualevu.

The Applicant is seeking seventeen declarations or orders. In essence the Applicant is saying that there was a breach of natural justice, that the first Defendant took irrelevant matters into account, the decision is unreasonable and there is veiled suggestion that R1 acted ultra vires.

The application concerns a piece of native land being NLC Lot 13 on Map E/5, 4 and F/1, 3. It is annexure MR2 in plaintiff's affidavit. The Register of Native Lands shows that the Mataqali Navisoi of the Yavusa Yanawai is the proprietary unit owning this land. The Mataqali Navisoi at some stage became extinct so the subject land reverted to the State under the provisions of s 19 of the Native Land Trust Act. It is convenient at this stage to set out s 19(1) in full. It reads:

> *If any mataqali shall cease to exist by the extinction of its members its land shall fall to the Crown as ultimus haeres to be allotted to the qali of which it was a part or other division of the people which may apply for the same or to be retained by the Crown or dealt with otherwise upon such terms as the Board may deem expedient.*

It appears from plaintiff's affidavit that upon Mataqali Navisoi becoming extinct, there were customary dealings with the land by the chiefs in the area. Customary dealings are recognised by s 3 of the Native Lands Act but only in respect of native lands.

Counsels could not inform me under what powers the chiefs dealt with the land, the land having reverted to the State and one would expect only the State to be able to legally deal with the land. However nothing much turns on that fact as these customary dealings were given legal recognition. An extract from NLC register (MR3) shows the Native Lands Commission on 29 May 1962 recommended that the land be reserved for Yavusa Naisamuwaqa. The President acting under the powers conferred upon him by s 18 of the Native Land Trust Act by proclamation dated 4 May 1992 set the land aside for use, maintenance and support of Yavusa Naisamuwaqa.

The controversy in this case is whether this proclamation had vested the customary ownership as the Applicant alleges or only the usage rights in the Applicant Yavusa as the Respondents allege. The Applicant says that since customary ownership had passed to Yavusa Naisamuwaqa R1 could not have dealt with the land.

On 10 November 2002, a notice appeared in the Fiji Times notifying all that a formal inquiry into claims for allotment of extinct mataqali lands will be conducted at Dawara, Wailevu West. The Applicant was aware of this meeting. After the inquiry on 20 November 2002, R1 decided to assign the customary ownership of the land to Yavusa Yanawai. It is this assignment of land to Yavusa Yanawai which is the source of controversy in this case.

Fairness

The Applicant alleges that R1 acted in breach of natural justice in that the Applicant's views were not heard even though their rights in the subject land were at issue. I agree that the Applicant had the right to be heard. The Applicants knew of the meeting of 20 November 2002. However, he elected not to attend. The opportunity was offered; it was not taken. Counsel for Applicant told the court that the Applicant did not attend but wanted a postponement. If the

Applicant wanted his views taken into consideration, it was for him to be present at the meeting and put his views forward. This ground has no substance.

Ownership or usage rights only pass on proclamation

On 4 May 1992 the President acting under powers conferred upon him under s 18 of the Native Land Trust Act "set aside for the use of maintenance and support" for the Applicant the 368 acres of land in issue here. The Applicant submits that the effect of the proclamation is it confers ownership rights to the land as well.

Section 18 is designed to achieve important social objective in ensuring that members of a mataqali do not have their livelihood affected because of shortage of land. Often members of mataqali do not have the financial resources to buy land for themselves nor do they often have the education and expertise to compete in the modern urban life. For them living off the land is the essence of their life and means of survival. This section ensures that they are able to continue to live adequately from the land. The section empowers the President to provide sufficient land without any expense to the mataqali.

The President can only make the proclamation in respect of Crown land or purchase of land for such purpose. The Crown land in respect of which the proclamation was made was one which had reverted to the Crown as "*ultimus haeres*". Section 18 further says that any land so set aside under the proclamation shall be deemed to be a native reserve.

Nature of a native reserve

Native reserves have peculiar characteristics of their own. Even though all native land is vested in the Native Land Trust Board, the board cannot issue a licence or lease in respect of a native reserve without consent of the native owners. The obtaining of consent of native owners is a prerequisite to grant of a licence or lease. Such lease or licence can only be granted to another native Fijian.

Under s 18, the land subject of a proclamation is deemed to be a native reserve. The point in time when such land is deemed to become a native reserve is the date of proclamation by the President not when the Register of Native Lands kept by the Registrar of Titles has been altered to note the change. Once a proclamation is made in favour of a mataqali, its members can go and start to use the land. They do not have to wait the completion of the administrative act of change of register before they can enter the land. They can treat the land as theirs to the exclusion of others from other mataqalis. I am of the view that such a proclamation has the effect of passing the ownership to the proprietary unit in the traditional customary sense of ownership. Even though such concept of ownership may be a totally different concept of ownership of land in comparison to the generally understood concept of ownership of land, it is nevertheless recognised under the Native Land Act and Native Land Trust Act, and "such native rights and obligations may be recognised by the common law and enforced by the court" — *Mesulame Narawa v Native Land Trust Board* (unreported, FCA 12/1999) at 8.

In the course of hearing, it transpired that part of the land subject of dispute had been rented out for mining purposes. As a result, I asked for further information of this. Counsels agreed to this course of action as it would throw more light on the issue of ownership. As a result, Mr. Nawaikula produced a lease issued by NLTB to Mount Kasi Ltd sometime in 1997. The exact date is not

endorsed on the lease. Its significance however lies in the fact that on p 1 of the lease it is confirmed that the land is "*owned by Yavusa Naisamuwaqa*". Clause 4(m) further requires the lessee to pay $1 per ounce of gold produced to the Yavusa Naisamuwaqa for educational purposes. It is also agreed by all counsels that since the issue of lease in Mount Kasi it was Yavusa Naisamuwaqa which was paid lease moneys collected by Native Land Trust Board. A schedule of payments was also produced. Such payments to a mataqali are evidence of ownership rights not merely usage right to land.

The members of mataqali either individually or collectively may not hold any documents of title but that fact alone does not reduce their right to only a right to cultivate and occupy the land. They hold a proprietary native title which in this case is reinforced by the proclamation of 4 May 1992.

Conclusion

The Commission I conclude, made in error of law in concluding that the Proclamation of 1992 only granted usage rights to the Applicant and no more and therefore R1 could reallocate the land.

Accordingly certiorari shall issue to quash the decision of R1 and second Respondent made on 20 November 2002 and 17 December 2002 respectively to assign the customary ownership of the land to Yavusa Yanawai.

Application granted.